Trabalhos

Themis 2020

CENTRO DE ESTUDOS JUDICIÁRIOS

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

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

Na edição de 2020, realizada em condições muito especiais face à pandemia que nos afecta, foram quatro as equipas do Centro de Estudos Judiciários que participaram (todas do 35.º Curso de Formação de Magistrados).

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

Ficha Técnica

Nome:

Trabalhos Themis 2020 – 35.º Curso de Formação de Magistrados

Departamento de Relações Internacionais do Centro de Estudos Judiciários

CENTRO DE ESTUDOS JUDICIÁRIOS

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Chandra Gracias

CENTRO
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SEMI-FINAL B

Undressing Dreams: A burden of proof or a burden to prove? – First Reception Centers: reception, identification and age assessment procedures of unaccompanied children

Auditores:

CATARINA BORGES DA PONTE
MÓNICA GONÇALVES MARTINS
MELANIE-ANNE MORAIS

Chandra Gracias*

Senti como um verdadeiro privilégio o convite formulado pelas Sras. Auditoras de Justiça do 35.º Curso Normal de Formação de Magistrados para os Tribunais Judiciais, Sras. Dras. Catarina Borges da Ponte, Mónica Gonçalves Martins e Melanie-Anne Morais, para as acompanhar na jornada Themis, na qualidade de tutora.

O texto que se segue, intitulado «*Undressing Dreams: A burden of proof or a burden to prove? – First Reception Centers: reception, identification and age assessment procedures of unaccompanied children*», é da sua exclusiva autoria, e foi apresentado na «Semi-Final B: EU and European Family Law», da competição THEMIS, que se deveria ter realizado em Budapeste, na Hungria, de 3 a 5 de Junho de 2020, mas que, com as contingências próprias do Corona Vírus, acabou por se desenrolar *on line*.

O tema escolhido é inovador, actual, tecnicamente complexo, e com uma especial relevância no contexto do judiciário, pois convoca, ao mesmo tempo, a especial vulnerabilidade das crianças e jovens, os desafios éticos, os ideais humanistas, a interligação multidisciplinar de saberes, a perspectiva holística, e abre pontes de reflexão em caso de conflito de direitos.

Todo este trabalho assentou numa investigação consistente e aprofundada, com o cruzamento de várias fontes de informação e metodologias, sustentada na análise criteriosa da jurisprudência mais relevante do Tribunal Europeu dos Direitos Humanos, e que é tanto mais de aplaudir quanto foi realizado, sempre em espírito de equipa e colaborativo, mas com a distância física e geográfica entre os membros da equipa, que o Corona Vírus ditou.

Aliás, deve realçar-se que a pandemia motivou a suspensão da competição, o que significou o abandono do projecto durante largas semanas, e, com a notícia de que iria ser retomada, agora em versão *on line*, implicou um esforço acrescido, não só de terminar a pesquisa e a redacção do texto, em tempo record e em simultâneo com as actividades do CEJ, como ainda, de efectuar um vídeo atinente ao tema escolhido, exigência adicionalmente imposta pelo novo formato.

* Juíza de Direito e Docente do CEJ.

A *novidade* da apresentação e discussão do tema através de plataforma informática indicada para o efeito, aportou um novo desafio à equipa, que desconhecia, em absoluto, como se iria processar a interacção com os membros do júri, com a equipa arguente, e mesmo entre si própria.

Não obstante, no dia da defesa do trabalho, a equipa nunca desistiu de tentar fazer valer a tese aí explicitada, replicando com coragem, segurança, alegria, mas também humildade, os seus argumentos e as suas propostas de solução, ciente do seu carácter controverso, tomando posição expressa sobre os pontos nevrálgicos, ainda que nacionais, criticando-os consciente e fundadamente quando necessário, o que lhes valeu os elogios unânimes quer do júri, quer das demais equipas.

