Trabalhos

Themis 2019

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

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

Na edição de 2019 foram quatro as equipas do Centro de Estudos Judiciários que participaram (duas do 34.º Curso de Formação de Magistrados e, pela primeira vez, duas de um Curso de Formação de Juízes para os Tribunais Administrativos e Fiscais - 5.º Curso).

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

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CENTRO
DE ESTUDOS
JUDICIÁRIOS

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Apresentação das Equipas

Accompanying Teacher
Chandra Gracias

CENTRO
DE ESTUDOS
JUDICIÁRIOS

Chandra Gracias *

Foi com enorme honra e prazer que fui convidada, por 6 (seis) auditores de justiça do 34.º Curso Normal de Formação de Magistrados do Centro de Estudos Judiciários, para ser a sua docente orientadora, no âmbito da Competição Themis, concretamente acompanhando-os até à respectiva meia-final B (Direito Europeu da Família), realizada na Escola Judicial grega, sita em Salónica, entre 7 a 9 de Maio de 2019.

Compõem as duas equipas portuguesas, Gabriela Lacerda Assunção, Raquel Neves e Geraldo Ribeiro (Team Portugal I), com o tema «Brussels II-A recast: the suppression of the exequatur and the hearing of the child», e Rafaela Aragão Pimenta, Ricardo Quintas, e Rita Fidalgo Fonseca (Team Portugal II), com o tema «Migrant Children through Hermes' winged sandals (πτερόεντα πέδιλα): far from home, close to justice?», e os textos que se seguem são fruto da sua co-autoria briosa, dedicada, trabalhosa, mas sempre alegre.

Destaco, aqui, as prestimosas colaborações da Sra. Dra. Paula Pott, Juiz Desembargadora, Ponto de Contacto da Rede Judiciária Europeia em matéria civil e comercial, e do Sr. Dr. Carlos Melo Marinho, Juiz Desembargador, perito, membro activo da Rede Europeia de Formação Judiciária, e tantas vezes Presidente dos júris da Competição Themis, a quem aproveito para apresentar sentidos agradecimentos.

Esta competição foi co-criada pelo Centro de Estudos Judiciários, e destina-se a auditores de justiça das instituições europeias encarregues da formação de magistrados, visando promover, aprofundar e divulgar o conhecimento e o debate, em língua inglesa, em formato dialogante e competitivo, em áreas temáticas actuais e pertinentes de interesse comum à formação judiciária, e à cultura jurídica em geral.

Cada meia-final pressupõe três fases temporais distintas, e que no caso português decorrem concomitantemente às múltiplas actividades formativas enquanto auditores de justiça: a entrega de um trabalho escrito sobre o assunto escolhido e relativo à meia-final em causa, a apresentação oral desse trabalho, e a sua discussão, primeiro com uma outra equipa sorteada nesse momento para o efeito (no nosso caso, as equipas francesa e italiana), e logo após, com o júri.

Os dois trabalhos escritos submetidos a concurso debruçam-se sobre temas prementes e com grande relevância na agenda do Direito Europeu da Família, e são demonstrativos da extensa e minuciosa pesquisa doutrinária e jurisprudencial e da capacidade de análise, reflexiva, e crítica levada a cabo pelos auditores de justiça.

* Juíza de Direito e Docente do CEJ.

Aquando da sua apresentação e discussão orais, em ambos os casos completada com uma representação teatral inicial, revelaram criatividade, grande desenvoltura e domínio seguro e sólido da matéria, perpassando entre os seis auditores de justiça verdadeiros laços de entreajuda e de amizade, o que lhes valeu rasgados elogios dos jurados, das equipas concorrentes e dos seus tutores.

Muito para além do seu unânime reconhecimento, profissional e pessoal, e do prémio que lhes foi atribuído, sinto o privilégio de partilhar a experiência Themis, sobretudo com os colegas bósnios, país que pela primeira vez se apresentou na competição, como factor de enriquecimento de todos nós.

Com a inserção dos dois textos neste E-book, o Centro de Estudos Judiciários prossegue a sua missão de estimular o conhecimento do Direito Europeu na comunidade jurídica, e reconhece-se publicamente o esforço e o mérito dos indicados auditores de justiça.

11 de Julho de 2019

COLEÇÃO THEMIS

1.
1.1. Brussels II-A recast: the suppression of the exequatur and the hearing of the child

Team Portugal I

Gabriela Lacerda Assunção | Raquel Neves | Geraldo Rocha Ribeiro

Accompanying Teacher

Chandra Gracias

CENTRO
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JUDICIÁRIOS

EUROPEAN JUDICIAL TRAINING NETWORK

THEMIS COMPETITION

SEMI-FINAL B THESSALONIKI (*ΘΕΣΣΑΛΟΝΙΚΗ*), 2019

Brussels II-A recast: the suppression of the *exequatur* and the hearing of the child

Portugal – Centro de Estudos Judiciários

Team 1
Gabriela Lacerda Assunção
Raquel Neves
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Dra. Chandra Gracias

International Judicial Cooperation in Civil Matters European Family Law

2019

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ABBREVIATIONS

CFR — Charter of Fundamental Rights
CRC — Convention on the Rights of the Child
EC — European Commission
ECEC — European Convention on the Exercise of Children's Rights
ECHR — European Convention of Human Rights
ECJ — European Court of Justice
ECrtHR — European Court of Human Rights
EESC — European Economic and Social Committee
TEU — Treaty of the European Union
TFUE — Treaty on the Functioning of the European Union
UE — European Union

Disclaimer: This paper comes to print as it was presented in Thessaloniki, on May 7th 2019. Since then a final version of the Brussels II-A recast was approved[1].

[1] See, https://data.consilium.europa.eu/doc/document/ST-8214-2019-INIT/en/pdf (last date of access: 07-10-2019).

I. Background

A. The Area of Freedom, Safety and Justice

The Amsterdam Treaty established, as a major goal for the European Union, the creation of an area of freedom, safety and justice (Article 67(1) TFUE), as a way to allow the free movement of people – a goal that was more recently reiterated in the Treaty of Lisbon. This has granted the EU legitimacy to expand and enter new domains, typically reserved for national legislation. Ever since, we have watched a considerable evolution of European law in the fields of private international law, international procedural law and international family law.

One of the means through which the area of freedom, safety and justice is achieved is judicial cooperation in civil matters. As a key element of cooperation, in 1999, the European Council of Tampere approved the principle of mutual recognition of judgments, based upon the principle of mutual trust. In the Presidency Conclusions, one can read that "Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities."[(2)]. Thus the path towards the abolishment of *exequatur* was being paved.

B. From Brussels II to Brussels II-A

With more people moving freely across Europe, families with spouses of different nationalities became a frequent reality. To ensure their rights, the elimination of physical borders was not enough. Delicate problems arise especially when the project of a common life comes to an end. With family law varying significantly from one Member State to the other, European law had to move progressively into what had traditionally been a national domain. With Member States resisting the harmonization of laws in such sensitive matters, common rules for determining jurisdiction and of procedural nature had nonetheless to be adopted.

In this context, Brussels II was approved, entering into force in 2001. It was intended to regulate domains that were excluded from the Brussels Convention and Brussels I. It contained important provisions on both jurisdiction and recognition and execution of judgments in matters related to divorce and parental responsibilities, but its scope was limited as regards the latter[3]. As early as 2003 it was recast, being repealed and replaced by its current version, Brussels II-A, which has been in force since 1 March 2005.

[2]See, https://publications.europa.eu/(last date of access: 04-18-2019).
[3] It only applied to the common children of the couple, where the child was a habitual resident of a Member State and the dispute arose in the context of proceedings of divorce, legal separation or marriage annulment. It left out children of unmarried couples, children of one of the spouses and children of couples who had sought divorce at a time not coinciding with the judgment on parental responsibility. This system created glaring inequality between

Brussels II-A is more extensive and bolder than its predecessor, its main achievement being, perhaps, the abolishment of *exequatur* for two sets of decisions regarding parental responsibilities: those concerning access rights (also contact orders) and those determining the return of the child, in cases of parental abduction. Concerning the latter, the Regulation created an interesting method, seeking to strengthen the return mechanism set forth in the 1980 Hague Convention making the return of the child more likely. It put in place what is known as the "overriding mechanism", based on the primacy of a judgment deciding the return of the child, adopted in the Member State of origin (the State of habitual residence),over a non-return order based on Article 13 of the 1980 Hague Convention given by the court of the Member State to which the child was illegally taken or where he or she is being kept.

The abolishment of *exequatur* means that foreign judgments are essentially equivalent to domestic rulings, only a very limited number of exceptions to recognition and enforcement being possible. The absence of intermediate proceedings requires an advanced degree of integration and the trust that fundamental rights are equally observed throughout the European Union. It was a bold ambition, one that Brussels II was pioneer in accomplishing - even if, up until now, only partially. Shortly after this Regulation others followed[(4)]. As noted in the "explanatory memorandum" for the proposal of a recast of Brussels II-A, the *exequatur* procedure often results in delays in proceedings, which vary according to the Member State, but can extend to several months (or more, in case an appeal is lodged). It also signifies additional costs for the parties involved.

C. Safeguards: the public policy exception and the best interests of the child

The desired free circulation of judgments should not harm the protection of fundamental rights – a natural concern for the Member State. As long as there are differences in the legislation of each country, additional guarantees will be understood as necessary.

In Brussels II-A, few reasons can be invoked against the recognition or enforcement of foreign decisions. One such justification is not new to international private law and consists of the exception of public policy (*ordre public*). This clause intends to assure that the core values of nations, such as the right to a fair trial or – arguably – the hearing of the child, are protected.

In private international law, a difference is established between internal or domestic public policy and international public policy. The Regulation clearly states, in Article 23, grounds of non-recognition for judgments relating to parental responsibility: "A judgment relating to parental responsibility shall not be recognized: (a) if such recognition is manifestly contrary to

children and within the families themselves, which was hardly acceptable, and the necessity to rethink it became one of the reasons why this first version of the Regulation did not last long.

[4] In the field of civil law see Regulation (EC) no. 805/2004 of European Parliament and of the Council of 21 April 2004; Regulation (EC) no. 1896/2006 of the European Parliament and of the Council of 12 December 2006; Regulation (EC) no. 861/2007 of the European Parliament and of the Council of 11 July 2007. For the abolishment of *exequatur* in family law see Council Regulation (EC) no. 4/2009 of 18 December 2008.

the public policy of the Member State in which recognition is sought taking into account the best interests of the child". Member States thus have a saying but it is limited to decisions that are not only contrary to public policy but *manifestly* contrary. This clause is only to be used in exceptional cases. Though the Regulation refers to the public policy of the Member State, the ECJ is the entity that ultimately sets its limits. We cannot help but notice this, particularly following the introduction of the CFR, especially Article 52(3)[5]. In the specific area of international family law, one cannot interpret the public policy exception disconnected from the best interests of the child, an idea that indeed permeates the Regulation and without which it cannot be successfully interpreted or applied.

II. The case-law of Brussels II-A

The intention behind the selection of this particular case law is to question the limits to the control of "foreign decisions" by the requested Member State, under this Regulation. All of the following decisions were made in the context of child abduction, a sensitive topic by nature, and one where courts from different Member States are especially called upon to cooperate with one another.

A. Raban - the best interests of the child (ECrtHR app. no. 25437/08)

We find this decision relevant insofar as those who are expected to apply the Regulation need to be aware of the case law of the ECrtHR, as well as the case law of the ECJ. The former has a different scope, centred around the respect for human rights in light of the ECHR, but because of that often provides contributions that serve the interpreters of Brussels II-A.

In Raban v. Romania, the ECrtHR had the opportunity, in the context of a claim of an alleged violation of Article 8 of the Convention, following a decision of non-return of a child who had been taken from Israel to Romania by her mother, to ascertain which interests are at stake in such cases, and very importantly, what should be considered as the child's interest in particular. The Court identified three separate interests that must be balanced: the child's, the parents' and the interest of public order, whilst acknowledging and underlining that the interest of the child, if dissident, must be prevalent.

Even though one cannot say what is best for every child given that families and circumstances differ, it is usually in the child's best interest to maintain ties with his or her family, as well as to be guaranteed a safe environment that allows him or her to develop free of constraints. This

[5] With the Opinion 2/13, the ECJ has stated that the binding effect of the ECHR would jeopardize the mechanism of mutual recognition. For some authors this means that the ECJ "mutual recognition supersedes the protection of fundamental rights" (HAZELHORST, 2017,p. 129). Since the case *Bosphorus* by the ECrtHR, the guaranties of human rights were reinforced by binding force of the CFR. Article 52 (3) of the Charter aligns the protection of fundamental rights of the European law system held the ECHR and it indirectly supports the application of the presumption of equivalent protection (RAVASI, 2017 p. 102).

affirmation allows the Court to state that the child's return under the 1980 Hague Convention cannot operate automatically, as it seems to follow from the rules of the Hague Convention and even more so from Brussels II. On the contrary, the courts must understand which solution is adequate to the case *in concreto*. Hence, they must give all parties concerned fair opportunity to explain and argue their position to, and conduct a careful examination of the family situation and other relevant factors [6].

B. Rinau (ECJ, C-195/08 PPU)

In *Rinau*, the court of the Member State where the child was being illegally retained by her mother, in Lituania, handed an initial judgment in which it failed to recognize that the father had the right to take his daughter back to Germany, where they used to live, according to the Hague Convention. The decision was not transmitted through the appropriate channels (via the Central Authorities), nonetheless, the German court was made aware of it by the applicant himself. Later, the Lithuanian courts decided to overturn the decision and ordered the return of the child. Meanwhile, the German court certified a decision where the father is said to have custody of the child and that, accordingly, she must return to Germany. Confronted by the mother with a request not to recognize this latter judgment, the Lithuanian court stalled the proceedings. It then asked the ECJ if the German court could have made a subsequent decision on the return of the child even though the Lithuanian court had also decided in favour of the return of the child, and whether it was possible to cause a crisis regarding the recognition of such a decision, as the mother intended.

The Regulation made the return of children to their country of origin a priority, creating a mechanism that goes further than the Hague Convention, by giving more power to the court of the Member State of origin. Once a non-return decision is taken by a court of the Member State where the child was illegally retained, the court of the Member State of origin can override it by pronouncing a decision of return. The latter prevails. For the Member State of origin to make such a decision it only needs to be aware that a non-return decision has been made in the other state – this decision does not need to be final, and it is not relevant that that jurisdiction itself later changed the ruling. The German court thus acted in compliance with the Regulation and the Hague Convention. No opposition to recognition is allowed, for decisions on the return of children are not dependent on an *exequatur*. Only if the court of the Member State of origin itself provided a decision incompatible with its former one, would the court in the Member State to where the child was taken have grounds, under Article 47(2) to refuse recognition.

C. Povse – change of circumstances (ECJ, C-211/10 PPU and ECrtHR app. no. 3890/11)

In this case, a point was made by the ECJ in the sense that the enforcement of decisions may not even be denied when new circumstances arise. If the new circumstances are such that the

[6] http://www.europarl.europa.eu/summits/tam_en.htm

interest of the child supports a different decision, the new facts can only be presented to the competent court in the Member State of origin. Interestingly, the mother, who lost custody subsequent to an Article 11(8) decision that ordered the return of her daughter to the father, in Italy, sued Austria in the ECrtHR for complying with the Regulation and therefore dismissing her claim. In this context, the Court had to recognize Austria had no margin to act differently when confronted with the overriding decision of the court of the Member State of origin[7].

D. Zarraga and the hearing of the child (ECJ C-491/10 PPU)

The Zarraga case reaffirms what has been said in Povse, and goes even further. In this case, the ECJ not only confirms that the court of the Member State to which the child was illegally taken or is being retained cannot deny recognition and enforcement to the decision of the court of the Member State of origin -— provided it has been certified — rather it goes as far as to say that even if the court where enforcement is sought is aware that the very requirements the requesting court should have followed to certify the judgment where not observed in the first place, it cannot refuse recognition.

In the *Zarraga* case, it was argued that the decision had been taken in violation of a fundamental right, one that the Regulation also protects explicitly — the hearing of the child. Yet the ECJ was adamant in saying that there can be no control of the circumstances in which a certificate is issued by another court. That is the case even when the information on that certificate is deemed incorrect and may jeopardize a fundamental right. The control must be made before the certificate is issued, by the first court.

In *Zarraga*, the mother and the child were not heard. Interestingly, at the time of the ECJ's decision, the text of Brussels II-A seemed to better support the opposite understanding, given that the absence of an opportunity for the child to be heard was an explicit ground for the refusal of recognition – which is no longer the case in the proposal for a regulation recast. Of course, one of the arguments that can be made in defence of this ruling is that opportunity was given for the mother and child to be heard. But was it? The mother expressed her concern in going back to Spain and asked for a videoconference to be used, which was denied, but could have solved the problem in a satisfactory manner. We believe that such technology is not being used sufficiently in European courts, partially because there is some distrust on the part of judges. Even though immediation is better assured when the judge and the parties are in the same room, technology should be used when one of the parties is abroad and cannot reasonably be expected to appear in court (see proposed recital 24). The alternative, that a child who might want to speak, ends up not doing so, is far worse. In any case, the violation of a fundamental right should constitute an exception to the immediate recognition and enforcement of any decision. But with the proposal for a recast of Brussels II-A, the Court is not expected to change its case law. On the contrary, the opportunity for the child to give his opinion was struck off the list of reasons that can be invoked to refuse recognition (current Article 23, Article 40 of the proposal). The right of the child to express his or her opinion is now

[7] For a similar reasoning, see ECrtHR *Šneersone and Kampanella v. Italy,* of 12 of July 2011.

an autonomous principle (Article 20) reinforcing the idea that it is for the court of the Member State of origin to control its observance and, on the other hand, making the hearing of the child an important moment of any procedure under Brussels II-A, and not only those concerning the return of children to their country of origin.

III. Why the need for a reform?

Article 65 of Brussels II-A envisioned that, at the latest, on January 1st, 2012 and, thereafter, every five years, the Commission would present a report on the implementation of Brussels II-A and amendment proposals to the European Parliament, the Council and the EESC, after gathering information from Member States. It was published in April 2014(8) and identified some problems that needed tackling on matters of jurisdiction, recognition and enforceability, cooperation between Central Authorities and cross-border parental child abduction.

As regards parental responsibility it was found to perpetuate certain misunderstandings relating to Article 12's consensual prorogation of jurisdiction and Article 15's transfer of jurisdiction[9]. On matters of recognition and enforceability, the observance of *exequatur* for judgements beyond certified returns and access rights enhances the procedure's complexity, length and cost and enables antinomic rulings. Apropos of recognition, it pinpoints the leading disagreements between Member States as to the use of the "public policy" clause; the understanding of the child's opportunity to be heard and the comprehension of enforcement. In relation to cooperation between Central Authorities, there are difficulties connected with the collection and exchange of information on the child's situation. Lastly, with regard to cross-border parental abduction the greatest stumbling block is the discrepancy amidst Member States on the meaning of complying with procedural safeguards in order to issue a certification, primarily on the hearing of the child.

IV. The proposal

A. The main modifications

After issuing Report COM (2014) 225, the Commission assigned an external consultation to gather data related to Brussels II-A(10) which confirmed its broad conclusions. Subsequently it gave rise to the Commission's proposal to recast Brussels II-A(11), later amended by the European Parliament(12) and that has yet to be adopted.

[8] COM (2014) 225 final: available at https://eur-lex.europa.eu/(last date of access: 04-18-2019).
[9] It notes that the ECJ has given response to some questions, such as the impossibility to use provisional measures by the State where a child was abducted when a prior provisional measure was already in force (in *Detiček*, C-403/09 and *Purrucker*, C-296/10), the inapplicability of the *lis pendens* rule whenever provisional measures are taken. The absence of rules on residual jurisdiction, on *forum necessitatis* and on the demur to jurisdiction in favor of a third state court are seen as problematic.
[10] Study on the assessment of Regulation (EC) No. 2201/2003 and the policy options for its amendment, final report, available at: https://publications.europa.eu/ (last date of access: 04-18-2019).
[11] COM(2016) 411 final at https://eur-lex.europa.eu/ (last date of access: 04-18-2019).
[12] http://www.europarl.europa.eu/doceo/document/A-8-2017-0388_EN.pdf(last date of access: 04-18-2019).

The recast proposal bypasses matrimonial issues and focuses on parental responsibilities singling out six primary weaknesses: the child return procedure; the placement of children in another Member State; the *exequatur* procedure; the hearing of the child; the enforcement of decisions and cooperation between Central Authorities. We will chiefly consider the subject of the hearing of the child, linked to enforcement of decisions and the ***abolition*** of ***exequatur***.

Apart from terminological adjustments[13], the recast proposal sets out a definition of child — as any person below eighteen years of age — as in Article 2 of the 1996 Hague Convention. An important change concerns the reversal of the *perpetuatio fori* principle — which establishes jurisdiction based on the child's habitual residence when court was first seized (current Article 8) — in all matters except access rights (proposed Articles 7 and 8), since, whenever a child is lawfully relocated, jurisdiction will be assigned to a court within the new habitual residence country, unless otherwise agreed upon. Based on proposed recital 15, this applies even to pending proceedings if parties don't agree otherwise. With regard to the hearing of the child, the proposal envisions a new Article 20, with the epigraph "right of the child to express his or her views", which relies on, in articulation with national procedural rules, Article 24(1) of the CFR, Article 12 of CRC and the Council of Europe Recommendation CM/Rec(2012)2 to impose on Member States' authorities the duty to, when dealing with matters of parental responsibility, ensure that a child capable of forming his or her views on the matter is given a genuine and effective opportunity to express him or herself amid proceedings. Also, with respect to return proceedings, the hearing of the child when applying Article 12 and 13 of the 1980 Hague Convention, which was previously in Article 11(2), is now established autonomously in the proposed Article 24 with a direct cross-reference to the new Article 20 — giving it a different angle. Instead of merely being a duty for the Member State, it is now presented as a child's right.

Studies that preceded the Commission's proposal shed light onto the scarcity of child hearings, especially when dealing with return proceedings of Article 11, and have concluded that children are heard just in *circa* 20% of the time, and although their age and lack of maturity are the only reasons provided for in Article 11(2) those were not the motives identified by the interviewed judges, who conveyed issues like national procedural rules; the existence of a minimum age for exercising the right to be heard; the shortage of technical and human resources, etc[14].

Article 20 is novel for being an article of general usance, since until now the right of the child to be heard was only unambiguously mentioned with regard to return proceedings (Articles 11(2) and 42(2a)); as a reason for non-recognition of judgements (Article 23(b)) and as a requirement for issuing a certificate regarding access rights (Article 41(2c)).
The hearing of the child can, according to the new Article 20, be intermediated either by a judge or by a specially trained expert and must take place in an adequate manner and setting, in an unconstrained environment, with suitable language and bearing in mind the child's best

[13] In order to encompass different administrative authorities who hold jurisdiction in some Member States, the term "court" was replaced by authority, harmoniously with current and proposed Article 2(2). The same line of thought led to a shift from "judgment" to "decision".
[14] BEAUMONT/WALKER/HOLLIDAY, 2016.

interest. There should be no parties present (*e.g.*, parents) nor legal representatives, although a recording will be made available to all. Competent authorities must, if the child is heard, give his or her testimony due weight, considering his or her age and maturity and, in either case, document the variables that contributed to that decision. It was the Commission's intention to commit authorities with two different decisions: firstly, to gauge whether the child has enough age or maturity to form a personal view, and secondly to assess how to weight the testimony given by a child — which could warrant two different justifications by the competent judge, although Article 20 just foresees the former[15].

Brussels II-A was the stage for the first abolition of *exequatur* in EU law, although limited, concerning parental responsibilities, to access rights and child's return, which was followed by several other Regulations, such as Regulation (EC) no. 4/2009 and Brussels I-A.

The Commission's proposal intends to expand the abolition to all decisions on parental responsibilities, stating in Article 30(1) that "A decision on matters of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State shall be enforceable in the other Member State without any declaration of enforceability being required". Present-day Article 28(1), in contrast, clearly requires an application for enforcement by the interested party and, subsequently, a declaration of enforceability by the required Member State's court, professing that "A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there".

Under the contemplated solution, enforceability merely depends on: (i) the concurrent enforceability on the state of origin (emphasis on pending appeal's effects, since staying an appeal won't give ground to enforceability)[16] (new Article 28(1)); (ii) Submission of the necessary documents, *i.e.*, a copy of the decision capable of granting authenticity and the certificate contemplated in Article 53 (new Article 34); (iii) No ground for opposition of enforcement being called upon (Articles 38 and 40 of the Commission's regulation project).

The blueprint envisages various grounds for opposing enforcement, likewise Regulation Brussel I[17]. First, Article 40(1) refers to Article 38's grounds for non-recognition: (i) Opposition, considering the best interest of the child, to the public policy of the Member State in which recognition is sought (Article 38(1a)); (ii) Decision given in default of appearance if the person in default wasn't given a proper chance of defence and has not unequivocally accepted the decision (Article 38(1b)); (iii) By claims that a decision on parental responsibility was reached without a proper opportunity to be heard being given to the holder of such responsibility (Article 38(1c)); (iv) Irreconcilability with a later decision on parental responsibility by the requested Member State (Article 38(1d)); (v) Irreconcilability with a later decision on parental

[15] *Idem*.
[16] The proposed Article 36(1) envisions the possibility for the requested court to stay enforcement proceedings if enforceability is suspended in the State of origin. Each Member State can have different rules, making either stay or continuation of proceedings the norm — *e.g.*, in Germany and in Austria all decisions concerning children will only be enforceable when they become unappealable. See, HONORATI, 2017.
[17] That was a path argued by many authors, *e.g.*, KRUGER/SAMYN, 2016, p. 160.

responsibility by another Member State or in the non-Member State of habitual residence that is befitting for recognition in the requested Member State (Article 38(1e)).

To those, Article 40 adds that after a decision is given, circumstances can conspicuously change making its enforcement contrary to the public policy of the Member State of enforcement by reason of:

(i) The child of sufficient age and maturity objecting to the decision's enforcement and therefore making it incompatible with his or her best interest;

(ii) The change being so palpable that enforcement would be patently contrary to the child's best interest.

Different rules still apply to access rights and return decisions, since the second part of Article 40(1) exempts them from the grounds of non-recognition of Articles 38(1) sections a; b; and c. It is important to note that the only relevant changes in circumstances are those which could not have been considered by the court of the state of origin *i.e.*, those that followed the decision(18).

A significant contrast with the Regulation in force is that the proposal doesn't have a norm like current Article 23(b), which allows for the non-recognition, and, *ex vi* Article 31(2), refusal of enforceability, on the grounds of, beyond cases of urgency, a decision being issued without the child having an opportunity to be heard and that constituting a violation of basic procedural principles of the Member State where enforcement is being sought. The same is established with relation to access rights and return of the child, since, respectively, Articles 41(2c) and 42(2a) make the hearing of the child, when appropriate according to age and maturity, a condition for the issuance of a certificate by the State of origin, which in turn is a condition for its enforceability without the exequatur procedure.

The problem with clauses like the current Articles 23(b), 41(2c) and 42(2a) is that they heavily rely on national procedural laws and domestic understandings of the hearing of the child — as is best exemplified by *Zarraga* (*vide supra*).

The new Article 20, contrary to Article 23(b), doesn't merely reference national procedural rules, but conversely construes the hearing of the child by linking it to Article 24(1) of the CFR, Article 12 of CRC and the Council of Europe Recommendation CM/Rec(2012)2, therefore summoning an understanding beyond national borders, promoting a possibly more uniform and non-national meaning(19). Nevertheless, recital 23 of the proposal, like the current recital 19, states that Brussels II-A doesn't offer or intend to change national procedural rules concerning the hearing of the child.

There are some legitimate worries that an absence of coordination or minimum procedural standards could lead to an artificial compliance with Article 20, *i.e.*, a strictly formal

[18] As it was stated in *Detiček* (C-403/09), para. 47.
[19] As suggested, *e.g.*, by UBERTAZZI, 2017, p. 589 and KRUGER/SAMYN, 2016, p. 157.

acquiescence with the child's right to be heard. According to the proposed Article 53(2), all authorities that issue decisions on matters of parental responsibility must send forth a certificate using Annex II, *ex officio* if at the time it is already presented as a cross-border situation and whenever requested by interested parties, if it becomes cross-border afterwards. Nonetheless, *under* Article 53(4a), a certificate can only be produced not only if all parties have had an opportunity to be heard, but also if such opportunity was given to the child and it can be labelled as a genuine chance, as stated in Article 53(5) which refers to Article 20. If the State of origin understands that the child had a genuine opportunity to be heard and issues a certificate, because the *exequatur* procedure was abolished, there is no mechanism to refuse enforcement in the requested State apart from those in Articles 38 and 40, but that doesn't solve the pre-existing problem that conditioned mutual trust between Member States: the differing rules and practices *vis-à-vis* the hearing of the child[(20)], since Article 23(b) was invoked *approximately* 69% of the time so as to refuse enforcement [(21)].

In order to solve that difficulty, the Commission, in its report[(22)], suggested introducing common minimum procedural standards[(23)], although that was not embraced in the final proposal. Some authors still see an indirect possibility to refuse enforcement by reason of the child not having been heard, or for having been heard in an inadequate way, in the public policy clause laid out in Article 38(1a) since it is linked to the child's best interest[(24)]. Nevertheless, the commandant principle is mutual trust and, as was established in *P v. Q* (C-455/15 PPU), every refusal based on the contrariety to public policy must be interpreted in a restrictive manner[(25)]. Moreover, the legislator explicitly repelled a norm like Article 23(b) and grouped all the safeguards in the issuance and withdrawal of the certificate by the State of origin, evidencing its opposition to that kind of inspection by the enforcement country.

B. Article 20 as a common minimum standard procedural rule

Even though Article 20 in respect of the hearing of the child has a procedural nature, it is crucial to the construction of due process. This article opens the door to the control of the decision alongside Article 47 CFR and Article 6 of the European Convention. Article 12 of the CRC is the fundamental charter on children's rights and sets minimum standards on the consideration of their opinions and views., It also embodies the right to be informed, including the possible consequences of compliance with those views, in line with ECEC (Article 3). Article 24 of the CFR goes in the same direction[(26)].

The problem in the absence of unified or harmonized procedural rules is how to ensure, in a non-discriminatory fashion, the right of a child to be heard. The articulation between the reference to "appropriate information" and "age-maturity" of the child is vague and

[20] SCOTT, 2015, p. 31.
[21] VAZQUEZ, 2017, p. 776.
[22] COM (2014) 225, pp.11 and 14.
[23] Also, PINEAU, 2017, p. 152.
[24] E.g., SELLENS, 2017, p. 807.
[25] DOMÍNGUEZ, 2017, p. 637.
[26] See KOHLER/PINTENS, 2013, p. 1502 and MANSEL/THORN/WAGNER 2015, p. 9.

undetermined. The recognition of competence of the Member State due to the principle of procedural autonomy compromises the effectiveness of the right of the child. Until now, only Article 11(2) Brussels II-A specified an obligation of the hearing as a prerequisite to apply Articles 12 and 13 of the 1980 Hague Convention. Nevertheless, it does not confer an absolute right to be heard. Firstly, the legal standard on age and maturity depends on each Member State, and secondly, it implies a burden of justification for not hearing the child. We can say that there is a presumption that the child will be heard unless it appears to be inappropriate, taking into consideration his or her maturity and capacity and willingness to give an opinion.

The general scope granted by the grounds of non-recognition (Article 23(b)) as well as for the certificate of Article 41(2) and 42(2) incorporates a fundamental rights system. But, with the exception of Article 11(2), those provisions are neutral in the sense that they control *ex post* the right of the child.

The reformulation of this system embodied in Article 20 should confer an autonomous status to the hearing of the child as a true guarantee necessary to ensure the due process inherent to fundamental rights. But this new provision should be connected with Article 12 of CRC, linked to Articles 6 and 8 of the ECHR and the above-mentioned Article 3 of the ECEC and Article 24 of the CFR.

The proposed Article 20 differentiates the "whether" and the "how" of the hearing. In the first paragraph the focus is on the capacity to form a will and its manifestation. The second paragraph concerns the substance of the expressed opinion of the child. This distinction also takes place in the form-based certificate (see Annex II and Annex III draft). In fact, at least in the present context, the emphasis should be on the *obligation of* the authorities to hear the child. Although this corresponds to a subjective right, according to the meaning and purpose of the regulation, the perspective of the obligatory addressee seems more significant, since this is the only way to ensure the effectiveness of such right[27].

When talking about the abolition of the declaration of enforceability, we must address the problem that it represents. The effects of a decision shouldn't be object of restrictions *per se* in terms of its recognition and enforcement, but the common values the European Union lays down impose the positive obligation of safeguarding the best interest of the child, and for this purpose not every decision is guaranteed to be enforced, especially when changes in the situation of the child may have occurred.

This volatile effect, typical of the protection of children, ensures that every decision, foreign or national, should be able to be scrutinized, even though not generally and *a priori* subject to formal recognition and enforcement. The expression of RAAPE *leap into the dark*[28] when it comes to application of foreign law, has even a deeper meaning when it is referred to the effects of a foreign decision – especially because of the concrete impact that a decision represents for the parties involved, particularly for the child.

[27] WELLER, 2017. p. 227
[28] RAAPE, 1977.p. 199.

This problem becomes more relevant when the mechanism of mutual recognition, as a way to further the internal market, tends to conflict with the guarantees of the rights of a concrete child. The introduction of common minimum procedural standards, in particular regarding the hearing of the child, are the paramount prerequisite for enhancing mutual trust, a condition necessary for the abolition of the *exequatur*. In this respect, *mutual trust* must be present or at least taken into consideration when the effects of a decision will need enforcement in another Member State.

The proposal of Brussels II-A recast and its Article 20 keeps the autonomy of the Member State regarding how and when the child should be heard, stating that, when heard, the opinion of the child should be effectively taken into consideration. The new recital states "this Regulation is not intended to set out whether the child should be heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom or in another place or through other means. In addition, while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed taking into account the best interests of the child, for example, in cases involving agreements between the parties."[29].

Apparently nothing changes. The autonomy of Article 20 determines a due process obligation for the States that implies an *a posteriori* control in terms of opposing the enforcement of the decision by invoking a public policy clause (the proposed Article 38(2)), but indirectly it has a *prima facie* effect in rendering the hearing of the child mandatory.

The natural capacity is the key concept that will determine the necessity of the hearing. This will have as a consequence the need to ensure the effectiveness of the right of the child independently, as a prognosis judgement of the enforceability of the decision in other Member State. The coordination of systems as proposed by PAOLO PICONE ([30]) will have a prevalent meaning when the stakes are the effectiveness of a decision needed to be enforced in another Member State. This will impose the court to take into consideration the law or laws of other Member States in respect to the hearing of the child (with the limits set by recital 23 and the *supra* case-law of ECJ), done mainly in cooperation between States through Article 34 of 1996 Hague Convention.

The broad meaning of the general clause of Article 38(2) imposes that the Member State deciding on the issue of parental responsibilities has a special obligation to take into consideration the rights of the child as a fundamental effect of its decision. If it is certain that under Article 267 TFEU, it is to the ECJ to give the ultimate interpretation of European law and provide national courts with precise guidelines for applying it, it should scrupulously respect the "dividing line" between its jurisdiction and the national court's, in order not to undermine the foundations of this instrument of cooperation. This applies vertically in terms of the interplay between primacy and national procedural autonomy, but when it comes to horizontal cooperation with national courts the *effect utile* must be determined in respect with the common core of fundamental rights that binds the European Union and all Member States.

[29] Proposal for Brussels II – A *recast* - General approach. ST 15401 2018 INI.
[30] PICONE, 1986, p. 264 ss.

As KOHLER and PITENS stated in respect to the *Povse* case, the fundamental rights of a child are ensured if there is access to the court of the State of origin in case of change in circumstances, because it is this court that has the obligation to protect those rights, not only by Articles 6 and 8 ECHR [31], but also through the application of European law in terms of State responsibilities, mainly Article 24 of the CFR and Article 3 of the CRC. This concern is avowed in the special procedure of suspension of enforcement proceedings and refusal of enforcement (Subsection 2, Articles 47k ff.). Leaving Article 47k(4) the safety net of an individual decision to protect a child in a specific case.

The automatic enforceability of the decision — accompanied by the documents indicated in the proposed Article 33 — puts the burden on the defendant who wants to challenge its effects (Article 30). Until the proposal of reform, the declaration of enforceability was unnecessary only for the cases of return of a child and rights of access (Articles 41 and 42 Brussels II-A). With the new version, enforceability is guaranteed, only changing the impulse to oppose such effect and the limitation of grounds to successfully obtain the refusal of reinforcement and consequent recognition (Articles 47e and 47f).

i) *Ordre public* – Public policy

Human and child rights are consecrated in numerous instruments, even as supranational principles and freedoms sanctioned in European Union law, which cannot be forgotten, given that, in any case, we find undeniable constricting forces of private-international regimes of domestic origin. For that matter, international — *maxime*, the evolving legal cooperation between the United Nations, the International Commission on Civil Status and the Council of Europe — and European instruments — we think in particular of the extent to which human rights protection was also brought to the centre of the legal order of the European Union — to ensure the protection of human rights and establish the principles and legal criteria for the conformation of family relationships, ending up by harbouring a set of regulatory requirements that will be mandatory and will meet an inevitable regulatory function in the field of “spatially heterogeneous” private relations.

Indeed, although, in general terms, they do not formulate true conflict rules, what is certain is that they will often provide evaluative requirements that serve as authentic "minimum *standards* of protection" (RAMOS[32]), which may justify the abandonment of the strict *mise en oeuvre* of conflicting solutions and even, at least according to some doctrine, constitute the emerging horizon of a truly international or transnational public order. This means that the traditional mechanism of public policy, its simple function of national instrument for the eviction of the foreign law and decision, is becoming an instrument for the guardianship of supra-national values and understood as a positive legal measure.

In addition, also in relation to EU law, it is feasible to develop a parallel reasoning, especially since it is also possible to refer — similarly to what happens in the case of the instruments

[31] KOHLER/PINTENS, 2013, p. 1502.
[32] RAMOS, 2008.

relating to human and child rights — to the existence of an European public order or, at any rate, recognizing that the principles and freedoms sanctioned by EU law may immediately set up an autonomous limit to the application of the law deemed competent by the specific rule of conflict of laws and jurisdictions. In addition, there are numerous situations, *a propos* of the various institutes and criteria of private international law, where the functioning of State source solutions on the coordination of legal system, can be deemed incompatible with EU law. The existence of a European *ordre public,* as a result of the development of common standards, will still need the national States for its enforcement, particularly in the context of enforcement procedures, in order to ensure the rights of defendants as well as in the procedures for recognition and enforcement[33].

The notion of public policy becomes *materialized* by the best interests of the child and works as the chief criterion for the application of the instruments related to transnational situations akin to the legal status of children. The words of LAGARDE in respect to the 1996 Hague Convention — *the best interests of the child, which principle moreover should inspire the application of all the Articles of the Convention* – should also be extended to the Brussels II-A. The best interest has a modelling effect that shapes the public policy clause function and becomes a clause that allows for the incorporation of multilevel regulation from various sources of law. The CRC establishes the basic values and rules that bind the Member States directly and through regional cooperation and integration. Children's rights are therefore the paramount criteria in interpreting and applying the law.

Methodologically, the courts are primarily guided by established basic values, like the well-being of the child, taking into consideration his or her opinion. Secondly, in accordance with Article 24(2) of the CFR, the courts are subject to a *prima facie* scrutiny of the effects of decisions according to the child's rights. Thirdly, the ECJ expressly emphasized the interdependence between the interpretation of EU secondary law and Article 3 of the CRC. The interplay between international, European and national law outlines the framework of what is included into the concept of the best interests of the child, leaving little room for local moral values. Especially when it comes to the recognition of decisions in what should be an area of freedom, security and justice.

Article 23 states the core principle of recognition relating to children. The traditional public policy is intertwined with the protection of children's human rights. This doesn't mean that it is possible to raise obstacles to recognition solely for the noncompliance of rules on jurisdiction. Remedies should be ensured directly by the jurisdiction of the Member State of origin and not by indirect control of a decision by another court. The intervention of these courts, when necessary, must be regarded as an "exceptional remedy"[34]. Because of this, Article 23(b) and (d) (b) Brussels II-A stipulates that if the child was not given the opportunity to be heard in violation of fundamental principles of procedure of the requested State (except in a case of

[33] LOPES, 2018; ORÓ MARTÍNEZ, 2009, p. 221; BASEDOW, 2005, p. 65.
[34] "Although there is an overlap between public policy and breach of a fundamental principle under Article 23 (b), public policy, being an "exceptional remedy", requires "something more"" (Paul Torremans (2017) p. 1129). The public policy of the Member State where recognition is sought cannot be raised as an obstacle to the recognition or enforcement of a judgment given in another Member State solely on the ground that the Member State of origin failed to comply with the rules on jurisdiction contained in Brussels II-A.

urgency); the recognition is manifestly contrary to public policy of the requested State, taking into account his best interests.

The reform underway, even though it changes the formulation of said article, maintains the same grounds for refusal of recognition and consequent non-enforceability. As stated above, the formulation of situations where the hearing is not mandatory (in urgent situations or regarding decisions related to patrimonial acts) should have a clear effect directed to the Member State of origin, as regards the terms and requisites to hear a child and to scrutinize how the opinion of the child was taken into consideration when adjudicating.

ii) Harmonization of procedural rules

According to the well-established case law of the ECJ: "in the absence of Community rules in the field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)"(35).

The procedural autonomy is a result of the need of national authorities to enforce European law and the diversity of legal systems as well as administrative justice systems. "As such, there is what is referred to as the principle of national procedural autonomy, whereby in the absence of Union rules on the subject, the Member State have in principle autonomy to organize their respective judicial framework and procedures, with the result that the European Union essentially 'piggybacks' on what is provided for in the national legal systems."([36]). This autonomy interplays the principle of primacy stated in the case *Costa-Enel* and has been discussed in the literature for decades, starting with the case of *Simmenthal*. The main problem has to do with the *effect utile* that the primacy of European law relies upon. Article 4(3) TEU places national courts and tribunals under a duty to ensure the "full effectiveness of Union law". Recognition is an enabling instrument of the internal market and an assurance of European freedoms *(indirect communitarization)* therefore being extended to areas that are not directly integrated in the principle of conferral of powers.

In our case, it is important to dwell on the limits of procedural autonomy.

We should take as an example the experience of criminal cooperation of enhanced mutual trust and cooperation towards the suppression of the *exequatur*(37). An *ex ante* intervention between the authorities and the harmonization of procedural laws becomes the path to incorporate the trust needed to ensure the freedom of the decision's circulation.

[35] See, Joined Cases C-222/05 to C-225/05 *van der Weerd et. al.*, para 28.
[36] LENAERTS *et. al.*, 2014, p. 107.
[37] REQUEJO ISIDRO, 2017, p. 116.

Harmonization of procedural and substantive standards becomes necessary as a means in order to protect the fundamental rights of the child. One of the key ideas is to ensure a non-arbitrary decision or that the rights are not unjustifiably curtailed. For this purpose, it is essential that the court with jurisdiction take into consideration where the effects of enforceability are intended. A ubiquitous decision should be the premise for determining at least an equivalent protection of the child, and if needed, to consider the rules in respect to hearing of the Member State of enforcement. The interplay between procedural and substantive rules are intertwined to the point where the decision must take in consideration its radial or spread-out effects.

This allows the omission of a uniform set of procedural rules to be circumvented and allows, by means of coordinating procedural and substantive rules, the harmonisation of systems within the European Union.

The issue that arises is the need for a common ground of protection of the child's best interests that shouldn't be limited by a minimal common denominator, but requires an imperative standard applied beyond what is established by national law. The possibility of reverse effects (cases where internal situations are subject to less guarantees than international situations) should determine the evolution of national law towards a high standard of effectiveness of the rights of the child and not the other way around. Only then, can we talk of instruments that give full faith and credit to a decision that will have impact in another Member State.

In any case, the party concerned can still avail itself of this public policy clause, by creating an occasion for this condition to be examined by lodging an appeal against the *exequatur*. This, however, should work has an *ultima ratio* taking into account the need for mutual trust between authorities and the principle of equal treatment between the national and foreign law and respective decisions. Certain that the derogatory effect of the special public policy clause of Article 40 provides the instruments necessary for an actual and effective response by Member State's Authorities to ensure a decision that promotes the best interest of the child.

V. Results

After this analysis our contribution can be summarized in the following conclusions:

1. Establishing the child's right to be heard in an autonomous norm, as the proposed Article 20, provides an *a priori* control in the State of origin, instead of being solely a ground to refuse enforcement.

2. Even if it maintains a procedural nature, it is at the core of the right to due process and, by granting it a *status* of European Union Law, it becomes clear that merely surmising equivalence is not enough, and it permeates what can be described as a European public order.

3. Albeit Article 20, *prima facie*, does not collide with the procedural autonomy of Member States, we find that it imposes on them an enhanced burden of justification in every decision not to hear the child.

4. The court must, therefore, summon not only the procedural rules of the State of origin, but also take into consideration those of the countries in which the decision at hand can be enforced.

5. This is meant not as a path to downgrading this fundamental right of children but, on the contrary, to potentially lead to a spillover effect and a boost its strength by creating a net of enhanced safeguard.

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JUDICIÁRIOS

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1.2. Migrant children through Hermes' winged sandals (πτερόεντα πέδιλα): far from home, close to justice?

Team Portugal II

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Chandra Gracias

CENTRO
DE ESTUDOS
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[1] The πτερόεντα πέδιλα (winged sandals) are not exclusive of Hermes in ancient Greek mythology, as is discussed in CURSARU, 2013: 95-112. "[L]es fonctions hermaïques qui sont associées aux πέδιλα [sont] la capacité de voler en premier lieu, la mobilité et la rapidité d'Hermès, mais aussi sa capacité de passer inaperçu" (Ibidem, p.109), but the image of the sandals is also used to show the metaphorical and symbolical dimension of the journey, as we intend to demonstrate in this paper. Therefore, we believe the use of "winged sandals" in the title suits the analogous journey migrant children endure.

1. Introduction

Every year thousands of children flee their home countries to seek asylum protection in the European Union: in 2018 there were around 198.000 asylum applications from migrant children[2], with more than 20.000 being from unaccompanied minors[3].

Migrant children arriving in the European Union have generally lived through a range of traumatic experiences. Forced to leave their home country and compelled to embark on a precarious and unsafe journey to Europe[4], these children are often exposed to innumerous risks and different forms of violence – such as physical, psychological and sexual abuse, exploitation, trafficking and also the possibility of going missing or becoming separated from their families[5]. And if we add the fact that many of these migrant children are unaccompanied by any family members or any adult at all, the risks they are vulnerable to increase dramatically[6].

Despite this awful truth, most of the legal instruments regarding refugee status and their rights, tend to focus on the adult refugee, failing to capture the predicament of the migrant child. Consequently, by disregarding refugee children's true needs and treating them as adults, the States where the international protection is appealed, rather than diminishing the risks and traumas these children have been through, become a risk increasing factor themselves.
When faced with such circumstances, it is crucial, considering children's special vulnerability[7], to ensure that those thousands of migrant children receive proper protection. Once these children reach EU boundaries, EU Member States become responsible for their well-being and

[2] Data available at: http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database (accessed February 21, 2019).
[3] A dramatic number which is, however, decreasing if compared with the 102,685 applications from unaccompanied minors that took place in 2015. Information available at: http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database (accessed March 25, 2019).
[4] In 2017, 172,301 people arrived by sea (Mediterranean), 20% of them were children. Data available at: http://ec.europa.eu/justice/fundamental-rights/files/rights_child/data_children_in_migration.pdf (accessed March 3, 2019)
[5] As the European Commission informs, in its Communication from the commission to the European Parliament and the council (2017), concerning the protection of children in migration, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52017DC0211 (accessed April 4, 2019); As FAZEL & STEIN (2002: 366-367) underline, "[r]efugee children are at significant risk of developing psychological problems", especially during three stages: while in their country of origin; during the flight to safety; and when having to settle in a country of refuge. The most frequent diagnostic categories are post-traumatic stress disorder, anxiety with sleep disorders, and depression, as is outlined in the previous cited article.
[6] Being unaccompanied is a major risk factor for the physiological and emotional well-being of the unaccompanied migrant minors, resulting in important emotional and behavioral problems. Research shows that these children suffer more frequently from anxiety and depression symptoms than accompanied minor refugees – as in VODO, 2017. Their vulnerabilities result fromtheir having been deprived of support systems such as family and community life, but are also the consequence of being at increased risk of neglect, sexual assault, and other abuses, FAZEL & STEIN (2002: 369). The (sometimes specialist) treatment of children refugee must not be delayed, or else it will increase their chances of long-term psychiatric problems (TUFNELL, 2003: 431-443).
[7] The concept of vulnerability combines two elements: "an exposure to the possibility of harm to an individual's well-being, and a lack of, or limited, ability to protect oneself from that harm", TOBIN, 2015: 167. As SANDBERG (2015: 221-247) reminds us, children have a particular vulnerability as children, yet there are peculiar factors that improve that special vulnerability. The scholar gives some examples and points out migration as a factor that hugely increases children´s vulnerability to violations of their rights. Vulnerability is truly linked to dependency. See Case *O. and Others*, dated 06.12.2012, C-356/11 and C-357/11, paragraph 56, the meaning of dependence, which is not only financial but also legal or emotional (see also Chavez Vilchez, C-133/15, and Case *K.A. and others*, C-82/16). For BERNERI (2018: 308) these conditions (financial, legal, emotional) are alternative.

thus become obliged to reduce and overcome the intense risks the children have been exposed to. In order to carry this out, it is compulsory to make an individual evaluation of every migrant child, so there are no violations of Article 4 of Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF), also reproduced in Article 19, § 1 of the EU Charter of Fundamental Rights (EU Charter or CFREU)[8]. The European Court of Human Rights (ECtHR) has also implicitly recognized that States have the duty to fully protect migrant minors, even after releasing them from any kind of detention[9].

However, the increasing number of migrant children who arrive in the EU has put national migrant's management and child protection systems under a lot of pressure and has demonstrated innumerous gaps and shortcomings in the protection of children in migration[10]. The problem is now more real than it ever was.

In this essay we intend to explore those shortcomings and aim to propose alternatives to overcome them, especially when talking about unaccompanied minors.

Protecting these migrant children is, after all, "*about upholding European values of respect for human rights, dignity and solidarity. It is also about enforcing European Union law and respecting the Charter of Fundamental Rights of the European Union and international human rights law on the rights of the child*"[11].

[8] See ECtHR Case *Hirsi Jamaa and others* v. Italy, no. 27765/09 (p. 75): "the purpose of the provision is to guarantee the right to lodge a claim for asylum which will be individually evaluated". See also for the link between lack of individual assessment and collective expulsion, PERRUCHOUD, 1988: 677-680 and FAVILLI (2013: 267). The prohibition of massive or collective expulsion can also be seen in ECtHR Case *Khlaifia and others* v. Italy, (Application no. 16483/12, 15.12.2016). However, in this same case, the Great Chamber affirmed that Article 4 of Protocol 4 to CPHRFF does not guarantee "the right to an individual interview in all circumstances", because "the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State' (paragraph 248). So, "la sentenza Khlaifia ha valorizzato il criterio del "contest generale di emergenza migratória". This means, there has been, conceivably, an overestimation of the general context of migration emergency (SACUCCI, 2017: 563). The same author believes that with the *Khlaifia* case, the ECHR will struggle to make Europe be seen as «an island of hope in stormy times» (p. 565), since the level of protection of applicants' rights has been lowered, due to the migration emergency. SACUCCI (2017: 555) refers to a "*componente inovativa sul piano interpretativo*" regarding the position of the Great Chamber of ECHR in the case *Khlaifia* and others vs Italy, for example in paragraph 185: "While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time", which possibly makes way to the possibility of justifying a violation of article 3 of ECHR, jeopardizing "*il principio dell'intangibilità del divieto di trattamenti inumani o degradanti*". It goes against previous case law, Case *Hirsi Jamaa and others* vs Italy, paragraph 122 and 176, and Case *M.S.S. vs Belgium and Greece*, paragraph 223.

[9] Otherwise, there would be a breach of Article 3 of European Convention on Human Rights (ECHR), see Case *Rahimi* v. Greece, 5th April 2011, Application no. 8687/08, paragraphs 92, 94, 95. We, therefore, agree with GIL, 2015: 455-456.

[10] As in the Communication from the commission to the European Parliament and the council (2017) – COM/2017/0211 final – concerning the protection of children in migration, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52017DC0211 (accessed February 19, 2019).

[11] As in the Communication from the commission to the European Parliament and the council (2017), concerning the protection of children in migration, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52017DC0211 (accessed April 15, 2019).

2. Unaccompanied Migrant Children in International Refugee Law

An unaccompanied minor is, first of all, a migrant seeking a foreign country's protection.

The Universal Declaration of Human Rights (1948) enshrines the right to seek asylum from persecution in other countries (Article 14). Nevertheless, the United Nations Convention (The Convention Relating to the Status of Refugees, also known as the 1951 Refugee Convention) and the U.N. Protocol Relating to the Status of Refugees, which entered into force on 4 October 1967, regarding the refugees' status and rights, remain the key international instruments for refugee protection.

According to the 1951 Convention, a refugee is a person who, due to some individual characteristics – race, religion, nationality, membership of a particular social group, or political opinion – has come into conflict with her or his State and, owing to a "well founded" fear of being persecuted in the country of origin, is forced to seek protection in a foreign country (Article 1)[12]. When confronted with someone in such circumstances, the States where the asylum request is presented must ensure that she/he is entitled to a refugee status.

Despite the fact that an enormous number of refugees are children (one in four asylum applicants in the EU in 2015 was a child - source UNICEF, 2017), the truth is that international refugee law tends to center its focus on adults, disregarding children's difficulties[13]. The refugee children status is often given without considering each minor's specificities and needs.

As the 1951 Convention gives a general definition, the precise nature and extent of the protected characteristics are determined at the national level by the signatory States[14], which, nonetheless, must be interpreted according to the international general principles relating to the refugees, laid down in the Geneva Convention[15]. But, as we previously stated, only when one has been granted refugee status, may one obtain protective measures.

However, if we are facing a migrant child – especially when unaccompanied – the answer cannot be the same or at least it cannot be given from the same perspective. Thus, as regards a migrant child asylum applicant, the protective answer does not involve only the 1951 Convention definition of refugee analysis, but also and mainly, upholding the basic values of respect for human rights, dignity, solidarity and endorsing the international refugee law principle of *non-refoulement*. We must weigh this against the individual child's best interests.

In fact, the United Nations Convention on the Rights of the Child (CRC) remains the main legal instrument regarding children's rights, therefore it must be an interpretive aid for dealing with

[12] For a further analysis of this definition, EDWARDS (2013: 513-527).
[13] For example, there is no specific provision in the 1951 Convention for refugee children, which means that "according to the Geneva Refugee Convention first of all a (…) child has to meet the same requirements to qualify as a refugee as an adult", FERENCI, 2000: 527.
[14] MARIÑO MENENDEZ (1983: 337-369) reminds us that, to interpret the definition established in Article 1 of the 1951 UN Convention, we must embrace a humanitarian point of view, endorsing a "*in dubio pro refugee*" principle.
[15] The United Nations High Commissioner for Refugees (UNHCR) – whose primary purpose is to ensure the rights and well-being of people who have been forced to flee to another country – has had a major role, making efforts to safeguard an equal and harmonized application of the referred definition among the several signatories States.

migrant children claims as it creates a child-centered perspective for all the refugee international law[16].

Consequently, although the general international refugee law regarding refugee status (specifically the Geneva Convention) does not take into consideration, , the uniqueness of the child, all of the migrant children legislative regime must be interpreted according to a child-centered prism, taking in consideration the CRC. The principle of the best interests of the child[17] must be the primary consideration in all actions or decisions concerning migrant children[18].

3. Unaccompanied migrant children in EU Law

It all started in 1993 with the Treaty of Maastricht where cooperation on asylum was brought to the EU stage. Since then, the EU institutions have been working towards developing a common asylum system (also called CEAS), an intent that has developed into a pressing issue as a result of the refugee crisis that has been overwhelming Europe since 2014.

Although the fact that neither the Treaty on the Functioning of the European Union (TFEU) nor the EU Charter of Fundamental Rights provides a definition of refugee, as both instruments expressly refer to the Geneva Convention for guideline principles on refugee protection matters (Article 78 (1) TFEU and Article 18 EU Charter).

If a child presents a request for international protection, the Member States must obey specific legal documentation and procedures. All EU Member States are obligated to respect, protect and fulfil the children's rights set forth in the UN Convention on the Rights of the Child. In fact, the Treaty on European Union (TEU) expressly establishes the objective for the EU to promote protection of the rights of the child (Article 3 (3)). The EU Charter also ensures the protection of children's rights by the EU institutions and by EU Member States when they implement EU law (Article 24).

[16] As SADOWAY (2018: 80) reminds us, "[t]*his is relevant in addressing subjective fear of persecution, credibility assessment, and the increased fact-finding responsibility of the decision-maker when dealing with child claimants. The child-centered lens of the CRC* [Convention on the Rights of the Child] *also focuses on the myriad variety of serious harms that constitute persecution of children. Although some of these particular harms may not be persecutory for adults, they are persecutory for children as a result of their emotional and physical dependency, their developmental needs, and their greater sensitivity and vulnerability*". FERENCI (2000: 527), for example, signals that the "well-founded fear" criteria of Article 1 A (2) of 1951 Convention, when determining the refugee status of a minor, must take into account that «one cannot attach the same meaning to the impressions and sensation of a minor as to those of an adult". This interpretation is the most correct, considering the best interests of the child, contained in Article 3 of the CRC.

[17] The practice of the European Court, when demanded to evaluate the principle of the best interests of the child in cases relating to immigration, has shown that, in both first-entry and expulsion cases, the Court scrutinizes a few factors in evaluating whether the impugned measure would be contrary to the child´s best interests or not. The Court evaluates the following factors: the child´s age, the extent of the child´s ties with the country of origin and with the third country and the existence of an effective family bond of attachment (to determine the impact of a new or continued separation on family life). SMYTH (2015: 70-103)

[18] SADOWAY (2018: 80).

Therefore, prior to any other consideration regarding the migrant status of the child or any procedures relating to asylum requests, when deciding, the Member State has the obligation to respect and fulfil his/her rights and best interests, as imposed by those legal instruments.

For an unaccompanied migrant child, who arrives in a Member State demanding protective measures, the main EU legal instruments applicable are the CEAS compilation of laws, specifically the Dublin III Regulation and the Brussels II-A Regulation. Both Regulations uphold the best interest of the child as a guide principle.

While the Dublin III Regulation establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, the Brussels II-A Regulation determines the competent jurisdiction for judgments concerning parental responsibility matters, and, therefore, establishes the criteria for determining the Member State with competence to decide on the protective measures regarding the child.

To establish the criteria for determining the Member State responsible in case of an unaccompanied child international protection request, one looks at the Dublin III Regulation[19]. Under this Regulation (Dublin III), a minor is "*a third-country national or a stateless person below the age of 18 years*" (Article 2 (i)), an unaccompanied minor being one "*who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member State*".

The Brussels II-A Regulation, on the contrary, does not clarify who is considered a minor, failing to limit a scope or a maximum age to be considered a child. Consequently, the definition of who a minor is, must be given by the national law applicable to the case, since there is no universal definition.

For instance, all over Europe, government policy documents use different terminology, including "*child*", "*minor*", "*unaccompanied child*", "*unaccompanied minor*" and "*unaccompanied migrant minor*". Data on child migrants may be broken down into those who are accompanied, such as those who travel with their family members or guardians, and travel alone, either because they are unaccompanied or because they have been separated from their family or guardian during their journey. Some data sources also have a category for those who are *"accompanied-non-accompanied*", which means they are traveling with an adult, but the relationship with the adult is uncertain or defined by child marriage.

The Brussels II-A Regulation, in Article 13 (2), refers to *refugee children*, establishing the jurisdictional competence criteria in case of a migrant child seeking protective measures. Nonetheless, it does not define who a refugee child is. Considering what we have been explaining, it seems that the *refugee child* definition, for the purpose of the Brussels II-A

[19] Are also relevant, relating to an asylum application analysis, besides the Qualification Directive (2011/95/EU), the Reception Conditions Directive (2013/33/EU) and the Asylum Procedures Directive (2013/32/EU).

Regulation, must not depend on the migrant child refugee status entitlement[20]. As we have previously stated, the predicament of the migrant child that arrives in the EU demanding protection, must not depend on the granting of the refugee status. Therefore, it looks as though a case similar to the one presented could be covered by Brussels II-A Regulation in a *prima facie* analysis, since Article 13 (2) states that the competent Member State must operate protective measures where the child is physically present.

4. European enacted laws for the protection of migrant children

We have seen in the first part of this paper that children will be protected by the Refugee Convention if they meet the criteria established under Article 1A (2) of the Convention Relating to the Status of Refugee (1951)[21] and will be granted asylum[22]. The proof of existence of a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion (required by that provision) might be complex during the asylum procedure[23]. However, if children fail to qualify for refugee status, they will not be left in the legal void. Indeed, the child may be protected under "subsidiary protection" or "temporary protection".

The application for subsidiary protection may only be considered after the refusal of the application for refugee status[24]. Subsidiary protection covers persons who have good reason to be outside their country of origin owing to a real risk of serious harm arising from the death penalty or execution, torture or inhuman or degrading treatment or punishment, or even serious and individual threat to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict[25]. Thus, the subsidiary protection regards the protection given by a Member State whenever the person may not be returned to the origin country, due to the *non-refoulement principle*[26]. The Directive 2011/95/EU regulates the eligibility for subsidiary protection.

The temporary protection consists of "measures of protection of a temporary nature for displaced persons"[27], who request international protection in case of the sudden mass flight of people and who may qualify as refugees under the 1951 Convention (Article 2 (c) of Directive 2001/55/EC, 20 July 2001[28]). Since the concept "refugee" in the Refugee Convention is so rigid and strict, this Directive increases the range of (displaced) persons who will be granted

[20] REQUEJO ISIDRO (2017: 482-505).
[21] With the amendment of the 1967 Protocol.
[22] *Asylia*, a (not) sylia (subject to seizure), about the *asylia* in the ancient Greek world as sacred and inviolable places, BEHRMAN, 2016: 61-66.
[23] The concept of persecution is not defined which leads courts to face difficulties to interpret its meaning, as it is discussed in CONTE, 2016: 329-330. People who have fled as a consequence of armed conflict cannot qualify for refugee status when there is no link between the harm that they suffer and the Convention grounds. The well-founded fear (this subjective element) must be objectively rooted in circumstances in the country of origin that provoke a genuine alienation from his or her own society.
[24] Case C-604/12, *H. N.*, 8 May 2014, paragraphs 30, 32, 57.
[25] Article 15 of Directive 2011/95/EU, 13 December 2011.
[26] LAMBERT, 1999: 430.
[27] LAMBERT, 1999: 431.
[28] *Temporary Protection Directive*.

international protection, even though there is not a prejudgement of the recognition of refugee status under the Geneva Convention (Article 3 (1)). Hence, it "plugs the gap created by the narrow interpretation of the Refugee Convention and thus ensures protection in the EU for those fleeing war and conflict"[29].

Mainly, it gives Member States the advantage of a time-limited protection. Once the time period of three years (Article 4 (1) and (2)) has been reached, those protected by the Directive must return home (but always respecting the principle of *non-refoulement*[30]). It does not require the determination of an individual status, as a group-based approach and sufficient. Once the "Temporary Protection Directive" is activated, protected persons will receive immediate protection and will not have to go through lengthy status determination procedures"[31].

Unaccompanied minors are secured with swifter protection through Directive 2001/55/CE, since immediate protection is granted to those seeking refuge in the EU[32]. They would also be provided with suitable accommodation (in accordance with Article 13 (1)), necessary medical or other assistance (Article 13 (4)), be granted access to education system under the same conditions as nationals of the host Member State (Article 14 (1)).

These are undoubtedly some pros towards the protection of unaccompanied minors. Nevertheless, since the Temporary Protection Directive is geared to short-time periods, we believe that the best interests of child (Article 3 of CRC), as the primary consideration, imposes a more stable and durable protection for these children, more than that which is defined in Directive 2001/55/CE.

The unaccompanied minor is substantially defined the same way in both directives (Article 2 (f) of 2001/55/EC and Article 2 (l) of 2011/95/EU) and is a person below the age of eighteen who arrives in the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person, including a minor who is left unaccompanied after he or she has entered the territory of the Member States.

Having briefly discussed the three possible ways to grant some level of international protection to unaccompanied minors in the EU (through refugee status, the status of person eligible for subsidiary protection of Directive 2011/95/EU, and temporary protection of Directive 2001/55/EC), it is of great interest to discuss Article 13 (2) of Brussels II-A and some matters concerning Regulation No. 604/2013 (Dublin III), that determines which jurisdiction will consider an application for the asylum of a child.

[29] KOO, 2018: 173.
[30] Article 6 (2). KOO (2018: 175) reaches the same conclusion, but if the temporary protection comes to an end mandatorily (Article 6 (1)(a)),
[31] INELI-CIGER, 2016: 25
[32] INELI-CIGER, 2016: 25. KOO (2018: 166) believes that TP directive has not been successful and it is not the adequate way to address mass influxes.

4.1. Article 13 (2) of Brussels II-A

Article 13 of Regulation Brussels II-A states:

"*Jurisdiction based on the child's presence*
1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.
2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country"

The Courts of the Member State where the migrant child is present have jurisdiction in matters such as those set out in Article 1 (2) - placement of the child, representation and assistance to the child, measures for the protection of the child, among others.

The scope of Article 13 (1) and (2) is to provide a solution for those cases in which the factor "habitual residence"[33] cannot be determined and, therefore, the person cannot be linked with an EU Member State system. In fact, to determine the *permanent centre of interests* of refugee children or children internationally displaced because of disturbances in their home country would be puzzling. The centre of interests of those children will coincide with the place where they are present, otherwise they would not be there asking for international protection.

It seems clear, in short, that this provision appears to be a self-limited rule, restricted to the territory of the Member State where the child is present. But does this statute indicate the substantial rule which will provide the solution? Or must this statute be applied regardless of the normal rules of the conflict of laws? Could Article 13 (1) be understood as a Functionally Restricted Substantive Rule or spatially conditioned internal rule (*Régle d'application immédiate* or *norma di applicazione necessaria*)? If it were a *loi de police*, it would be '*une méthode a priori indifférente à la solution substantielle, alors que l'élément spatial était intimement liè à la coherence matérielle de la loi, à son efficacité*'[34].

There is an unbreakable link between the spatially conditioned internal rules and its territorial applicability. The method of these restricted substantive rules is different and beyond the method of rules of conflicts. In this case, we tend to think that, because one factor cannot be determined to link a person to a legal system, a subsidiary factor has been created, which is the "presence of the person [child] in that territory at that time". So, it is still a rule of conflict, but a rule of conflict which functions due to the failure of other factors. The spatial factor is deeply linked to the applicable law and it can be said with some certainty that Article 13 is self-

[33] As stated in Case C-297/89, Rigsadvokaten and Nicolai Christian Ryborg, 23 April 1991 "Normal residence must, according to consistent decisions of the Court in other spheres of Community law, be regarded as the place where a person has established his permanent centre of interests (see judgments in Case 13/73 Angenieux [1973] ECR 935, Case 284/87 Schäfleinv Commission [1988] ECR 4475 and Case C-216/89 Reibold [l990] ECR 1-4163)". The determination of the habitual residence, as DAVRADOS (2017: 134) points out, is "made with reference to objective factors (e.g., duration of stay in one place) as well as subjective factors (e.g., int ent to settle in a particular place, relations and connections with one place, etc.)". The habitual residence is a process that occurs in small stages over a period of time, but might be interrupted suddenly, if an "*individual abandons a place and moves elsewhere*" (DAVRADOS, 2017: 134).
[34] I. FADLALLAH, apud SANTOS, 1991: 940.

limited. The Member State Court will not have jurisdiction if the migrant child is in another Member State.

Article 13 (2) must be read in light of Articles 14 (1) UDHR and 18 of CFREU. The latter recognizes the subjective and enforceable right of all individuals with an international protection need to be granted asylum (notwithstanding that they must be in accordance with the TEU and TFEU[35])[36]. Stating that the courts of the Member State, where the refugee or internationally displaced child is present, have jurisdiction, is somehow linked to the enforceable and justiciable right contained in Article 18 of CFREU. Through this latter provision, the Charter clearly "promotes the integration and protection of citizens of third countries"[37]. By attributing jurisdiction to the courts of the Member State where the refugee child is present, the European Union managed to find a procedural path to make the granting of asylum easier.

4.2. Dublin III

The Dublin III regulation establishes a system of allocation of responsibility of EU State Members to appreciate asylum applications. In some way, it is the EU enacted law that deals with the issue of "*burden-sharing*"[38], in other words, the responsibility-sharing of refugee protection amongst States.

The Dublin III regulation is essential since EU Member States cannot neglect the hard principles of international refugee law[39]. Some of the fundamental elements of this body of law are the obligation to provide international protection to persons defined as refugees, the *non-refoulement* principle and the duty to rescue persons in distress at sea[40]. These are regarded

[35] '*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')*'.

[36] IPPOLITO (2015: 20) argues this article does not have autonomous legal content, due to its reference to TEU and TFEU, and the provision does not ensure a clear and unconditional right. We believe it does grant an enforceable right, even though it is dependent on procedural rules provided in other legislation. This is more in line with the nature of CFREU, which in case law is seen as a tool of interpretation, especially when it comes to the fundamental rights and the principles recognised in particular by the Charter (for example, *Aydin Salahadin Abdulla and others* v *Bundesrepublik Deutschland*, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, 2 March 2010, paragraph 54, *Federaal agentschap voor de opvang van asielzoekers* v. *Saciri* and others, (C-79/13), 27 February 2014, paragraph 35, the latter refers to Article 1 of the CFREU, the protection of human dignity, as an imposing interpretative tool, and Case C-648/11, *M.A. and others* v. Secretary of State for the Home Department, 6 June 2013, paragraph 59).

[37] IPPOLITO (2015: 19).

[38] This term may be seen as insensitive and inhuman, "*since it may imply that refugees constitute a burden for their host countries*", promoting a negative perception of displaced persons who are entitled to the right to be protected and disregarding the humanitarian duty of every State to protect those, see DOWD & McADAM, 2017: 869-870; INDER, 2017: 529. This norm of international refugee law does not establish legally binding obligations on States (DOWD & McADAM, 2017: 879).

[39] The "body of law that regulates the status and rights of refugees and the securing of long-term solutions to their situation", in order to ensure that they "receive protection of their basic rights, which they no longer enjoy from their own governments", EDWARDS, 2013: 514.

[40] "[Sont] *obligation de nature coutumière codifiée dans de nombreuses conventions internationals*", FAVILLI, 2013: 263. Giving a comprehensive overview of the fundamental rule of rescuing persons at sea, PAPANICOLOPULU, 2016: 491-514. These principles are understood as grounds for duties, inasmuch "as normative relationships, human rights imply duties" (BESSON, 2013: 40).

as international customary law, that is to say, consistent practices by States that are accepted by them as legally binding[41]. Even though the right of States of controlling migration is considered a truism, it "does not necessarily entail that these [States] can exclude the same people from the right to life as well"[42].

The respect of human rights imposes the principle of burden-sharing and solidarity between State-Members of the EU, to avoid that those with external borders in the EU do not comply with human rights' needs. Altogether, it is shown that in the area of asylum and immigration (Article 80 TFEU), three responsibilities of Member-States coexist[43] towards: refugees and migrants; fellow EU countries, executed in accordance with fair-sharing; and the EU as an integral entity, grounded in the sincere cooperation principle (Article 4 (3) TEU).

Nevertheless, after an attentive analysis of Dublin III, it is defensible that it does not represent the fairest nor the most equitable system of burden-sharing[44]. The general rule is that that an applicant who has crossed the border irregularly into a Member State by land, sea or air having come from a third country shall see the application for international protection examined by the Member State thus entered (Article 13 (1)). This is the case when the migrant requests asylum in a Member State that is different from the State of entry (with several exceptions, for example Article 13 (2), second paragraph).

It is true that there is the advantage of determining the responsible Member State swiftly[45]. The principle since the Dublin rules came into force in 1997 was and has always been that "an asylum seeker is entitled to make one claim for asylum in one state only"[46], the premise being that all states within the system are safe.

However, upon evaluating the unaccompanied minor regime in Dublin III (Articles 2 (j), 6 and 8 (4)), it is perceptible that the Regulation determines that the responsible Member State to examine the asylum request of a minor, without any traceable family, will be the one where the minor has lodged his or her application for international protection, "provided that it is in the best interests of the minor". This Article 6 (1) refers once again to the best interest of the child by stating that the "*best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation*".

[41] Specifically approaching *non-refoulement* as a hard law of international law, '*which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*', LEISERSON, 2017: 192; KOO, 2018: 165 and HURWITZ, 2009: 204-209. The principle of *non-refoulement* "*n'implique pas que l'État soit tenu d'accueillir les réfugiés sur son propre territoire: il suffit qu'il ne les envoie pas vers un État qui mettrait leur vie en peril*" (FAVILLI, 2013: 264). This means if the State sends the refugee to another country where his or her life, physical integrity and freedom are guaranteed, Article 33 (1) of Convention related to the Status of Refugee (1951) is not violated. This article truly constitutes 'an exception to the general discretion of states in respect of immigration control' and contains an immediately applicable right, EDWARDS, 2013: 521 and 523.
[42] SPIKERBOER, 2017: 29.
[43] MORANO-FOADI (2017: 241).
[44] Legitimizing the statement of INELI-CIGER (2016: 29) that Dublin III is not "a burden-sharing mechanism per se".
[45] MORANO-FOADI, 2017: 235.
[46] KOO, 2018: 161, and for Dublin II, HURWITZ, 2009: 91.

EU Member States must always assess the "best interests of the child" by taking into account possibilities for family reunification, the minor's well-being and social development, safety and security considerations, and the minor's viewpoint[47].

Unaccompanied minors with a family member, sibling or relative legally present in a Member State may have their application examined there. In this regard, YOUNG[48] recalls that this principle of paramountcy must guarantee that the best interests of the child are the paramount consideration in all actions concerning children. Cecilia WIKSTRÖM understands that Article 6 (1) is not in accordance with the CRC [as well as Article 24 (2) of CFREU], since this Convention would require the best interests of the child to be the (unique and solely) primary consideration[49].

This is even more understandable, if one considers that an unaccompanied minor might have lodged an application in one Member State, but is present on a regular basis in another Member State. Hence, an unaccompanied minor might need protective measures in this last Member State, for which the Courts of the Member State where the child is present will have jurisdiction (Article 13 (1)(2) Brussels II-A).

Nonetheless the court which will appreciate the asylum request will be in another Member State, since the application for asylum was lodged there[50]. A decision to transfer an unaccompanied minor based on this provision would most probably violate the best interests of the child[51]. Likewise, YOUNG[52] highlights that "in the case of an unaccompanied minor with no relatives present in the EU, the Member State of first arrival should become the Member State responsible for resettling the minor", in order to not waste and consume time. The minor should also "immediately be placed into the education system of the Member State responsible for his or her guardianship as any delay in education should not be considered in the best interests of the child in any circumstances"[53]. However, allocating an unaccompanied minor to the Member State of the first arrival is against the best interests of child, because it will only cause unnecessary and harmful delay. The best solution would be requiring the

[47] Committee on the Rights of the Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 2013, pp. 13-18.
[48] (2017: 390).
[49] WIKSTRÖM, 2017: 7; as well as YOUNG, 2017: 391.
[50] As REQUEJO ISIDRO (2017: 482-505) indicates, "[d]os instrumentos jurídicos sirven a determinar el Estado miembro a cargo de la protección: en el marco de la responsabilidad parental, en términos de competencia judicial internacional, el Reglamento Bruselas II bis; en el contexto de los procedimientos de asilo, en términos de Estado responsable, el Reglamento de Dublín III. Las medidas son las mismas; los criterios atributivos de competencia/responsabilidad, en cambio, no".
[51] As in Case C-648/11, 6 June 2013, *MA and others vs the Secretary of State for the Home Department*: "Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State", paragraph 55. GIL (2015: 456) concludes that that discretionary margin of States when deciding to expel minors (or transfer them to other States) is very reduced, due to the best interests of child. And the decision of children transference, on account of not being the State Member with jurisdiction according to Dublin III, must always be preceded by individual assessment, as it is conveyed in paragraph 223 of ECtHR Case *Sharifi and others* v. Italy and Greece, (no. 16643/09). Otherwise, it would breach Article 4 of Protocol 4 of CPHRFF.
[52] 2017: 393.
[53] *Idem*.

Member State responsible for examining the application for asylum to be the same one where the child is present (similarly to the provision of Article 13 (2) Brussels II-A)[54].

Advocate General Cruz Villalón in Case C‑648/11 also supports this result, always bearing in mind Article 3 of CRC, and the need to attend to the particular circumstances of each case: "*In any event, the application of the rule which, in accordance with my proposal, allocates responsibility to the Member State where the most recent application has been lodged, must be liable to exception if, once again, the minor's best interests so require. (…) it must be understood that, when there are a number of asylum applications, allocating liability to the Member State where the most recent application was lodged must also be subject to exception if the minor's best interests again so require. In other words, the criterion of the most recent application is justified only in that it is best suited, in principle, to serve the minor's best interests, so that if, in a given case, that principle is inapplicable, the minor's interests require an exception to be made*"[55].

The reason behind this solution is, as IPPOLITO[56] clearly depicts, according to the best interest of the child, "to not delay the procedure for determining the responsible Member State more than is strictly necessary, thus preventing the risk of children being returned to another country for their application to be examined".

It would also be the best way possible to prevent an (eventual) excessive length of a minor's detention, which ostensibly violates Article 37 (b) of CRC[57]. Whereas 20 demonstrates that concern as does 21 with regard to the need to avoid jeopardizing the rights of asylum seekers, even when the asylum systems face particular pressures[58].

Therefore, we tend to believe that there might be a potential dissonance between Articles 13 (2) Brussels II and Article 8 (4) Dublin III, when an unaccompanied minor has lodged an asylum

[54] This seems to be the opinion, delivered in 21 February 2013, of Advocate General Cruz Villalón in Case C-648/11, M.A. and others v. Secretary of State for the Home Department: "It is true that the minor applicant could always be returned to the Member State where he lodged his first application. However, I consider that neither for reasons of time nor in view of the best treatment owed to minors is it appropriate to make this type of asylum seeker engage in travel that can be avoided", paragraph 75.
[55] Paragraph 78.
[56] 2015: 24.
[57] The International Organization for Migration (Global Compact Thematic Paper (Detention and Alternatives to Detention, p. 5-6) suggests that there should be legally prescribed "human-rights compliant alternatives to detention, so that detention is a last resort imposed only where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes". Like in Case *Popov* v. France, ECtHR, 19 January 2012, Applications nos. 39472/07 and 39474/07, "*it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant*" and the authorities must implement all necessary means to limit, as far as possible, the duration of the detention of minors. Any other solution would be against Article 3 of CRC.
[58] Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers* v. *Saciri* and others, 27 February 2014, paragraph 35: ''[i]n addition, the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards", see also Bero & Bouzalmate (G. and R. (C-838/13)) and Mahdi (C-146/14).

application in one Member State but he or she is present in another, where he or she has been subjected to protective measures.

4.3. Dublin IV proposal

The Dublin IV proposal of 2016 has been extensively criticised, mainly for maintaining the same old principles of the previous Dublin Regulations and for not ensuring sufficiently equitable burden-sharing and protection of vulnerable minors (since it does not express the best interests of the child as the paramountcy principle[59]). It is true that Dublin IV aims to be an instrument for the "fair and equitable distribution of responsibility among Member States" (Dublin IV, 604/2013, recital 7 (new)). The corrective allocation mechanism would only function in situations when a Member State is confronted with a disproportionate number of applications for international protection for which it is responsible. Dublin IV provides an opt-out temporarily clause, for a maximum of 12 months, during which the applicants, who were the responsibility of the opting out Member State, would be absorbed by other States. But at what cost? It would cost € 250,000 for an applicant to be transferred to other State[60]. Dublin IV does not accomplish its goals, nor does it offer an equitable mechanism which reflects the importance of the burden-sharing principle.

In order to have fair sharing of responsibility, the Member States "should distribute the burden depending on their capabilities"[61], thus preventing that a Member State hosts the lion's share[62].

5. Final Remarks

All children are full owners of rights, regardless of their immigration status.

[59] YOUNG (2017: 390). For example, Article 10 (5) of Dublin IV proposal: 'In the absence of a family member, a sibling or a relative as referred to in paragraphs 2 and 3, the Member State responsible shall be that where the unaccompanied minor first has lodged his or her application for international protection, provided that it is unless it is demonstrated that this is not in the best interests of the minor' –according to recital 16 (available at: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-270-EN-F1-1.PDF, accessed March 21, 2019), the best interests of the child is only one of the several considerations necessarily made for the determination of the Member State responsible.

[60] It is unjustifiable and "outweighs any reasonable estimation of the costs associated with the RSD [refugee status determination] procedure and is an enormous increase to the figure of 6,000 euros provide in the September 2015 relocation decisions", YOUNG, 2017: 276. The most likely countries to require opt-out would be the most exposed ones (Greece, Italy). PROGIN-THEUERKAUF (2016: 4) outlines the same idea: "paying a solidarity contribution of € 250'000 to another Member State who is willing to take over the asylum seeker is simply absurd – not only because the amount is totally arbitrary, but also because it is actually not a sign of solidarity, but the exact opposite. Moreover, it will be impossible to execute this provision in practice, as Member States would have to transfer money back and forth all year long".

[61] (MORANO-FOADI, 2017: 247).

[62] However, as COSTELLO (2016: 275) signals, the utmost importance with a new Dublin regulation would have to be the "thorough and individualized assessment in all cases" and the "duty not to deport anyone to a place where the relevant risk of inhuman and degrading treatment is established".

The Geneva Convention of July 1951 relating to the Status of Refugees ('the Geneva Convention'), as supplemented by the New York Protocol of January 1967 provides the cornerstone of the international legal regime for the protection of refugees.

If we think only about unaccompanied minors as asylum seekers, we cannot disrupt our analysis from the EU Regulation: Brussels II-A, Dublin III and the Directive 2011/95/EU, in aiming for a higher degree of protection.

Bear in mind that an unaccompanied child is a child who has been separated from both parents and is not being cared for by an adult legally responsible to do so. Therefore, that child is defenceless and in need of special security.

Although we believe Member States apply common criteria for the identification of children genuinely in need of international protection, we also judge the disruptions of the system created to protect these vulnerable individuals.

On the one hand we have the 'best interests of the child' as a primary consideration of Member States when implementing the EU regulations, but on the other hand, the recognition of refugee status is a declaratory act given by the Member State in which the migrant child has lodged her/his appeal. In some cases, this can mean not attending to the special needs of that child in particular, since separated and unaccompanied children may not stop their journey in the first Council of Europe State they reach.

As soon as a child is registered as an asylum-seeker they should receive information about a whole range of rights: the right to a guardian, to information and to receive legal assistance, to special protection and assistance if they have been a victim of torture, to social protection and access to health and social services, not to be punished for illegal border crossings, to an effective remedy, to have their asylum claim considered on child-specific grounds if relevant. However, serious information gaps about children's rights in the context of asylum procedures are a reality.

And this only gets worse if you add the fact that the Member State granting asylum to this child may not be the one where the child is actually present or where the procedural measures are being granted to this minor.

We realize that judges and prosecutors around Europe are working to diminish this problem of coherence between regulations, but we also know that the specific needs of these particularly vulnerable groups of children (such as the unaccompanied ones) should not be decided without proper guidelines and law.

Appropriate safeguards must be applied to all children present in the European Union, at all stages of the asylum and return procedure. Currently, a number of key protection measures, notably as regards access to information, legal representation and guardianship, the right to be heard, the right to an effective remedy and multidisciplinary and rights-compliant age assessments, need to be stepped up.

Durable solutions are crucial to establish normality and stability for all children in the long term. The identification of durable solutions such as integration in a Member State, return to the country of origin, resettlement or reunification with family members in a third country, are all options that should be considered as soon as a child enters an EU Member State.

It is essential, though, that the Dublin III criteria of the Member State responsible and the Brussels II-A standards of the competent Member State shall be unified as one: the best interests of the unaccompanied minor, his opinion (if possible) and where he is physically present, should be the determinations carried out in all cases.

So, we can only imagine a world where the best interest of the unaccompanied minor will prevail and the guidelines of the regulations will find a unique and appropriate answer to this refugee and migrant children problem in Europe.

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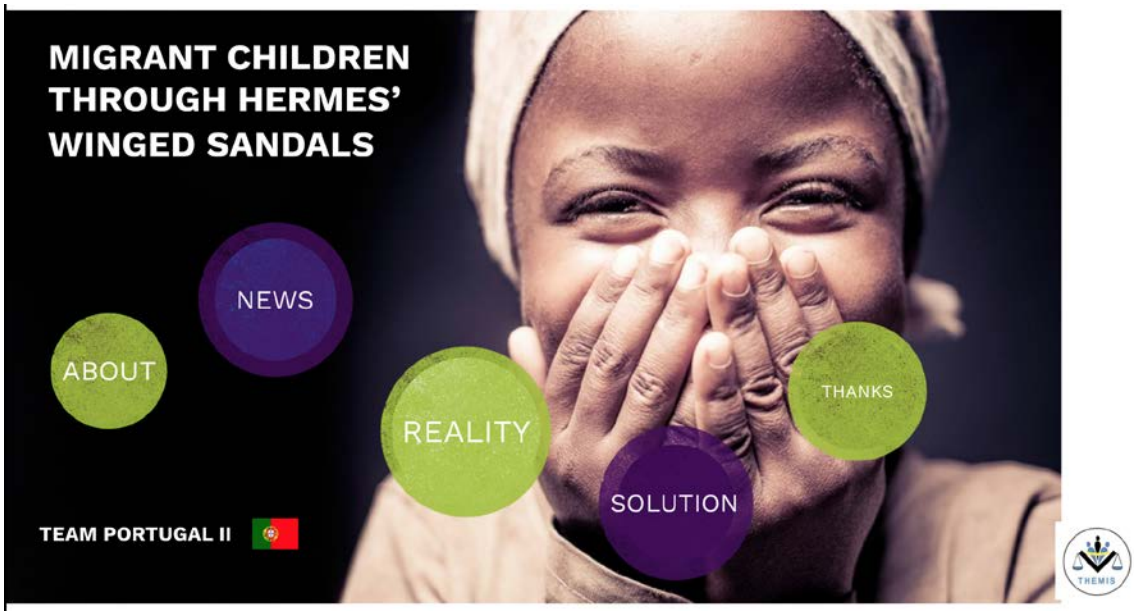

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

THEMIS

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2.

Apresentação da Equipa

Accompanying Teacher
Patrícia Helena Costa

CENTRO
DE ESTUDOS
JUDICIÁRIOS

Relatório sobre a participação de Auditores na semifinal D do projeto Themis
Julho de 2018

Patrícia Helena Leal Cordeiro da Costa *

Auditores:

ELISA ALFAIA SAMPAIO
JOÃO JOSÉ PIRES SEIXAS
PAULO JORGE GOMES

Os Ex.mos Srs. Auditores apresentaram trabalho dedicado ao tema "ARTIFICIAL INTELLIGENCE AND THE JUDICIAL RULING".

O tema escolhido é muito atual e de extrema relevância para o contexto do judiciário, não só pelas implicações éticas que coloca, mas também pela sofisticação técnica e possibilidades de utilização e evolução como ferramenta ao serviço da Justiça.

Os Srs. Auditores realizaram um trabalho muito profundo de investigação, seja quanto aos aspetos científicos da inteligência artificial, seja quanto à abordagem jurídica, salientando-se a atenção e atualização permanente ao longo de toda a investigação e preparação da apresentação, que lhes permitiu, por exemplo, detetar uma recentíssima decisão do TEDH e trabalhar a mesma com apuro.

Ao longo de toda a preparação e apresentação final, foi patente o espírito de equipa e colaboração entre os auditores desta equipa, sendo a participação de todos essencial.

O trabalho apresentado, seja na parte escrita, seja na parte da apresentação em Sofia, revelou que os Srs. Auditores, além da investigação e estudo feitos, refletiram profundamente sobre os pontos salientes do tema, discutiram-nos entre si e no confronto com outras opiniões, em atitude constante de curiosidade, análise crítica e humildade, mas também de coragem, não fugindo aos aspetos mais difíceis e controversos, tomando posição sobre os vários pontos de conflito e expondo-os de forma transparente e maturada.

Revelaram também desenvoltura na língua inglesa, quer no discurso escrito, quer no discurso oral, e excelentes capacidades comunicativas, seja em ambiente formal, seja em ambiente mais informal.

A avaliação final do júri foi, na minha opinião, bastante positiva, não sendo de estranhar ter o texto da apresentação sido escolhido para ser publicado no *Themis Annual Journal*, o que só por si é demonstrativo da elevada qualidade do trabalho realizado.

Nota final para salientar o empenho, elevada qualidade intelectual e postura serena e cativante em toda a atividade.

11 de julho de 2019

* Juíza de Direito e Docente do CEJ.

CENTRO
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2.
2.1. Artificial Intelligence and the Judicial Ruling

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CENTRO
DE ESTUDOS
JUDICIÁRIOS

THEMIS COMPETITION

SEMI-FINAL D: JUDICIAL ETHICS AND PROFESSIONAL CONDUCT

ARTIFICIAL INTELLIGENCE AND THE JUDICIAL RULING

TEAM PORTUGAL I (*)

ELISA ALFAIA SAMPAIO, JOÃO J. SEIXAS, PAULO JORGE GOMES

TUTOR: PATRÍCIA HELENA COSTA

SOFIA, BULGARIA
2-5 JULY 2019

CENTRO
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JUDICIÁRIOS

INTRODUCTION [1]

FRANKENSTEIN'S MONSTER'S SOUL

We, in our wealthy western societies, live in a world made possible by Science. We live longer than our ancestors, in better health, eating better food and, despite sensationalist newspapers or populist politicians, in less violent, safer societies than ever before in human History.

However, especially in Europe, Science, and its main by-product – technology – are perceived with growing mistrust. And, after nuclear energy, the cloning of mammals, and genetically modified organisms, the main threat seems to stem from developments in Artificial Intelligence. As more and more sectors of human life and comfort increasingly rely on robots and AI-operated machines, from medical diagnostics to self-driving cars, we hear growing calls for alarm: "Bank of England Economist Warns Thousands of Jobs at Risk from Robots"; "How Artificial Intelligence Could be Violating our Human Rights", are some recent newspaper headlines that illustrate the fact that Artificial Intelligence is the scare word of the day.

As it has been for some time, in one form or another, at least since the Luddite movement of the first half of the 1810s; the fear of AI is but another expression of technophobic thought. The revolutionary idea of Robert Owen to mechanize the weaving looms in his factories, announced by *The Hull* in 1817, found in Darwin's theory of Evolution the fuel that would ignite what became a perceived dispute between Man and Machine, as prefigured in an 1863 essay, "Darwin Among the Machines", by Samuel Butler. One could indeed see the rise of the machines in factories as a threat to one's livelihood, for an untiring machine could physically outperform any man, for hours on end; is it surprising, then, that a machine perceived to be as, or more, intelligent than any human being, should be feared as a possible substitute for Mankind itself?

In this brief essay, we intend to explore a specific context where AI can be expected both to reveal itself as an indispensable tool, and to raise more objections to its deployment: that of the Judiciary. With the possible exception of the various art forms, the Judiciary is undoubtedly that area of human activity where one expects human nature to manifest itself to its fullest: one expects the judge to apply both reason and emotion to his judgments, one complementing the other so that neither prevails. Balance is not only expected, it is to be desired. But are reason and emotion a part of intelligence? Can a machine be reasonable in its decisions? Or can it never be more than merely logical?

Not surprisingly, the ethical questions raised by the growing implementation, worldwide, of AI systems in several capacities in the Judiciary, was promptly addressed by the EU in the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment, issued by the European Commission for the Efficiency of Justice. Its tentative responses to an essentially unpredictable technological field will be part of the analysis to be found herein, as it seems to hesitate between embracing the science and technology of AI, or succumbing to the alarmist potential popularized in science-fiction films. As such, it reflects some of the European citizens' suspicion about science. As the then European Union's Science Adviser microbiologist Anne Glover stated in a 2012 interview with Science Insider (February 14, 2012), *"If you take people's opinions, for instance by looking at the Eurobarometer, people seem to be reluctant to accept innovative technologies. They are suspicious*

[1] The authors are deeply thankful to Dra. Margarida Valadas, for the revision of the paper, and their coach Dra. Patrícia Costa, for her useful insights and suggestions.

almost just because it's new. (…) There should be more communication about the rewards of the technologies".

Artificial Intelligence is one technology that shows the promise of the greatest rewards. As such, it demands great responsibility while being dealt with. Neither undue optimism, nor unjustified fear, must be allowed to prevent us from exploring this brave new world, or to benefit from its fruits.

As scientists and programmers try to perfect artificially intelligent systems that can operate in the judiciary, helping judges render better decisions, providing people with fairer and more equal justice, or even handing down decisions in a human case, to a human party, they are trying to get such systems to choose an action that best satisfies conflicting goals: and such ability, the ability to choose such an action "*is not an add-on to intelligence that engineers might slap themselves in the head for forgetting to install; it is intelligence*" [(2)].

CHAPTER I

A THEORETICAL FRAMEWORK

1. The AI in the Fourth Revolution

We're living in a hyperhistory, described by LUCIANO FLORIDI as *"(…) the stage of human development when third-order technological relations become the necessary condition for development, innovation, and welfare"*, based on *"(…) technologies as users interacting with other technologies as prompters, through other in-between technologies (…)"*. This shapes the self-understanding of human identity as informational organisms or inforgs [(3)]. In this century, we are witnessing a new spring for AI on a daily basis: it is in our smartphones, in commercial logistics, search engines, electronic games, social networks, aviation, health and bank systems, or in legal and judicial contexts.

Roughly speaking, AI is known as intelligence demonstrated by a computer machine or software. This notion leads to other questions: what is intelligence? Where are the boundaries between thought and computing [(4)]? Does the human brain function as a computer or are the mental processes indivisible? Can machines learn as humans do? These questions pose deep philosophical problems (epistemological, ethical, metaphysical), aggregate different areas of science (cognitive, biology, logic, psychology, linguistics, mathematics, cybernetics, engineering) and energise several schools of thought (evolutionists, symbolists, computationalists, bayesians, analogisers). Naturally, this is not the place for, nor do the authors have the presumptuousness to, face all these enquiries. Nonetheless, the task proposed in this paper will demand some small detours into other less familiar issues for trainee judges, and try to clear up some miscomprehensions.

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(2) STEVEN PINKER, *Enlightenment Now: The Case for Reason, Science, Humanism, and Progress*, Penguin Books, 2018, p.300.
(3) L. FLORIDI, *The Fourth Revolution: how the infosphere is reshaping human reality*, Oxford University Press, 2014, p.31.
(4) See WILLIAM J. RAPAPORT, «What is a Computer? A Survey», *Mind & Machines*, 2018.

2. Big Data

It has been estimated that humanity had accumulated approximately 12 exabytes [(5)] of data in its entire history up until the time when the use of computers became widespread [(6)]. In the 21st century, between 2006 and 2011 alone, the data available had grown to over 1.600 exabytes. Nowadays, we live in the zettabyte Era [(7)], and it tends to grow exponentially since the use of data will generate more data [(8)]. Some estimations purport that by around 2020, for every person on earth, 1,7 megabytes of data will be created every second [(9)]; the IDC White Paper (2018), for instance, predicts for 2025 an increase of the total global data up to 175 zettabytes [(10)]. This ocean of data needs to be collected, stored, managed, and analysed computationally. In other words, data, to be big, needs models, through which algorithms extract inferences about patterns, trends and correlations [(11)].

As Professor JACK M. BALKIN highlighted, *"Big Data is the fuel that runs the Algorithmic Society; it is also the product of its operations"* [(12)]. In contrast to humans, AI systems are comfortable with a large number of data sets. It allows the AI system to find new patterns and to label new examples, expanding the collection of all perceived history. For instance, to surpass the ambiguity of natural language, a translation algorithm will have a better performance if it has billions of words stored in its training set, instead of just a couple million. The increase in data will improve the machine's ability to achieve its goals.

3. Human versus artificial intelligence

As JAMES H. MOORE pointed out in 1985, the advances of new technologies involve not only *policy vacuums* but also *conceptual vacuums* which needed to be filled [(13)]. Generally speaking, intelligence is associated with reasoning, memory, understanding, learning and planning: a «general intelligence» with the ability to perform intellectual tasks. There are many disputed definitions of intelligence in psychology, including the «multiple intelligences» theory, proposed by Howard Gardner [(14)]. SHANE LEGG

(5) Putting in perspective, 1 exabyte corresponds to a 50,000 year-long video of DVD quality.
(6) L. FLORIDI,*The Fourth Revolution*…p. 13 (note 3).
(7) One zettabyte corresponds to 1000 exabytes.
(8) Again, putting the power of exponentially in perspective, if one takes 30 normal steps forward it will be moved around 30 meters. If one takes 30 exponential paces, doubling the length each time (first step one meter, second step two meters, third step four meters…) at the 29th step one would had reach the moon. The 30th step would bring the traveller back to earth, C. CHACE, *The Artificial Intelligence and the Two Singularities*, CRC Press. 2018, p. 45.
(9) See https://www.domo.com/learn/data-never-sleeps-6 (last access on 29 May 2019).
(10) IDC White Paper, *The Digitization of the World From Edge to Core*, 2018, available at https://www.seagate.com/files/www-content/our-story/trends/files/idc-seagate-dataage-whitepaper.pdf, last access 10.06.2019.
(11) Consultative Committee of the Convention for the Protection of individuals with Regard to Automatic Processing of Personal Data, Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data in a World of Big Data, Council for Europe, 2017, p. 2.
(12) J. M. BALKIN, *The Three Laws of Robotics in the Age of Big, Data*, 2017, p. 6, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2890965 (last access 13 June 2019).
(13) JAMES H. MOORE, «What is Computer Ethics?» *Metaphilosophy*, 16(4), 1985, p. 266.
(14) Namely, linguistic, musical, logical-mathematical, spatial, bodily-kinesthetic, intrapersonal, and interpersonal intelligences (see HOWARD GARDNER, *The Theory of Multiple Intelligences*, Basic Books, 2011).

& MARCUS HUTTER proposed a definition of intelligence as a measure of *'an agent's general ability to achieve goals in a wide range of environments'*. However, there is no agreed definition[(15)].

Ontologically, AI is based on a previous design to develop a task and achieve specific goals. The AI is limited to a set goal, even if it has astonishing learning capacities, which nevertheless are still aimed at obtaining a specific result, usually based on an inductive approach. Due to the realm of perception and its meaning, human intelligence is epistemologically broader [(16)]. AI systems have shown difficulties in dealing with semantic content, mainly with the open texture of natural and legal language. In the latter case, *ambiguity* (when the same legal concept have different meanings in different contexts), *vagueness* (neutral concepts that can possess intrinsic properties which are by themselves sufficient condition both to assign and not to assign the specific term), *variable standards* or *evaluative-open concepts* ("due care", "public interest"), or *defeasibility* (e.g. the forbidding rule about motor vehicles in the park does not apply to ambulances) [(17)], are some attributes of legal norms and language that require special attention to the particular case. As MIREILE HILDEBRANT pointed out, *"meaning depends on the entanglement of self-reflection, rational discourse and emotional awareness that hinges on the opacity of our dynamic and largely inaccessible unconscious"* [(18)].

However, if one accepts that meaning in law is normative and objective, in the sense of being reference-related and inter-subjectively valid [(19)], AI systems would be an undeniably helpful tool in this quest. Some small-scale algorithms have already been successful in resolving the open texture problem, such as 1980s' Case-Based Reasoning, although it hasn't advanced substantially since. Considering the growth of Big Data and the integration of suitable models and data sets with the deep learning capacities of AI, it is conceivable that significant advances are still to come in this area. The main problem, in our view, is not in dealing with semantic content, where AI could be a useful instrument. In the judicial point of view, the core issue is to be found in the fundamental externally justificatory demands of legal discourse, where the opacity of the AI reasoning systems poses justified fears. In short, one should not overestimate human intelligence or underestimate the AI potential. Being two different kinds of intelligence they are not commensurable. As LUCIANO FLORIDI pointed out, AI pursues neither a *descriptive* nor a *prescriptive* approach to the world. It *inscribes* new artefacts that interact with nature, becoming part of it [(20)].

The difference between human intelligence and AI is about the same as the difference between «general, full or strong AI» (AGI) and the «narrow or weak AI». *Strong AI* is related to AI systems which could carry out the same cognitive functions as humans (only probably better), applied to all problem solving or human activities. In other words, a strong AI would be an emulation, not just a simulation, of

(15) SHANE LEGG, & HUTTER MARCUS, Universal Intelligence: A Definition of Machine Intelligence, 2007, p. 12. Available at: https://arxiv.org/pdf/0712.3329v1.pdf (last visit 10 April 2019).
(16) WENCESLAO J. GONZALEZ, «From Intelligence to Rationality of Minds and Machines in Contemporary Society: The Sciences of Design and the Role of Information», *Minds & Machines*, 26 June 2017, pp.8-12
(17) Generally speaking, defeasibility is what happens when even though the scope of the rule is correctly determined and its applied to a given case to produce the conclusion C, it is possible to formulate the reason R and reject the conclusion C, cfr. F. BÉLTRAN & G. B. RATTI , «Validity and Defeasibility in the Legal Domain», *Law and Philosophy*, 29, 2010, pp. 601-626.
(18) MIREILLE HILDEBRANT, *Law as Computation in the Era of Artificial Intelligence. Speaking Law to the Power of Statistics*, 2017, p. 10, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983045 (last visit 23 May 2019).
(19) MATTHIAS KLATT, *Making the Law Explicit - The Normativity of Legal Argumentation*, Hart Publishing, 2008, pp. 211 ff.
(20) L. FLORIDI, *The Fourth Revolution...* (note 3), p.142.

human intelligence, with volition and maybe even consciousness [21]. Nowadays, it is still science-fiction, despite the growing optimism that AGI will be achieved in this century. The actual AI systems are weak, or narrow, focusing on single subsets or in a pre-programmed way of working. Although the prevalent AI is narrow, it is nonetheless getting stronger and increasingly raising ethical concerns that could shake some basic foundations of human knowledge[22].

Trustworthy AI

In obtaining a reliable model of an AI agent, the quantity of the data fed to it is a crucial factor. But the quality of said data is even more so, for a lack of attention to data quality could easily lead to take correlation for causation, thus wrongly predicting a link between two unrelated phenomena and creating false positives/negatives. Indeed, knowledge is more than information; it requires explanation and understanding, not just truth or correlation [23]. The European Union took the lead with the Draft Ethics Guidelines for Trustworthy AI by the High-Level Expert Group on Artificial Intelligence (henceforth AI-HLEG), proposing the cornerstone concept of «trustworthy AI», admittedly influenced by the paper of LUCIANO FLORIDI *et alli* [24]. The «trustworthy AI» should be based on an ethical purpose, based on the respect for fundamental rights. The AI HLEG lists five principles and values for a human-centric AI: (1) *beneficence* ("do good"); (2) *non-maleficence* ("do no harm"); (3) *autonomy* ("preserve human agency"); (4) *justice* ("be fair"); (5) and *explicability* ("operate transparently"). The AI algorithms should also be technically robust and reliable to deal with errors and inconsistencies, permitting corrections and calibrations [25].

In an auxiliary paper, the AI-HLEG offered a comprehensive definition for AI [26]:

"Artificial intelligence (AI) refers to systems designed by humans that, given a complex goal, act in the physical or digital world by perceiving their environment, interpreting the collected structured or unstructured data, reasoning on the knowledge derived from this data and deciding the best action(s) to take (according to pre-defined parameters) to achieve the given goal. AI systems can also be designed to learn to adapt their behaviour by analysing how the environment is affected by their previous actions."

[21] Christof Koch, chief scientific officer of the Allen Institute for Brain Science in Seattle, considers that consciousness is a property of matter well organized, just like mass or energy. If one could emulate a human brain, there would be consciousness, cfr. https://www.technologyreview.com/s/531146/what-it-will-take-for-computers-to-be-conscious/ (last visit 06.06.2019).

[22] Such as the Human Brain Project, launched in October, 2013, as an interdisciplinary European project involving several researchers of more than 100 institutions of 24 countries. This European project seeks to leverage cutting edge information and communication technologies, creating a multi-level brain simulation platform (see: https://www.humanbrainproject.eu/en/brain-simulation/, last visited 05 May 2019). This project raises medical hopes for the diagnosis and treatment of brain diseases, but also some ethical apprehensions. As Daniel Lim puts it, if we could emulate a human brain in a computer, there would be a new personhood, DANIEL LIM,. «Brain simulation and personhood: a concern with the Human Brain Project», *Ethics and Information Technology*, 20 October, 2013.

[23] L. FLORIDI, *The Fourth Revolution…* (note 3), p. 130.

[24] LUCIANO FLORIDI/JOSH COWLS/MONICA BELTRAMETTI/RAJA CHATILA/PATRICE CHAZERAND/VIRGINIA DIGNUM/CHRISTOPH LUETGE/ROBERT MADELIN/UGO PAGALLO/FRANCESCA ROSSI/BURKHARD SCHAFER/PEGGY VALCKE/EFFY VAYENA, «AI4People—An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations», *Minds and Machines*, 2018.

[25] High Level Expert Group on Artificial Intelligence, Draft Ethics Guidelines for Trustworthy AI, 2018. Available at: https://ec.europa.eu/digital-single-market/en/news/ethics-guidelin-trustworthy-ai (last access 09 June 2019)

[26] High-Level Expert Group on Artificial Intelligence, A Definition of AI: Main Capabilities and Disciplines. 2019. Available at: https://ec.europa.eu/digital-single-market/en/news/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines (last visit 09 June 2019).

This definition assumes a new kind of intelligence through machine processing or computation, aimed at achieving set goals. Just as aeroplanes do not fly like birds, or submarines do not swim, so AI is not human intelligence *redux*. As the AI-HLEG points out, rationality does not exhaust the notion of intelligence, even though it is a significant part of it. This has a significant symbolic effect when it comes to the process of judicial decision: even if the judge is bound by the law, where his authority is delegated by the State, he is not exercising its power as an automaton, but as a human being before another human being.

5. Machine learning and deep neural networks

STUART RUSSEL and PETER NORVIG stated that the computational learning theory relies on this fundamental principle: *"any hypothesis that is seriously wrong will almost certainly be "found out" with high probability after a small number of examples because it will make an incorrect prediction. Thus, any hypothesis that is consistent with a sufficiently large set of training examples is unlikely to be seriously wrong, that is, it must be probably approximately correct"* [(27)]. Machine learning involves a set of techniques mostly dealing with a mix of statistics and computer engineering, from which the required computational algorithms are developed. It uses mathematical models with data sets, mainly obtained from Big Data, where the parameters are configured during the learning phase, through different learning methods [(28)]. Algorithms are not able to create neutral or non-discriminatory and independent predictions about future events since they are contingent from its previous design.

There are three main types of learning: *supervised*, *unsupervised* and *reinforcement learning*. In *supervised* machine learning the AI system is given pre-labelled data and required to work out the rules that connect them. Thus the agent observes a data set, interprets it as a set of possible input-desired output examples and creates a model of the underlying function so that the difference between the desired and predicted outputs is as small as possible for previously unseen patterns. The supervisor then compares the desired and the predicted outputs, adjusting the model.

In the *unsupervised learning* or self-organising systems, the machine is given no pointers and has no desired outputs. It has to identify the inputs and the outputs as well as the rules that connect them, even though there is no specific feedback. This type of learning is used in detecting potential useful clusters (grouping) of input examples: a self-driving taxi can develop the concept of «good traffic days» and «bad traffic days» without any previous labelled examples.

By *reinforcement learning,* the system gets feedback from the environment through artificial punishments or rewards. The decision made before the reward is solely the agent responsibility; there is no supervisor or human intervention. [(29)]. The ability to learn provides the AI system with the

[(27)] STUART J. RUSSELL & PETER NORVIG, *Artificial Intelligence: A Modern Approach*, 3 ed., Pearson Education Limited, 2016, p. 714.
[(28)] CONSTANCE DE SAINT-LAURENT, «In Defence of Machine Learning: Debunking the Myths of Artificial Intelligence», *Europe's Journal of Psychology*, 14(4), 2018, p. 737; XÁVIER ROSIN & VASILEIOS LAMPOS, «In-depth study on the use of AI in judicial systems, notably AI applications processing judicial decisions and data», in *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment. Strasbourg*, CEPEJ - Commission Européene pour l'Efficacité de la Justice, 2018, p. 51, available at https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c (last visit 16 June 2019).
[(29)] EZEQUIEL LÓPEZ-RUBIO, «Computational Functionalism for the Deep Learning Era», *Minds & Machines*, 5 October, 2018. p. 4; STUART J. RUSSELL & PETER NORVIG, *Artificial Intelligence…*, pp. 694-695 (note 27).

adaptability for solving problems in a complex and rapidly changing environment, achieving significant breakthroughs and challenging the dividing line between creativity and reason made by machines [30].

Deep learning through artificial neural networks is the most challenging and unique among machine learning algorithms as it exhibits many similarities with the biological neural networks. The deep learning and neural networks require a large amount of data and are extremely efficient in finding complex patterns. They use several layers of processing, each taking data from previous layers through fundamental units called artificial neurons and passing an output up to the next layer. The nature of the output may vary according to the nature of the input, which can be weighted and not just turned on or off [31].

CHAPTER II

THE IMPLEMENTED SYSTEMS

1. The experiences within the European Union

There are several possible classifications of AI reasoning methods and techniques. To pinpoint in what way those technical categories can be seen as judicial AI tools, one could tackle some examples such as advanced case-law search engines, online dispute resolution, tools of assistance in drafting deeds, analysis tools (predictive or scales), categorisation of documents (such as contracts), or chatbots to offer legal information or legal support. Not all of the pinpointed examples can be transposed to a judicial decision point of view. Although the practical examples of the use of AI in judicial decisions are rare, most of the examples (as some of those stated above) are of tools used in a judicial context but mostly by private companies or other judicial actors, namely by lawyers and law firms. Besides the tools put in action both by the private sector and the judicial actors, there have been some academic projects using reasoning methods to predict judicial decisions that are worthy of mention, as we will see further on.

Some EU Member States already have some sort of AI judicial tools implemented and/or have a public political strategy to develop AI technologies, including AI in the administration of justice. In 2016, the UK

[30] In 1996, William McCune solved the Robbins axiom in Boolean algebra, with the help of the Equational Prover program, succeeding where the best mathematicians had failed for 60 years (see, THE NEW YORK TIMES, «Computer Math Proof Shows Reasoning Power», December, 10, 1996, stored in https://archive.nytimes.com/www.nytimes.com/library/cyber/week/1210math.html (last visit 05 May 2019). In 1997, the IBM's Deep Blue chess program succeeded in defeating world champion Gary Kasparov in a six-game match. In 2011, it was used the supercomputer Watson in the famous American TV quiz show Jeopardy, outperformed its two human opponents. The Watson program is currently used in healthcare, as a diagnosis and treatment assistant, and in several educational projects. In 2015, the AlphaGo, developed by Google, became the first computer program to win a 9-dan professional in the board game Go, by a score of 4 to 1. It learns by examining hundreds of thousands of online Go games played between humans, using it as data for a machine-learning algorithm. AlphaGo played against different versions of itself, fine-tuning its strategies by deep reinforcement learning. It was considered by the *Science* magazine one of the breakthroughs of 2016 (see https://www.sciencemag.org/news/2016/12/ai-protein-folding-our-breakthrough-runners, last visit, 03.06.2017). The AlphaGo Zero computer program, with only a little period of training, beat its predecessor AlphaGo with a 100-0 victory. In 2018, ALVIN RAJKOMAR and EYAL OREN signed the study «Scalable and accurate deep learning with electronic health records», Npj (Nature Partner Journals), Digital Medicine, 1, n.º 18, 201, May 2018, available at https://www.nature.com/articles/s41746-018-0029-1 (last visit 04 2018), where it shows the performance of a predictive deep learning algorithm, that analysed clinical records of 216,221 patients. It predicted with a level accuracy between 75 and 94% the risk of in-hospital mortality (93%-94%); 30-day unplanned readmission (75-76%), prolonged hospital stay (85-86%) and discharge diagnosis (90%).

[31] C. CHACE, *The Artificial Intelligence and the Two Singularities*, p. 14 (note 8).

made public a report in *"Robotics and artificial intelligence"* [(32)]; in 2017, Finland launched a strategic plan to turn the country into a leader in the application of AI (*"Finland's age of artificial intelligence"* [(33)]); in 2018, France also made public a report *"For a meaningful artificial intelligence towards a French and European strategy"* [(34)].

In the UK one can find *Luminance*, a tool of text analysis based on machine learning technology (pattern-recognition, as pointed out by the company [(35)]) that reviews documents and learns from the interaction between lawyers and documents; or *HART* (Harm Assessment Risk Tool), the algorithm that predicts the level of risk of suspects committing further crimes in a certain period of time [(36)], through an algorithm of "random forest", combining certain values, the majority of which focus on the suspect's offending history, as well as age, gender and geographical area. In France, there are some tools such as *Doctrine*, *LexisNexis* and *Dalloz*, simple search engines for court decisions and other legal texts. More interesting are the software tools *Prédictice* and *Case Law Analytics*, both analysis tools with the aim of predicting the outcome of a specific case [(37)] ("trend" analysis tools, in fact).

France also conducted an experiment to test predictive justice software (the *Prédictice* software tool) on various litigation appeals in 2017, in the two courts of appeal in Rennes and Douai. The results were not optimal. In fact, the aim of the experiment was to try to reduce excessive variability in court decisions in the name of citizen's equality before the law. The result was that the experiment did not add any valuable insight as to the role of AI in decision-making. It seems that the software got confused between lexical occurrences and the causalities that had been decisive to the judges in the decisions used as "data fuel", leading to absurd results [(38)].

In Austria AI has been used as a tool to structure information for the quick and efficient analysis and handling of documents [(39)]: the AI tool analyses incoming mail without any manual contact by the court's staff, extracting metadata, identifying and recognizing procedures to file documents and its categorization; it functions as a tool for digital file management (particularly important in the management of unstructured documents); as a tool for analysis in investigating data, namely analysing and classifying metadata from any form of data and recognition of communication flows and relationships; and, at last, as a tool for automatic anonymization of court decisions (personal data of the parties).

[(32)] Available online at https://publications.parliament.uk/pa/cm201617/cmselect/cmsctech/145/145.pdf (visited on the 29th of May of 2019).
[(33)] Reports available online at: http://julkaisut.valtioneuvosto.fi/bitstream/hadle/10024/160391/TEMrap_47_2017_verkkojulkaisu.pdf?sequence=1&isAllowed=y and http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160980/TEMjul_21_2018_Work_in_the_age.pdf (visited on the 31st of May of 2019).
[(34)] https://www.aiforhumanity.fr/pdfs/MissionVillani_Report_ENG-VF.pdf (visited on the 29th of May of 2019).
[(35)] The website: https://www.luminance.com/.
[(36)] As described by Cambridge University (https://www.cam.ac.uk/research/features/helping-police-make-custody-decisions-using-artificial-intelligence, last visited on the 26th of March of 2019), this algorithm helps the police to decide, after taking someone into custody, whether let the person free on police bail or keep him/her locked until going to court.
[(37)] https://predictice.com/ and https://www.caselawanalytics.com/.
[(38)] XÁVIER ROSIN & VASILEIOS LAMPOS, «In-depth study on the use of AI in judicial system…p. 42 (note 28).
[(39)] *How is Austria approaching AI integration into judicial policies?*, a presentation from STAWA, Georg, President of the CEPEJ and Head of Department for Strategy, Organizational Consulting and Information Management, Federal Ministry for Constitution, Reforms, Deregulation and Justice, Austria, 2018, https://rm.coe.int/how-is-austria-approaching-ai-integration-into-judicial-policies-/16808e4d81 (visited on the 12th of June 2019).

University College London (UCL) also conducted an investigation [(40)] to predict judicial decisions of the European Court of Human Rights using only the textual information extracted from relevant sections of ECtHR judgments. The investigators framed the task as a binary classification problem where the training data consisted of textual features extracted from given cases and the output was the actual decision made by the judges. The study predicted the outcome with 79% accuracy. The authors concluded that *"the information regarding the factual background of the case as this is formulated by the Court in the relevant subsection of its judgments is the most important part obtaining on average the strongest predictive performance of the Court's decision outcome"*, and that *"the rather robust correlation between the outcomes of cases and the text corresponding to fact patterns contained in the relevant subsections coheres well with other empirical work on judicial decision-making in hard cases and backs basic legal realist intuitions"*.

Another fruitful field of application of AI solutions in the judicial world is in small claims civil litigation. Many countries within the EU have already put in place – or are on the verge of doing so – some sort of Online Dispute Resolution (ODR) service. The Netherlands, United Kingdom, Latvia and Estonia are some of them. Estonia intends [(41)] to create a totally human-independent system that renders decisions in small claims up to €7.000,00. In theory, the two parties would upload documents and other relevant information and the AI technology (ODR) would issue a decision; that decision can be appealed to a human judge.

The UK ODR platform for small claims resolution is not a truly AI solution, since it is a human judge that decides the dispute. The main difference between this method and the traditional decision-making method is that all contact between the user and the court is through the online platform. The other difference from a traditional approach is that there are *online facilitators,* that is, in Professor Richard Susskind's own words, *"individuals who will look at claims and bring the parties together negotiating and perhaps acting as mediators after some kind of guidance"* [(42)].

Latvia also has an ODR solution similar to the UK ODR in claims up to €2.100,00: it is a totally (or mostly) written procedure, submitted online by the claimant, and it only applies to small claims for recovery of money or for recovery of maintenance, and the application need to comply with specific rules on these proceedings (a certain form model or, for instance, the claimant has to indicate if he or she requests a court hearing to consider the matter). As the British ODR, the decision is rendered by a judge and not by any sort of AI tool[(43)].

The European Commission provides an ODR platform as well, to help resolve consumer disputes originating on online purchases without going to court. It can be used for any contractual dispute arising from online purchases of goods or services where the trader and consumer are both based in the EU or Norway, Iceland, and Liechtenstein. This ODR is regulated by the Regulation (EU) n.º 524/2013 of the European Parliament and of the Council of 21 May 2013. It is an ADR (alternative dispute resolution) and the platform merely works to facilitate communication between the parties and a dispute resolution

[(40)] NIKOLAOS ALETRAS, DIMITRIOS TSARAPATSANIS, DANIEL PREOŢIUC-PIETRO, VASILEIOS LAMPOS, *Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective*, 2016, https://peerj.com/articles/cs-93/.
[(41)] For more details, the article on https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/ (visited on the 26th of March of 2019).
[(42)] For a brief and clear explanation of UK's ODR, https://www.judiciary.uk/reviews/online-dispute-resolution/what-is-odr/ (visited on the 5th of June 2019).
[(43)] For a more detailed analysis, https://e-justice.europa.eu/content_small_claims-42-lv-en.do?member=1 (visited on the 12th of June of 2019).

body, without going to court. One of the biggest advantages of this ODR is that it provides automated translations between all EU languages, as well as information and support throughout [44].

The Netherlands' ODR is the oldest one in Europe that we are aware of. The *e-Court* is a private initiative ADR launched in 2010 and, as the model intended by Estonia, is a fully automatic AI decision render. The creditor submits the required information (documents) and the decision is rendered without any human intervention. Nevertheless, to initiate enforcement proceedings, the users of e-Court still have to obtain an enforceable title, and this title is issued by humans. In fact, the automated online-made decisions are sent to a public court, where the clerks manually recalculate the awarded amounts [45].

Also worth mentioning is *Rechtwijzer*, another Dutch-made ODR solution: its mission was to reduce the burden of the legal process of divorce by reducing its adversarial nature. The process started with a diagnosis phase, then the intake phase for the initiating party and, at last, the other party was invited to join and undertake the intake process. This platform was a channel of communication between the parties to work on agreements (and hopefully achieve them) on the topics needing resolution. Even though it was a solution based on the negotiation of the parties, they were also informed about the legal rules concerning the agreements negotiated (dividing property, child support, etc.) and, at the end of the online process, these agreements would be reviewed by a neutral third party (a lawyer) [46]. The *Rechtwijzer* project ended in 2017 and there seems to be no official explanation for its demise.

2. What is being done in the EU

Aside from what is already put into practice, in April 2018 the UE Member States signed a declaration of *"Cooperation on Artificial Intelligence"* [47], where the countries agreed to build a EU towards achievements and investments in AI, as well as progress towards the creation of a Digital Single Market. That same month the European Commission issued a communication on *"Artificial intelligence for Europe"* [48], addressed to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. In that communication, the Commission argues that UE *"should have a coordinated approach to make the most of the opportunities offered by AI and to address the new challenges that it brings"* [49], granting explicit support in AI research on *inter alia "public administrations (including justice)"* [50]. Later that year, the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe launched an *"European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment"* [51]. Despite the

[44] For more details, the online address of the ODR platform https://ec.europa.eu/consumers/odr/main/?event=main.home2.show (visited on the 12th of June of 2019).
[45] For more details, the analysis of H.W.R. (Henriëtte) Nakad-Weststrate, H.J. (Jaap) van den Herik, A.W. (Ton) Jongbloed and Abdel-Badeeh M. Salem, *The Rise of the Robotic Judge in Modern Court Proceedings*, conference paper on the 7th International Conference on Information Technology, 2015, pp. 59-67.
[46] For more details, https://law-tech-a2j.org/odr/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/. (visited on the 6th of June 2019).
[47] Available online at https://ec.europa.eu/jrc/communities/en/node/1286/document/eu-declaration-cooperation-artificial-intelligence (visited on the 6th of June 2019).
[48] Available online at https://ec.europa.eu/digital-single-market/en/news/communication-artificial-intelligence-europe, (visited on the 6th of June 2019).
[49] Ibid, p. 3.
[50] Ibid, p. 8.
[51] Available at https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c (visited on the 6th of June 2019).

path taken by the EU over these past years, there is still a long way to go concerning the use of AI technology in judicial decisions within the EU.

CHAPTER III

SOME ETHICAL AND LEGAL CHALLENGES

1. The European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment

Bearing in mind that the implementation of AI is not something for the far future but something for our time, the European Commission for the Efficiency of Justice (CEPEJ) formally adopted the five fundamental principles on the use of AI in judicial systems and their environment previously mentioned in Chapter 1 [(52)]. These principles aim to guarantee respect for the European Convention on Human Rights (ECHR) and the Convention on the Protection of Personal Data (CPPD) by framing public policies on this field, and assuring that the processing of AI respects principles such as the transparency, impartiality and equality, certified by an external and independent expert assessment.

These principles, however, are not to be written in stone. The CEPEJ intends to subject them to monitoring and supervision with the aim of a continuous improvement of practices. For now, the five principles are:

1. *Respect for fundamental rights*: ensure that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights [(53)];

2. *Non-discrimination*: specifically prevent the development or intensification of any discrimination between individuals or groups of individuals [(54)];

3. *Principle of quality and security*: with regard to the processing of judicial decisions and data, use certified sources and intangible data with models elaborated in a multi-disciplinary manner, and in a secure technological environment [(55)];

4. *Principle of transparency, impartiality and fairness:* make data processing methods accessible and understandable, and authorise external audits [(56)]; and

[(52)] European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment, pp. 7-12.
[(53)] The processing of the data must serve clear purposes, in compliance with the ECHR and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; the use of AI to assist in judicial decision-making must not undermine the guarantees of the right of access to the judge and the right to a fair trial, i.e., equality of arms and respect for adversarial process; ethical-by-design approach, meaning that the ethical choices are made in the design phase and never left to the user.
[(54)] The AI users must ensure that the methods do not reproduce or aggravate such discrimination; there must be taken measures in the development and deployment phases when processing sensitive data, ensuring that when discrimination has been identified, must be taken measures to limit or neutralise these risks, as well as awareness-rising among stakeholders; AI use to combat discriminations is encouraged.
[(55)] Through a multidisciplinary approach – designers of machine learning, justice system professionals and researchers in the fields of law and social sciences; data used on the machine learning process should come from certified sources and should not be modified until they have been used, and the whole process must be traceable; secure environments to ensure system integrity and intangibility.
[(56)] A balance between the intellectual property, the need for transparency, impartiality, fairness and intellectual integrity, applying to the whole process; it should be able to be certified and audited by independent authorities; public authorities should grant certification, regularly reviewed.

5. *Principle "under user control":* precludes a prescriptive approach and ensures that users are informed actors and in control of the choices made [57]. These five principles tackle some of the main ethical issues posed by the use of AI tools in a judicial system and their environment, as well as the principles and legal barriers that surround this field within the EU.

2. The use and automatic treatment of personal data

Article 9(1)(a) of the CE's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [58] provides the principle that *"Everyone has the right not to be subject to a decision affecting him significantly, which shall be taken solely on the basis of automatic processing of data, without his point of view being taken into account. Notwithstanding this principle of prohibition, Article 9(2) states that "paragraph 1(a) shall not apply if the decision is authorised by a law to which the controller is subject and which also provides for appropriate measures to safeguard the rights, freedoms and legitimate interests of the data subject"* (in a similar sense, see article 22 of the General Data Protection Regulation).

In *Z. v. Finland* [59], concerning Article 8 [60], the court stated that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to privacy and family life, just as *"*[r]*especting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general."* [61]

Recently, the court stressed [62] the fact that it has consistently held that systematic storage and other use of information relating to an individual's private life by public authorities entails important implications for the interests protected by Article 8 of ECHR. Thus any interference will be in breach of the ECHR unless it is in accordance with the law and shows itself to be necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8 § 2 ECHR). The court also stressed that it is well established case law that *accordance with law* requires it to be accessible, foreseeable and accompanied by necessary

[57] User autonomy should be increased; the possibility of review judicial decisions and the data used to produce the result; informed consent, meaning that the user must be informed in a clear way if the AI tools are binding, the alternative options available, the right to legal advice and the right to access a court within the meaning of Article 6 of the ECHR; literacy programmes on the use of the AI tools.
[58] As amended by the Protocol adopted in May 2018.
[59] *Z. v. Finland*, n. º 22009/93, §§95, 25 February 1997.
[60] *1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
[61] As to regarding public access to personal data, the court recognises that "a margin of appreciation should be left to the competent national authorities in striking a fair balance between the interest of publicity of court proceedings, on the one hand, and the interests of a party or a third person in maintaining the confidentiality of such data, on the other hand. The scope of this margin will depend on such factors as the nature and seriousness of the interests at stake and the gravity of the interference (see, for instance, the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, para. 58; and, mutatis mutandis, the Manoussakis and Others v. Greece judgment of 26 September 1996, Reports 1996-IV, p. 1364, para. 44)."
[62] *Surikov v. Ukraine*, n. º 42788/06, §§70-74, 26 January 2017.

procedural safeguards affording adequate legal protection against arbitrary application of the relevant legal provisions [63].

3. Some recent decisions of the ECtHR and the ECJ

One of the biggest challenges put forward by the use of AI in judicial systems and their environment is the compliance with the rights and principles enshrined within the ECHR. As stated in the *European Ethical Charter*, these solutions have to comply with such individual rights as *"the right to a fair trial (particularly the right to a natural judge established by law, the right to an independent and impartial tribunal and equality of arms in judicial proceedings) and, where insufficient care has been taken to protect data communicated in open data, the right to respect for private and family life"* [64].

In the judgement *Vernes v. France* [65], the court found several violations of Article 6 §1, but as far as what concerns us most right now, it found a violation due to the impossibility for the applicant to request a public hearing [66] and a violation due to the lack of impartiality of the administrative body resulting from the absence of an indication of its composition [67]. In its judgement, the Court recalled that public hearing is a fundamental principle enshrined in Article 6 § 1 of the Convention. This principle may suffer from adjustments justified in particular by the interests of the private life of the parties or the safeguarding of justice (*Diennet v. France*, n. º 18160/91, 26 September 1995) or by the nature of the matters submitted to the judge in the context of the proceedings in question (*Miller v. Sweden*, n. º 55853/00, 8 February 2005, *Göç v. Turkey*, n. º 36590/97, § 47,). The Court concluded that, in the absence of a public hearing, the applicant's right to a fair trial was not ensured. The Court also recalled that for the purposes of Article 6 § 1, impartiality must be assessed on the basis of a subjective approach, allowing to determine the personal conviction of a judge on such an occasion, and also according to an objective approach such as to ensure that it offered sufficient safeguards to exclude any legitimate doubt in this respect, and, thus being so, the Court agreed with the applicant that the failure to state the identity of all the members of the administrative body who deliberated was such as to cast doubt on its impartiality, which implies that impartiality is also assured by the identification of the judges who rendered the decision. This is a factor of undeniable relevance if and when a case should be judged by an AI.

In *Golder v. United Kingdom*, the court recognized a right of access to a court but also stated that it is not absolute, admitting some implied limitations [68] [69]. The case law established in *Deweer v.*

[63] *Ibidem*, §71.
[64] *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment*, CEJEP, §8, p. 15.
[65] *Vernes v. France*, n. º 30183/06, ECHR, 20 January 2011.
[66] *Vernes v. France*, n. º 30183/06, §§30-31, 20 January 2011.
[67] *Vernes v. France*, n. º 30183/06, §§41-44, 20 January 2011.
[68] *Golder v. The United Kingdom*, n. º 4451/70, §38, 21 February 1975: *"As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication."*
[69] But even where there are implied limitations, some other aspects of the right enshrined on Article 6 § 1 must be observed, such as the right to be heard before a court within a reasonable time (cfr. *Kart v. Turkey*, n. º 8917/05, §67-70, 3 December 2009).

Belgium [70] made clear that the right to a court is perceived as an element of the right to a fair trial, enshrined in Article 6 §1, and it is no more absolute in criminal than in civil matters.

In *Kontalexis v. Greece* [71], the ECHR recalls that under Article 6 § 1, a court must always be established by law, which reflects the principle of the rule of law, inherent in the entire system of the Convention and its protocols (§38). The court states that a body that has not been established in accordance with the will of the legislator, would necessarily lack the legitimacy required in a democratic society. In *DMD GROUP, a.s, v. Slovakia*, the court reiterated the notion of a court established by law, and that the paramount importance of judicial independence and legal certainty for the rule of law calls for particular clarity of the rules applied in any case and for clear safeguards to ensure objectivity and transparency, as to avoid any appearance of arbitrariness in the assignment of particular cases to judges [72]. And, more recently [73], the Court considered that where the assignment of a case is discretionary in the sense that the modalities are not prescribed by law, it puts at risk the appearance of impartiality, by allowing speculation about the influence of political or other forces on the assignee court and the judge in charge, even where the assignment of the case to the specific judge in itself follows transparent criteria.

Regarding the independence and impartiality of the court, as required by Article 6 §1, it is settled case law that impartiality must be determined *"according to a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case* [the impartiality must be presumed until proved otherwise]*; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, Morice v. France [GC], no. 29369/10, § 73, 23 April 2015 and the cases cited therein)"* [74].

Concerning the principle of equality of arms, the court held recently [75] that *"the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a "fair hearing" within the meaning of Article 6 § 1 of the Convention. They require a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents (see Regner, cited above, § 146)."*

One of the most important rights enshrined in Article 6 §2 is the presumption of innocence. The ECHR perceives it as the right to be presumed innocent until proven guilty according to the law. It is *"viewed as a procedural guarantee in the context of a criminal trial itself"*, but the presumption of innocence also *"imposes requirements in respect of, inter alia, the burden of proof; legal presumptions of fact and law; the privilege against self-incrimination; pre-trial publicity; and premature expressions, by the trial court or by other public officials, of a defendant's guilt (see Allen v. the United Kingdom [GC], no. 25424/09, § 93, ECHR 2013, and the references cited therein)"* [76].

[70] *Deweer v. Belgium*, n. º 6903/75, §49, 27 February 1980.
[71] *Kontalexis v. Greece*, n. º 59000/08, 31 May 2011.
[72] *DMD GROUP, a.s, v. Slovakia,* n. º 19334/03, § 66, 05 October 2010.
[73] *Miracle Europe KFT v. Hungary*, n. º 57774/13, §58, 12 January 2016.
[74] *Ivanovski v. "the Former Yugoslav Republic of Macedonia"*, n. º 29908/11, §§136-141, 21 January 2016.
[75] *Prebil v. Slovenia*, n. º 29278/16, §§42-45, 19 March 2019.
[76] *Kangers v. Latvia*, n. º 35726/10, §50, 14 March 2019. Also, *Lolov v. Bulgary*, n. º 6123/11, 21 February 2019; *Allenet de Ribemont v France*, 10 February 1995; *Viorel Burzo v. Romany*, n. s 75109/01 and 12639/02, 30 June 2009; *Lizaso Azconobieta v. Spain*, n. º 28834/08, 28 June 2011.

Combining almost all provisions of the rights enshrined in Article 6, the court was very recently challenged in *Sigurdur Einarsson a. o. v. Iceland* [77] with potential violations of said article in a criminal proceeding where the defendant alleged, *inter alia*, that he had been denied full access to the file held by the prosecution. The criminal proceedings concerned a potential criminal conduct in connection with the collapse of one of the country's largest banks during the financial crisis that hit Iceland in 2008. The investigation lasted almost three years and led to an extensive collection of data (inclusive data seized due to a court search warrant). To conduct a search of the electronic data, the prosecution used a AI tool called "Clearwell", an e-discovery system, whose results were exported and tagged as "investigation documents". The applicants complained that they never had the opportunity to review the documents submitted to the court and that they had been denied the possibility of searching the same data using the electronic system applied. This substantiates, in their view, a violation of the principle of equality of arms (relying on Article 6 §1 and §3(b)) because they should have had the same opportunities as the prosecution to access and select evidence from the collection of documents gathered by the police during the investigation.

The court didn't find any violation of Article 6 on mass data that was not tagged, stating that to that extent the prosecution did not hold any advantage over the defence (it was not a situation of *non-disclosure*). Regarding the tagged data, this was reviewed by the investigators (manually and through "Clearwell") in order to pick which material should be in the investigation file. The court recognized that this selection was made by the prosecution alone without the involvement of the defence or any judicial supervision, as well as that further searches by the defence through the data would have been technically possible and appropriate for a search for potential disculpatory evidence. The court thus concluded that *"any refusal to allow the defence to have further searches of the "tagged" documents carried out would in principle raise an issue under Article 6 § 3(b) with regard to the provision of adequate facilities for the preparation of the defence"* [78]. The case law of *Sigurdur Einarsson a. o. v. Iceland* is paramount in the combination of AI tools and the rights enshrined in Article 6. Even though it did not found any violation of the article due to a procedural formality, it established a clear principle that where AI tools are used to deal with massive data and information is extracted through that mechanism, the principle of equality of arms (Article 6 §1) and the right to have adequate time and facilities for the preparation of defence demands that the defendant (in a criminal case or in a civil claim, as stated in *Deweer v. Belgium*) has the right to participate in the cherry picking of information and has the right to conduct his/her own search through the data using the same tool as the prosecution.

Regarding the European Union, in the joined cases C-293/17 and C-294/17, the Council of State of the Netherlands requested a preliminary ruling from the ECJ, where it was asked whether Article 6(2) of the Habitats Directive [79] could be interpreted as meaning that measures such as procedures for the surveillance and monitoring of farms whose activities cause nitrogen deposition and the possibility of

[77] *Sigurdur Einarsson a. o. v. Iceland*, n. º 39757/15, 4 June 2019.
[78] *Ibidem*, §85-91. Despite the mentioned conclusion, the court dismissed a violation of Article 6 §3(b) because it found that the applicant did not formally seek a court order to have access to those documents, and thus it was not denied a fair trial overall. The judgement had a dissenting opinion on this part from Judge Pavli. Particularly interesting, §10*: "It is worth recalling at this point that what is at stake in this case is a fundamental tenet of criminal due process, namely equality of arms. In the light of this cardinal principle, the majority's overall approach seems insufficiently attuned to the complexities of electronic disclosure in criminal (or for that matter, civil) proceedings involving high-volume data; to the use of modern technological tools in this context; and to their combined implications for equality of arms. The assumption that standard rules of disclosure ought to apply unchanged in this context is one that, at the very least, needs to be tested."*
[79] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

imposing penalties, up to and including the closure of those farms, are sufficient for the purposes of complying with that provision. The answer was positive [80].

4. Ethical concerns: opacity and anchoring

The black box problem, arising mainly in deep neural networks, is what happens when the AI agent gives a result in a way that humans or even its creators cannot understand or explain how it was achieved, even though the accuracy outperforms human decisions or predictions. Its use in judicial ruling could be a threat to some nuclear concepts in judicial decision, such as causation and intention [81]. Moreover, it could lead to suspicions about the parameters or variables used in the AI agent, casting doubts on judicial independence. If we want to preserve the essential core of judicial ruling, we must not accept a simple "computer says no" answer. However, just as one cannot ask the human judge to open up his brain and describe how he got to his ruling, we cannot expect full transparency from AI algorithms that can only be achieved at the expense of its performance. The full transparency of the AI agent would probably not be understandable for the majority of people; to which we should add the issues concerning the intellectual property rights over the algorithms. More important than knowing how an AI agent gets its results is assuring it has enough explanatory power, for instance, through the use of unconditional counterfactuals as a mean to provide explanations and surpass the opacity of the black box [82]. Regardless of the technique employed or the uses of the AI agent, it should always be guaranteed, as the ECtHR strongly points out, the adversarial process in the judicial decision-making, in order to assure transparency and reinforce people's confidence in the rule of law.

Another ethical concern is related to a possible anchoring effect. If the AI decision is evidence-based, the judge will tend to follow it, relinquishing his own decision. And the more he trusts his AI assistant's expertise, the more the judge will be depending on the machine for his rulings [83]. Nonetheless, if the AI agent is «trustworthy», in the sense meant by the AI-HLEG, this is actually good news. With this powerful ally, the judge would make better decisions, faster, and more fairly, provided that the dialectical nature of the procedure would be assured [84] and that the AI's assistance could always be challenged by the parties.

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[80] *"In the light of the foregoing, the answer to the eighth question in Case C-293/17 is that Article 6(2) of the Habitats Directive must be interpreted as meaning that measures introduced by national legislation, such as that at issue in the main proceedings, including procedures for the surveillance and monitoring of farms whose activities cause nitrogen deposition and the possibility of imposing penalties, up to and including the closure of those farms, are sufficient for the purposes of complying with that provision." (§137)*

[81] YAVAR BATHAEE, «The Artificial Intelligence Black Box and the Failure of Intent and Causation», *Harvard Journal of Law & Technology*, vol. 31, n.º 2, 2018, p. 938.

[82] SANDRA WACHTER, BRENT MITTELSTADT, CHRIS RUSSELL, *Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR*, available at https://ssrn.com/abstract=3063289 (last access 09 June 2019). A counterfactual (or contrary-to-fact) is a conditional sentence in the subjunctive mood, such as 'if you had broken the bone, the X-ray would have looked different', or 'if the reactor were to fail, this mechanism would click in'. It carries the suggestion that the antecedent of such a conditional is false. Since counterfactuals could be related to all kind of possible worlds, it's important that the world we are using is close to the real world, that is, it should be the closest possible world, see SIMON BLACKBURN, *The Oxford Dictionary of Philosophy*, Oxford University Press, p. 85-86.

[83] IAN KERR, CARISSIMA MATHEN, *Chief Justice John Robert is a Robot*, p. 8, paper presented on 5th April, at the WeRobot 2014 Conference, available at http://robots.law.miami.edu/2014/wp-content/uploads/2013/06/Chief-Justice-John-Roberts-is-a-Robot-March-13-.pdf (last access 13 June 2019).

[84] JOÃO MARQUES MARTINS, «A system of communication rules for justifying and explaining beliefs about facts in civil trials», *Artificial Intelligence and Law*, 05 March, 2019.

Final remarks

In his 2018 book, *Enlightenment Now*, Steven Pinker noted that "*intelligence is a contraption of gadgets: software modules that acquire, or are programmed with, knowledge of how to pursue various goals in various domains*". When defined as the "*ability to deploy novel means to attain a goal*", intelligence is a common property of machines and humans alike, and those two very different forms of its manifestation, artificial and human, will hopefully allow for a fruitful coexistence and cooperation in the Judiciary.

Volition, values and affection play a significant role in human decision-making. AI does not have intentionality or a real attitude, but only set tasks and goals; it does not make real judgements based on principles, rules, priorities or values. Even if the algorithm learns some principles, values and rules, the range would be limited to those which are significant to the model in order to accomplish its goal. On the other hand, human intelligence goes beyond this strictly cognitive domain, because it is connected to actions and rests on a large collection of values [(85)]. Applying the law is more than a simple logical syllogism, as Justice Oliver Wendell Holmes once implied. Judging is a mix of skills, including research, language, logic, creative problem solving and social skills [(86)]. Nonetheless, interpretation and application of law necessarily imply argumentation, oral or written, and explanatory capacities in which logic analysis play an important role [(87)]. AI systems could be helpful devices to the judicial ruling, above all in preventing biases or transient emotional instability affecting the decision. Judges are subject to personal and work-related stress and burnout, which can naturally shake the decision-making objectivity [(88)], where AI is less prone to these flaws[(89)].

We should encourage the use of AI agents that are less susceptible to inspire mistrust as a way of incrementing the judiciary's productivity [(90)]. One should not bet on a "legal singularity", in which AI assistance to the judicial ruling will get it right all the time, thus eradicating any legal uncertainty. However, all the help in trying to achieve this purpose should be *prudently* welcome.

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[(85)] WENCESLAO J. GONZALEZ, «From Intelligence…», p. 10 (see note 16).
[(86)] RICHARD A. POSNER, *Cómo Deciden los Juices*, Marcial Pons, 2011, pp. 16 e ss. (Victoria Roca Pérez, Spanish translation of *How Judges Think*, Harvard University Press, 2008).
[(87)] E. BULYGIN, «What can one expect from Logic in the Law? (Not everything, but more than something)», *Ratio Juris*, 2008, p. 21. As Bulygin points out, "*that logic cannot give a full account of any legal system is obvious; I wonder who (…) could expect it to. I know of no legal philosopher who would raise such a claim. What logic, or rather logical analysis, can do, however, is to clarify legal concepts and thus introduce greater order, thereby deepening our understanding of legal phenomena.*"
[(88)] Take, for instance, a study which concluded that judges were more likely to accept prisoner's requests for parole at the beginning of the day than at the end, SHAI DANZIGERA, JONATHAN LEVAVb, and LIORA AVNAIM-PESSO, «Extraneous factors in judicial decisions», PNAS, vol. 108, n.º 17, 2011, available at https://www.pnas.org/content/pnas/108/17/6889.full.pdf (last visit 11.06.2019).
[(89)] Past experiences had shown that AI decision-making could reveal structural biases, such as the Correctional Offender Management Profiling for Alternative Sanctions – COMPAS, that was used for predicting the likelihood of defendants committing a future crime, which was considered racially biased against African American defendants. However, these shortcomings can always be corrected.
[(90)] THOMAS JULIUS BUOCZ, « Artificial Intelligence in Court: Legitimacy Problems of AI Assistance in the Judiciary», *Retskraft – Copenhagen Journal of Legal Studies*, vol. 2, n. º 1, 2018, p. 50.

CENTRO
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COLEÇÃO THEMIS

3.

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Marta Cavaleira*

O texto que se segue é da autoria dos auditores de justiça do 5.º Curso de Formação de Magistrados para os Tribunais Administrativos e Fiscais Darcília Maria Sousa de Matos, Luís Filipe Brito da Silva Guerra e Pedro Alexandre Ramos Casinhas Ferreira e foi apresentado na semifinal D - *Judicial Ethics and Professional Conduct*, da competição THEMIS, que se realizou em Sofia, na Bulgária, de 2 a 5 de julho de 2019 (equipa denominada na competição como Portugal II).

Com o título «*The participation of judges in civil society organisations*» o texto analisa restrições de direitos fundamentais dos juízes, em particular relativas à liberdade de associação e participação na vida pública, confrontando estas restrições como o princípio da proporcionalidade. São abordadas questões muito controversas tais como o direito de associação sindical e o direito à greve, a liberdade de associação política, a participação em associações desportivas amadoras e profissionais e a participação em sociedades comerciais.

O trabalho apresentado é fruto de grande esforço, sendo de reconhecer o empenho e a dedicação de todos os elementos da equipa na elaboração do texto e preparação da apresentação. Apesar de, ao contrário de outros participantes, não terem tido muito tempo disponível para se prepararem, os senhores Auditores fizeram uma apresentação oral muito dinâmica e interessante e que provocou intensa discussão entre os participantes que se prolongou para além da apresentação. Conscientes de que apresentavam propostas controversas, os senhores auditores souberam defender os seus entendimentos perante o júri da competição, respondendo com pertinência e segurança às questões formuladas.

O balanço da participação desta equipa na competição THEMIS é muito positivo tendo sido atingidos os seus principais objetivos porquanto permitiu a troca de experiências entre os participantes, a partilha de conhecimento e perspetivas sobre a ética e conduta profissional dos juízes, o desenvolvimento do pensamento crítico e das capacidades de comunicação e o estabelecimento de relações entre colegas.

Merece especial referência a excelente relação estabelecida não só entre os elementos da equipa, sendo de realçar a relação de amizade e entreajuda que estabeleceram, mas também com os outros participantes futuros magistrados europeus.

Agradeço, por tudo isto, o facto de me terem concedido o privilégio de os acompanhar nesta experiência que nos marcará para sempre e me deixa confiante no seu desempenho futuro como juízes portugueses e europeus.

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3.
3.1. The participation of Judges in Civil Society Organizations

Team Portugal II

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CENTRO
DE ESTUDOS
JUDICIÁRIOS

European Judicial Training Network (EJTN)

Themis competition 2019

SEMI-FINAL – D Judicial Ethics and Professional Conduct

02-05 July 2019, Sofia

THE PARTICIPATION OF JUDGES IN CIVIL SOCIETY ORGANISATIONS

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TEAM PORTUGAL II

Team Members: Darcília Matos (trainee administrative and tax judge)

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Team Tutor: Marta Cavaleira (judge and trainer at Centro de Estudos Judiciários**)**

1. INTRODUTION

Ethics is a comprehensible and personal conception of life: "*…the field of ethics (or moral philosophy) involves systematizing, defending, and recommending concepts of right and wrong behaviour."* [1]

Deontology, and specifically **professional deontology,** creates a set of standards of behaviours to mark the performance of the profession. These behaviours have multiples purposes. They can protect the professional, indicating how to behave in some situation, and also defend the image of a class of professionals, acting according to society's expectations.

The judiciary as one of the pillars of the democratic estates, is under a great deal of pressure regarding the professional and personal conduct of judges. This is why there are some rules of conduct. However, it is only possible to determine if a conduct is ethically admissible or not and, most of all, impartial, in a specific context. In fact, "(…) *The personal impartiality of a judge must be presumed until there is proof to the contrary (see Hauschildt v. Denmark, 24 May 1989, § 47, Series A no. 154). (…) In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see Micallef, cited above, § 95). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see Kyprianou, cited above, § 119)"*[2]

This paper analyzes the restrictions on the fundamental rights of judges in Portugal, in particular as regards the freedom of association and participation in public and economic life, by virtue of their professional status, in the light of the principle of proportionality, considering, on the other side, the relevant social contribution that they can give in the field of extra-professional associative activity as citizens.

It is intended to find a field of participation in public life, through civil society organizations, for judges, which does not jeopardize their independence and impartiality, stimulating their active citizenship.

One final note just to clarify we always assume that the main activity of a judge is to be a judge and participation in society is carried out on a secondary basis without harming the performance of his function.

2. FREEDOM OF ASSOCIATION

Since the liberal revolutions of the eighteenth and nineteenth centuries, freedom of association has been one of the pillars of democratic societies, integrating the nucleus of so-called civil and political rights of citizens, as enshrined in the Universal Declaration of Human Rights (Article 20), International

[1] Internet Encyclopedia of Philosophy in https://www.iep.utm.edu/ethics/, consulted on 15.06.2019
[2] Case of Morice v. France, judgment of the European Court of Human Rights (ECtHR) of 25 April 2015, para. 74 and 75 https://www.menschenrechte.ac.at/orig/15_2/Morice.pdf

Covenant on Civil and Political Rights (Article 22) and the European Convention on Human Rights (Article 11).

Accordingly, Article 2 of the Constitution of the Portuguese Republic (CPR), stipulates that "*The Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organisation, respect for and the guarantee of the effective implementation of the fundamental rights and freedoms, and the separation and interdependence of powers, with a view to achieving economic, social and cultural democracy and deepening participatory democracy*". In turn, Article 46/1 CPR, establishes that "*Citizens have the right to form associations freely and without the requirement for any authorisation, on condition that such associations are not intended to promote violence and their purposes are not contrary to the criminal law*".

Developing this concept, the CPR sets forth that "*Freedom of association includes the right to form or take part in political associations and parties and through them to work jointly and democratically towards the formation of the popular will and the organisation of political power*" [Article 51(1)]. More over, the same constitutional norm [Article 51(2)] prescribes that no one may be deprived of the exercise of any right because he is or ceases to be registered as a member of any legally constituted party.

And along the same lines, Articles 48 and 50 of the CPR define the rights of participation in public life[3] and access to public offices[4] in universal terms.

The constitutional norms establishing these rights, freedoms and guarantees are directly applicable and binding on public and private entities, and may only be restricted in the cases expressly provided for in the Constitution and the restrictions should be limited to what is necessary to safeguard other rights or interests constitutionally protected [Article 18(1) and (2) CPR]. In addition, laws restraining rights, freedoms and guarantees must be general and abstract in nature and may not have retroactive effect or diminish the extent and scope of the essential content of constitutional precepts (3).

Finally, with regard to the constitutional provision in this area, reference should also be made to Article 13 (principle of equality), which prohibits arbitrary or unjustified discrimination on grounds of political and ideological beliefs, and Article 216 (guarantees and incompatibilities) of the CPR. The latter provision provides, *inter alia*, that *"Serving judges may not perform any other public or private function, save for unremunerated teaching or academic legal research functions, as laid down by law"* (3), as well as "*The law may lay down other incompatibilities with the exercise of the function of judge*" (5).

[3] "*Every citizen has the right to take part in political life and the direction of the country's public affairs, either directly or via freely elected representatives*".
[4] *"1. Every citizen has the right of access to public office under equal and free conditions. 2. No one may be prejudiced in his appointments, job or professional career or the social benefits to which he is entitled, due to the exercise of political rights or of public office. 3. In governing the right of access to elected office, the law may only lay down the ineligibilities needed to guarantee both the electors' freedom of choice, and independence and absence of bias in the exercise of the offices in question".*

In this case, the reference to ordinary law rests primarily on the Statute of Judicial Court Judges (SJCJ), approved by Law no. 21/85, of July 30, in its current version[5], which also applies to magistrates of administrative and tax courts, pursuant to article 3/3 of the Statute of the Administrative and Tax Courts (SATC), approved by Law no. 13/2002, of February 19, and successively amended. In this field, mention should be made of Articles 11 (prohibition of political activity) and 13 (incompatibilities) of the SJCJ. Subsidiarity, as regards the regime of duties, incompatibilities and rights, the General Labour Law in Public Functions (GLLPF), approved by Law no. 35/2014, of June 20, in its current version is also applicable to Judges, by reference to Article 32 of the SJCJ. In this legal instrument, the provisions of Articles 19 (Incompatibilities and impediments), 20 (Incompatibility with other functions), 22 (Accumulation with private functions or activities) and 23 (Authorization for cumulating of functions) are relevant for this purpose.

With this normative framework in mind, let us turn to actual cases of this problem, namely the participation of judges in non-profit associations, trade union associations and political parties.

2.1. Scope of freedom of association of judges

Article 13(1) of the SJCJ establishes the general principle of incompatibilities, reproducing, in essence, the constitutional text: "*Judicial magistrates, except for retired persons and those on long-term unpaid leave, may not perform any other public or private professional function, except for teaching or scientific research of a legal nature, unpaid, and also directing functions in union organizations of the judiciary*".

It appears from this legal provision that nothing prevents judges from participating in non-profit associations, in particular in their representative bodies, provided that those functions are voluntary and are not remunerated. In fact, in the absence of functions of a professional nature, there is nothing preventing the judges from giving their assistance to the pursuit of the statutory purposes of the associations, contributing to their relevant social role (MARÇALO, 2011). However, there were those who supported the interpretation, based on the preparatory work of the SJCJ, that magistrates could not perform functions in humanitarian or cultural organizations, since this reference, which appeared in the Government's proposal, wasn't included in the approved text (ROCHA, 1985). However, in our view, such an interpretation would lead to an unconstitutional result, as it would thus disproportionately offend the essential content of freedom of association (in the same sense, *vide* Judgment of the Portuguese Constitutional Court – CC - No. 457/93[6]).

In fact, it should not be forgotten that the restrictions on the fundamental rights of judges are aimed at guaranteeing their independence, hence the rule of functional exclusivity. In fact, "the meaning of the principle is not only to prevent the judge from being spread thin by other activities, jeopardizing his function as judge, but also preventing him from creating professional or financial dependencies that jeopardize his independence" (CANOTILHO and MOREIRA, 2014, pg. 587/588). It is therefore a question of professional incompatibility, for which the only exception is unpaid teaching and scientific research. This exception is explained, in the opinion of the same authors, because these professional

[5] The legislative process amending the SJCJ is under way. The approved bill is available here .
[6] Available on Internet at www.tribunalconstitucional.pt/tc/acordaos .

activities are not incompatible with judges' judicial functions and can contribute to their improvement; they do not create financial dependence, since they are not remunerated; and do not cause undue functional dependence, given the constitutional guarantee of freedom of education (see Article 43 of CPR).

Regarding leisure activities, such as volunteering, the judge cannot be prevented from engaging in humanitarian, cultural, recreational, social or other causes since, they are part of his right to personality development (Article 26 of CPR). Moreover, Article 22 (3) of the GLLPF points in the same direction[7]. It should also be noted that there is only incompatibility of functions, under paragraphs 1 and 2 of the same legal provision, if those are concurrent, similar or conflicting with public functions, considering as such the private activities that, having identical content to the public functions performed, are developed in a permanent or habitual way and address the same group of recipients.

A different question is whether the participation in this type of association is, or not, subject to the authorization of the High Council of the respective jurisdiction. Indeed, Article 23 of the GLLPF makes combining functions with functions or private activities dependent on the competent entity's authorization. However, in spite of the need for transparency, in order to preserve the independence of judges, this permission requirement appears to be excessive. Compulsory notification, for this purpose, would suffice. In effect, "*the judge is often confused with a mere agent of the State or a public official, in a social framework that is representative of some decades of the functionalization of its status*" (COELHO, 2016, pg. 109). Though, such cultural atavism needs to be replaced by a principle of confidence in the sense of responsibility of judges commensurate with their constitutional status. In this way, if the accumulation of functions is communicated, there should be only a restrictive reaction *"a posteriori"* of the competent authority, when there are objective indications of the judge's loss of independence (in the same sense, MARÇALO, 2011)[8].

In addition, at an international level, the Bangalore Principles of Judicial Conduct, namely Principle 4.6, expressly protect the freedom of association of judges, providing that *"*a judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary". Therefore, there is no need to get a permission for the exercise of this right and only its concrete exercise may be subject to some kind of supervision, whenever the independence or impartiality of the judge can be harmed. This is also the jurisprudence of the European Court of Human Rights, as it results of the Cases N. F. v. Italy and Maestri v. Italy[9].

[7] "The exercise of public functions may be cumulated with private functions or activities that: a) Are not legally considered to be incompatible with public functions; b) They are not developed in overlapping hours, although partially, to the public functions; c) Do not compromise the exemption and impartiality required for the performance of public functions; (d) they do not cause prejudice to the public interest or to the legally protected rights and interests of citizens".

[8] In the same vein, Article 8-A (2) of the new SJCJ, contained in Draft Law no. 122 / XIII / 3 (GOV), which has not entered into force yet: *"For the purposes of the previous paragraph, unpaid executive functions in foundations or associations of which judicial magistrates are associates that, by their nature and purpose, do not jeopardize the observance of their functional duties, are not considered of a professional nature, but the exercise of those functions should be preceded by a communication to the Superior Council of the Judiciary".*

[9] Disponíveis na Internet em http://www.legislationline.org/documents/id/5042 e file:///C:/Users/AU10208/Downloads/001-61638.pdf, respetivamente.

2.2. The freedom of association in union organizations

For its part, Article 13 (1) of the SJCJ expressly provides for the possibility for judges to form and join trade unions in the judiciary, as well as to exercise management functions within them. However, the meaning and scope of this associative freedom are controversial. On the one hand, there are those who believe that the professionalization of judges can not lead to their being placed on an equal footing with holders of other public or private functions for the exercise of the right to participate in trade union organizations or to strike (BRITO, 2010). On the other hand, there are those who recognize the freedom of association of judges, but have doubts about the right to strike, given their status as holders of sovereignty bodies (CANOTILHO and MOREIRA, 2014).

However, although Article 202 (1) of the CPR grants the courts the status of sovereign bodies, there is no doubt that judges have a complex professional status. In fact, "*the statute of judges is also based on a relationship of service or public employment with the State and is distinctively asserted in the experiences of the model of the professional career of judges (bureaucratic model or judge-employee), which unfolds in a set of rights and duties that is in some ways analogous to the employment relationship of civil servants*" (COELHO, 2016). Therefore, in the current constitutional model, it makes sense that judges can exercise trade union rights, including the right to strike, in order to claim from other public powers the right balance between their rights and their functional duties, without which their independence would be more vulnerable (MARQUES, 2016)[10].

2.3. The political freedom of association

Following Article 216 of the CPR, Article 11 of the SJCJ prescribes that "*1. Serving judges are forbidden from participating in political party activities of a public nature"*; and "*2. Serving judges cannot occupy political positions, except that of President of the Republic or member of the Government or of the Council of State".*

Moreover, along this line, electoral laws estipulate that judges are the ineligible to hold office in the Assembly of the Republic, the European Parliament and bodies of local authorities (see, respectively, Article 5 (c) of Law 14/79, of May 16; Article 5 (d) and (f) of Law 14/87 of 29 April; and Article 6, paragraph (1 e)) of Organic Law 1/2001, of August 14), although this restriction is conditional, at least in the first two cases, upon the effective exercise of functions.

Of course, these legal provisions restrict the political participation rights of judges, in particular those provided for in Articles 48 and 51 of the CPR, as transcribed above, and are therefore subject to the proportionality principle set out in Article 18 of the CPR. Thus, these restrictions must be adequate, necessary and balanced, or they can be found unconstitutional.

In that sense, with regard to the ineligibilities of judges, the Constitutional Court, in its judgment no. 364/1991 of 31 July[11], held that "*the existence of a system of ineligibility is justified by the necessity, in*

[10] It is acceptable, however, that the call for a strike may be subject to prior approval by the judges' congress or another mechanism for consultation of them by the Directorate of the trade union.
[11] Available on Internet at www.tribunalconstitucional.pt/tc/acordaos

a democratic State of law, to guarantee the dignity and genuineness of the electoral act, either as a means of providing correction to the formation of the will of the voter, without disturbing his freedom of choice".

Explaining these ideas, in its Judgment no 250/2009, of 18 May[12], the same court wrote that «*it will always be necessary, as a result of the constitutional configuration, to predict a body of preordained measures to guarantee the independence of the exercise of such functions, which is the "ratio of the rules establishing grounds for incompatibility with the exercise of certain functions, resulting, mostly, from the need to prevent possible conflicts of interest in order to guarantee the impartiality of the public authorities and, in the specific field of the judicial function, the requirement to guard the image and substance of the independence of judges, regardless of the category to which they belong*" (*Corte Costituzionale, Sentenza* no 60, of 16 February 2006). *Nonetheless, it should be borne in mind that, in addition to that requirement, the ineligibility associated with the members of the bodies exercising the judicial function also presupposes the recognition that the exercise of those positions may lead to electoral conditioning – "captatio benevolentiae" or "metus publicae potestatis"* (*in the judgment of Corte Costituzionale, Sentenza* no. 5, 1978) - *which is an obstacle to the free exercise of the right to vote*».

Assuming this restriction is justified, the consistency of the possibility of participation of a serving judge in the Government is not clear. It is true that, in Portugal, the members of the Government are not directly elected, being appointed by the President of the Republic, on proposal of the prime minister (see Article 187 (2) of CPR). Nevertheless, although the prime minister is usually the leader of the most voted political party in legislative elections, there is nothing to prevent the President of the Republic from appointing a serving judge as prime minister, after hearing parties with parliamentary representation and taking into account the electoral results (see Article 187 (1) of CPR). This means that, in theory, it is possible for a serving judge to head the Government, although he cannot be a member of the Parliament. The question is whether the requirement to protect the image and substance of the independence of judges would not be compromised in this case, in particular in the event of a return to judicial duties at the end of the political mandate.

For that reason, it has already been proposed that the only acceptable government office for serving judges is that of Minister of Justice and Secretary of State or Under-Secretary of the same Ministry, considering the functional affinity of this position with the exercise of the judicial duties (ROCHA, 1985). But the constitutionality of the current legal solution has also been questioned, because it was considered too restrictive (RODRIGUES, 1999).

In any case, judges who are not in judicial office may be candidates in the aforementioned elections. This group will include judges whose functions are suspended, namely because they are on unpaid leave. However, judges who are on authorized secondment, pursuant to Article 216 (4) of the CPR, continue to be considered to be in judicial office for this purpose. And this is another point of some perplexity, given that the authorization of certain service commissions, particularly in ministerial or parliamentary offices, may also jeopardize the independence of judges once they have ceased

[12] Judgment concerning the personal case of one of the members of this Themis team, in connection with his candidacy for the 2009 European Parliament elections, while serving as justice of the peace. This judgment is also available in the same URL mentioned above.

(BRITO, 2010). So, the regime should be harmonized by making prevail that which most favours the effectiveness of the fundamental political rights of judges and, therefore, their eligibility, while they are seconded, in functions that are separate from the activity of the courts, as is the case with those who are on unpaid leave.

However, the Bangalore Principles of Judicial Conduct seem to point in the opposite direction, when they refer to the value of independence: *"1.3 A judge shall not only be exempt from inappropriate connections and influence of the executive and legislative branches of government, but shall also appear to be free from them to a reasonable observer".* Nevertheless, the preoccupation with the image of judges cannot make them hostages of the slander of the "*vox populi*", enclosing them in a kind of monastic cell. And, likewise, deontological requirements cannot be placed on an unattainable plane of duty that imposes the denial of the actual human being that the judge does not cease to be. Yet, it is acceptable to impose a limited period of inhibition on a judge who has returned from political office, restricted to the cases in which one of the parties was his former colleague in the government or parliament as well as in cases where he had prior intervention.

Finally, the question of partisan membership of the judges deserves reference. The rule in Article 11 of the SJCJ does not seem to prohibit such a link, provided that it is not exercised publicly (RODRIGUES, 1999). It may be said that the "*ratio legis*" also covers these cases, since it will be difficult to keep a judge´s political affiliation secret. And the quoted (Bangalore) principle goes in the same direction. However, it should be noted that, with regard to the restriction of fundamental rights, extensive interpretation of the legal rules must be cautious; otherwise the essential content of those rights may be called into question. Thus, although it may be advisable for judges not to have partisan membership, this condition is not illegal and cannot be imposed, in spite of the judge's duty of reserve in this field. After all, even if not affiliated, the judge will most certainly have his political and ideological convictions, but this, in itself, cannot or should not harm him or jeopardize his independence[13].

3. THE PARTICIPATION IN PROFESSIONAL AND NON-PROFESSIONAL SPORTS CLUBS

3.1. The social framework

Though the interest in and the legislative forecast are not limited to football - as there are other sports with great economic scope and that are capable of attracting massive crowds (such as futsal or cycling), we will use football as an example only because it is has the most extensive media coverage and for that reason is the most problematic example of the participation of judges in public life.

In Portugal, where there are three daily sports newspapers, along with some publications in digital format, the broadcasting of football news and events is continuous.

[13] Accordingly, with regard to this idea, the European Court for Human Rights held that the Finnish law which enables judges to simultaneously be members of Parliament didn't violate Article 6 (1) of the Convention (see CASE OF PABLA KY v. FINLAND - Application no. 47221/99).

There are also a lot of sports programs (on various TV channels and cable sports channels) that are dedicated to the exhaustive analysis and commentary of what happened in a specific football game or what player X or coach Y.

It is impossible not to mention the football fervour that floods Portuguese culture (which is not a Portuguese exception or originality), which means people are not always able to calm their emotions, allowing themselves be contaminated by an exacerbated vision of the football phenomenon.

Besides, society today has the perception that football can be associated with corruption and money laundering phenomena, considering the large amounts of money involved in the professional competition and sports bets.

From the 1980´s, several judges have appeared, in this context, on the board of professional football clubs or even in professional football disciplinary and organizational institutions, under the guise of the impartiality and independence of their profession, and with a view to contribute to the credibility and prestige of the football phenomenon. In fact, even nowadays we have judges on the board of professional football clubs, in professional football disciplinary and organizational institutions and in the recent past, more than a judge has presented his candidacy to be chairman of a professional football club.

However, to preserve the ethics and deontology that are central to the function, judges must avoid conducts, activities and frequenting circles that may harm their image of independence, impartiality and integrity.

So, suddenly, we have judges whose impartiality and independence is distrusted because of their participation in football. And here we come to the heart of the matter. It is that when doubt is cast on a judge, it is not only that judge that is called into question but the whole professional class, seen as the ultimate guardian of justice (one of the pillars of the effetive democratic rule of law) whose dignity, credibility, independence and impartiality is questioned.

3.2. The perspective of the Superior Council of the Judiciary (SCJ) / Superior Council of Administrative and Tax Courts (SCATC) and the legal framework

3.2.1. Legislative evolution and intervention of the Superior Council of the Judiciary (SCJ) / Superior Council of Administrative and Tax Courts (SCATC)

As a result of the participation of judges in professional football institutions, at least since 1993 (and with replicas in 2005, 2006 and 2008), the SCJ has expressed, through its deliberations, the dislike of the relationship between judges and football.

As a consequence of the deliberation of the SCJ of 1993, and by the Decree of the Assembly of the Republic (AR) n. 120 / VI, a rule was added to the Statute of Judicial Court Judges (SJCJ), where it was established that SCJ could "*prohibit unremunerated activities, when, by their nature, they are liable to affect the independence or dignity of the judicial function*."

This decree was subject to an abstract preventive review of constitutionality, by the Constitutional Court (CC), in Judgment no. 457/93, of 08/12/1993, and the CC concluded that the fact that this statute did not contemplate a minimum classification of activities outside the function (MEIRIM, 2007), but attributed this faculty to the SCJ, did not fit "with the special and particular requirements, adequacy and proportionality of the restrictions of rights, freedoms and guarantees, laid down by Article 18 of the Constitution of the Portuguese Republic (CPR), and a legal solution that would confer such a wide margin of compression and restraint on the fundamental rights of judges as citizens to an organ of a nature and administrative vocation, such as the SCJ", pronouncing the unconstitutionality of the precept.

In 2006, through bill no. 312 /X40, Article 13 (3) of the SJCJ, would read as follows: "*Judicial magistrates, except for retired persons and those on long-term unpaid leave, are prohibited from performing functions in statutory bodies of sports clubs, sports associations or of sporting companies that are public limited liability companies, involved in professional competitions*". However, this bill was criticized in an opinion of the Committee on Education, Science and Culture - responsible for sport - of the AR, and the legislative initiative was shipwrecked. At the end of 2006, the SCJ also approved a proposal for a standard to be introduced in the SJCJ, which was addressed to the AR and the Ministry of Justice. In that proposal, and by the margin of a single vote, the argument of the relative incompatibility to the detriment of the absolute prohibition was avenged, and the intervention of the SCJ was foreseen, authorizing or not the exercise of those functions. The future Article 13-A of the SJCJ would provide: "*1. Judicial magistrates, except for retired persons and those on long-term unpaid leave, may not be members of statutory bodies of entities involved in professional sports competitions unless previously authorized to do so the Superior Judicial Council. 2. The authorization shall be granted if the exercise of such activities does not result in damage to the service or to the independence, prestige and dignity of the judicial function*." However, this initiative has not benefited from the necessary follow-up in the legislative sphere.

Already in 2008, in the preparatory work that gave rise to the "Compromisso Ético dos Juízes Portugueses"[14] (2010), the second principle of Article 10 (2) stated: "*Judges should engage in extrajudicial activities aimed at improving the administration of justice, contributing to the progress of law and to the independence of the Courts. They must refrain entirely from joining organizations that engage in any form of discrimination prohibited by law. f) In addition to situations provided by law or expressly authorized by the Superior Council of Judiciary, judges must abstain from exercising any type of activity, even if totally free of charge and without payment of any type of expense, in sports associations linked to any form of professional sport, in particular football.*"

This idea was then matched in the final version of the "Compromisso Ético", approved at the 8th congress of portuguese judges, which stated: "*Participation in civic activities outside the functions of the judge, even if there is no objection to the impartiality of the judge, is rejected in all cases where it is reasonably foreseeable that subjection to vexatious and undignified public assessments is implied. It will usually be the case of participation in associative bodies linked to professional sports, where, through their specific emotional context and the type of language used and controversies developed*

[14] Ethical Commitment of Portuguese Judges

there, the judge is easily subject to references that can be discrediting and is connoted with situations of little transparency."

The legal opinion of the SCATC (2012), recommended that "*for the future, the SCATC should impose on the judges a duty of prior communication of the exercise of functions in bodies outside the jurisdiction*" and that, "*regarding the current situation (…), the SCATC determined that a survey should be carried out with a view to determining whether there are serving judges in the administrative and fiscal jurisdiction or retirees exercising functions in bodies outside their jurisdiction, in particular in organs of sports institutions*" (Inverbis).

The truth, however, is that these non-binding guidelines did not aim at the objective of removing judicial magistrates from the football phenomenon.

3.2.2. *The current legal framework*

Article 216 (3) of the CPR, quoted above, stipulates that practicing judges may not perform any other public or private function other than teaching or scientific research of a legal nature, provided they are unpaid.

Constitutional Law No. 1/97, dated 20/09 (fourth constitutional revision), added a paragraph 5 to this provision, which states that: "*the law may establish other incompatibilities with the exercise of the function of judge*".

The SJCJ, in the above mentioned article 13 (1), governs the incompatibilities of judges and Article 82 of the SJCJ provides a concept of disciplinary infraction, stating that "*constitute disciplinary infraction the facts, even if merely guilty, committed by judicial magistrates in violation of professional duties, and acts or omissions of their public lives or which are reflected therein, incompatible with the dignity essential to the performance of their duties*.

These rules also apply to magistrates of the administrative and fiscal jurisdiction, as stated above.

Thus, under the current legal framework, the participation of judges in professional sports clubs is not prohibited, but rather the decision to participate or not is left to the ethical discretion of each one, as citizen before being a judge.

3.2.3. *Future legal framework (Draft Law no. 122/XIII/3.ª (GOV))*

It was recently approved the legislative amendment that determines that "*It also lacks authorization by the Superior Council of Judiciary, which is granted only if the activity is not remunerated and does not involve prejudice to the service or to the independence, dignity and prestige of the judicial function: a) The exercise of non-professional duties in any statutory bodies of public or private entities that have the specific purpose of exercising disciplinary activity or settling disputes; b) The exercise of*

non-professional functions in any statutory bodies of entities involved in professional sports competitions, including their respective shareholders".

This raises the question of compliance with the CPR, in parallel with the situation referred to in the above-mentioned judgment of the CC No 457/93, since an administrative entity (the SCJ or the SCATC) is empowered to limit the exercise of a fundamental right, which limitation must be exceptional, without being clear the criteria which will support the decision in each case.

Nevertheless, and considering the circumstances outlined above, we believe that it would be desirable to adopt a more restrictive and clearer legal solution, which would simply prevent judges from taking part in professional sports clubs, namely those where football is the main activity.
The legislative amendment still leaves room for associative activities that do not conflict with the judicial function, such as the participation in modalities and non-professional clubs, namely in amateur teams of any sport, which is applauded, taking into account what has already been said about the freedom of association of judges.

In fact, it should not even be necessary to legislate on this subject.

In the words of a judge, taken from the last scene of "The bonfire of vanities" (film made by BRIAN DE PALMA based on a novel by TOM WOLFE): *"Is that Justice? I don't hear you! I'll tell you what Justice is. Justice is the law, and the Law is man's feeble attempt to set down the principles of Decency. Decency! And Decency is not a deal; it isn't an angle, or a contract or a hustle. Decency! Decency is what your grandmother taught you! It is in your bones! Now, you go home! Go home and be decent people! Be Decent."* (MEIRIM, 2007).

4. PARTICIPATION IN BUSINESS

Individual judges must be free from unwarranted interferences when they decide a case. And there are many factors, some of which will be apportioned below, in order to determine whether a court of law or tribunal is independent.

As the European Court of Human Rights has stated in the past "(…) *that in order to establish whether a tribunal can be considered as «independent» regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question of whether it presents an appearance of independence*"[15]

Such independence also means that judges must decide cases despite their personal preferences and must have no interest or stake in a case. This implies that the judge may not hold pre-formed opinions about cases or as regards the parties involved. Cases must only be decided "*on the basis of*

[15] In Findlay vs the United Kingdom, judgment of the European Court of Human Rights (ECtHR) of 25 February 1997, Series 1997-I, p.16 para. 73 see also: Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A, p. 15, para. 37).

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" [16]

However, an additional requirement is made as regards the judges, in the sense that they may "*not carry on any other function, whether public or private, paid or not, that is not fully compatible with their duties and status (…)*" as established at article 6(4) of the International Association of Judges, the Universal Charter of the Judge, adopted by the IAJ Central Council in Taiwan on November 17th, 1999, and updated in Santiago de Chile on November 14th, 2017.[17]

So, it is commonly accepted and promoted that judges must avoid participating in companies, regardless of whether such companies are family companies, small or large companies, or whether they actively make decisions or if they are completely passive as regards the decisions of such companies.

But is this restriction necessary to guarantee the independence of the judge?

Is the full scope of this restriction not in violation of the basic human rights of judges?

As regards this matter, Article 8 (2) of the European Convention of Humans Rights (ECHR) establishes, with reference to the right to respect for private and family life, that "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".*

Article 11(2) of the ECHR establishes, with reference to the freedom of assembly and association, a similar rule, although adding that *"This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police or of the administration of the State*". It is interesting to find that such limitations are not allowed with regard to the right to respect for private and family life.

Similarly, as already mentioned, Article 18 of the Portuguese Constitution establishes that the law may only restrict rights, freedoms and guarantees in cases expressly provided for in the Constitution, and the restrictions should be limited to what is necessary to safeguard other constitutionally protected rights or interests.

Taking the above into account, there appears to be a contradiction between the interdictions that are imposed on judges to guarantee their independence and the freedom to have economic activities that is generically recognized for the general population.

[16] UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 2.
[17] Similar to the chapter 3 - 12 of the Compromisso Ético dos Juízes Portugueses, 2009, pág. 13

As regards the international documents transcribed and the Portuguese regulation, it's generally accepted that judges cannot be partners in companies, regardless of their role in the organization of the company, the size of the company, or who the other partners are and what the activity of the company is.

For example, on 23 of January a legal opinion was requested of the SCATC about the possibility of a trainee judge be a partner of capital in a limited liability company (LLC) with her husband, partner and manager of that business. The legal opinion of the SCATC, in the procedure 1170, was based on these assumptions:

(1) Companies carry on commercial activity;

(2) A LLC is a commercial company;

(3) Being a partner in a business implies, even if not as managing partner, is the exercise of a commercial activity as result of the deliberations; being a partner in company "... *Is the mobilization of the personal interest* and "*in which they are typically exercised for the purpose of obtaining benefits or remuneration*";

(5) The exercise of commercial activity conflicts with the exclusivity of the function of judge;

(6) The exercise of commercial activity necessarily involves profit; and

(7) Being a partner of a LLC, is doing business of commerce on a permanent basis and from which he/she obtains profits. In conclusion, the SCATC held that a judge cannot be a partner of a company because it is incompatible with the functions of judge.

However, the role of the partner isn´t to represent the company to the general public, clients or providers. As such, most of the time the general public, the society in which the company acts, wouldn't know that the judge is a partner. Additionally, the obligation of the judge to disqualify himself in cases related to the field of his company activity would seem to ensure that impartiality is carried out.

Also, there is no consideration of the size of the company and, consequently, its relevance in the market. If there is a small company, a family company for example, the intervention of the company in the market is probably smaller and too insignificant to influence the market in which the activity of the company is developed.
Likewise, if the judge is simply one more partner in a big company with many partners, and has a small participation in the company, due to the large number of partners, regardless of the company position, the judge's capacity of influencing the market is extremely limited.

However, both in the case of small family companies with small market impact and large companies with a large number of partners, the judge's position would legally be considered to be biased.

Notwithstanding, judges can buy shares in the stock market, so it seems that here also is a contradiction between the possibility of the judge to be a partner or buy stocks, if such is done in a regulated market. And more relevant to this analysis is that in both examples the judge would have the same profits – he/she would earn dividends for his/her participation in the company.

Also, the reality today is very different and there are a lot of small companies and family businesses that are created solely for the administration of a family estate or inheritances. In other cases, the small company may have been incorporated for the best organization of a small business.

If there is a small company in the family of the judge, the depth of the relationship with the organisation may be profound, regardless of whether he is a partner of the company. So, if the judge´s relatives have companies, is the relation of the judge only an issue if he is a partner and has a clear and formal relationship with the company?[18]

In addition, the activities of companies can be so disconnected to the field of the judge´s intervention, even if it is involved in commerce, that it cannot be understood as having the potential to jeopardize the judge´s impartiality.

For example, one judge may be partner in a family business that organizes funerals but is not able to decide about questions related to other companies with said object (because he/she is a judge in family courts, for example). In other cases, the matter of territorial competence may be sufficient to ensure that the judge may never have an intervention that could in any way benefit his/her family company.

The need to guarantee the impartiality of judges is unquestionable and necessary, but the exclusion from economic life may not be the best way to guarantee such impartiality. There are a lot of economic realities and activities that are excluded because of such inhibitions, despite the fact the participation of a judge could in no way affect the image of the jurisdiction. However, these economic realities and situations could make a difference to the judge in terms of financial independence or family relations. The possibility of participation would be better assessed on a case-by-case basis and should not be denied by a general prohibition.

Judges must maintain the legality, justice and security of society, and also know the obligations and rules by which they are bound. So, the intervention in companies in accordance with basic principles and rules would not be harmful to society or to the perception of impartiality or independence of judges.

A simple mechanism that could ensure this independence and impartiality would be to establish a set of rules that would force judges to declare themselves inhibited in certain cases where their impartiality could be questioned, combined with an obligation to publicly declare any situation that could potentially lead to a case where the judge would be forced to declare him or herself inhibited from deciding.

[18] According to the Commentary on the Bangalore Principles of Judicial Conduct (169), judges must be allowed to participate in family companies.

What we believe is that it is necessary to open mentalities to accept that judges can be part of many social and economic realities and that they could learn a lot from undertaking other activities, with professional benefits, as long as such undertakings do not come into conflict with their main activity: ensuring the correct application of the law and administrating justice on behalf of citizens.

We stress that we do not defend that the participation in companies should be totally free. This participation should be communicated and public. Therefore, there would be an inherent transparency in such situations, as should be the case in all the activities in which judges intervene.

5. CONCLUSIONS

Freedom of association and freedom of economic initiative are fundamental rights of all citizens, including judges.

On the other hand, the independence of the judiciary and, as a consequence, of judges is a pillar of the functioning of democratic societies, which are based on the principle of separation of powers.

Therefore, the defense of the independence and impartiality of the judges may justify restrictions, with a more or less limited scope, to those fundamental rights, to the extent strictly necessary.

This could be the case of participation in public political-partisan activities and in professional sports institutions, as well as in business management functions.

For the rest, namely participation in government or, in the cases mentioned below, the performance of elected public offices; the fulfilment of secondments within the executive or legislative branches; and the ownership of shares, it is sufficient to establish a set of legal measures, to ensure the transparency of situations and to inhibit judges from judging causes, for a limited period of time, where there may be a conflict of interest.

On the other hand, there is nothing to prevent the judge from being affiliated to a political party, provided that he does not participate actively in it, namely by integrating the respective statutory bodies and taking part in their public actions. In addition, if they are not in office, either because they are on unpaid leave or because they are performing duties outside the jurisdiction of the courts, judges must be able to stand for parliamentary elections and local authority bodies, suspending their legal-functional bond during the term of office, in case of election.

At the same time, judges should be free to participate, without authorization, in non-profit associations of a humanitarian, cultural, recreational and sporting nature (which do not enter into professional competitions), as well as in trade union associations representing their professional interests.

So, considering the study carried out, which is based on the situation and legal framework in Portugal, but because we are dealing with matters that apply to other countries and cultures, since the

impartiality and exemption of the judge and consequent trust in justice are cross-cutting concerns throughout European law, we present the following proposals:

I- To train people in ethics from an early age to an awareness of themselves and others and the importance of being in a society ethically, namely through their introduction in curricula from the beginning of school life (importance of the role of school in the construction of society).

II- To give training to Judges on how to observe themselves and become self-aware during their judicial activity.

III- To implement a repository of allowed and prohibited conduits at an European level and, make this repository available, namely by publishing it on the Internet, thus making it available to both judges - who will be aware of which procedures are admitted or prohibited in each country - and ordinary citizens – who will gets a better sense of what justice and its rules are - thus contributing to the creation of a trustworthy framework for citizens in general.

IV- To establish a legal mechanism that makes it mandatory for a judge, when he initiates functions, to make a declaration of interests regarding situations of potential conflict, such as having shares or stock actions in a company or being a member of an association bodies, making it public (for example on the website of its Judiciary´s Superior Council), in order to give transparency to the administration of justice and to make the legal system of impediments, excuses and suspicions more effective.

V- After exercising political functions and at the moment of returning to the exercise of the judicial duties, to establish a period of legal impediment, lasting for the same time in which the political functions were carried out, up to a maximum of five years, to try cases involving matters where the judge had prior intervention as politician, the political party that formed the Government in which he has participated, as well as the other members of the same governing team, the leaders of that political party and, in the cases of secondment in the Parliament, the members of the same group, including in all these cases companies which are owned or managed by them.

VI- In professional sports (especially in football), to establish, at least, a mandatory declaration of interests regarding the participation of judges in the bodies and entities involved in competitions, as a common European regulation.

VII- With regard to participation in commercial companies, to adopt, beyond the mandatory communication, the obligation of the judge to request an excuse in cases related to the field of activity of the company in which he participates.

VIII- To give the Consultative Council of European Judges (CCEJ) responsibilities, in terms of the ethics and deontology of judicial magistrates, to formulate recommendations that may lead to a common regulation for European countries, with a view to preserving the independence of judges, without exceeding the limits of the above restrictions on the exercise of their fundamental rights.

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