Se já a todos havia cativado com a escolha do tema e a animação produzida, como ali foi profusamente salientado, aquando da discussão oral, a equipa, a uma voz, brilhou com a qualidade e desenvoltura do seu raciocínio, a postura serena e a fluência da língua inglesa.

Por conseguinte, a avaliação final do júri foi a mais meritória, com a atribuição do 1.º lugar da Semi-final, o que garante um lugar na Grande Final, aprazada para o mês de Novembro, na cidade de Bona, na Alemanha, ou, não sendo possível, novamente em formato *on line*.

Concomitantemente, este texto foi escolhido para ser publicado no Themis Annual Journal 2020, o que dispensa qualquer consideração adicional sobre a qualidade que se reconhece ao mesmo.

Em conclusão, a despeito de tantas vicissitudes enfrentadas pela equipa, estranhas ao CEJ e à estrutura da competição Themis, o certo é que o balanço da participação é muito positivo, ao ter permitido a partilha das dificuldades e dos conhecimentos, a troca de experiências, a construção do diálogo e do pensamento crítico em várias matérias estruturantes e fracturantes do Direito Europeu da Família.

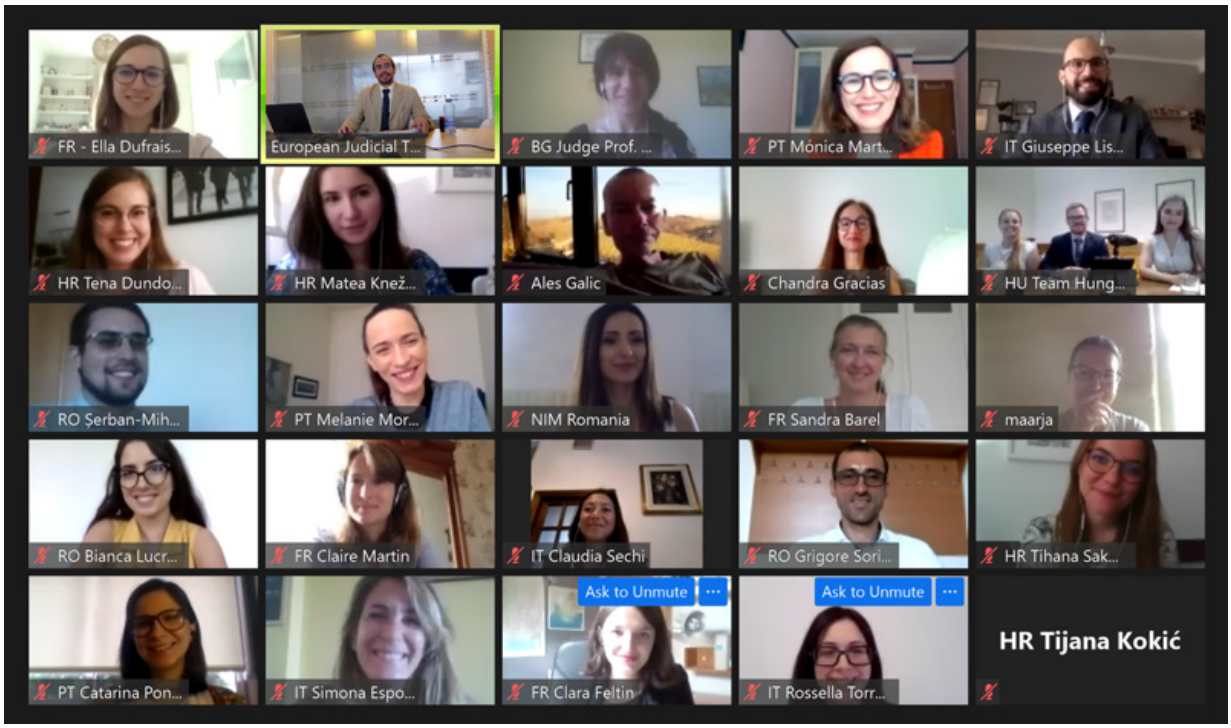
Com a publicação deste texto, não só o CEJ reconhece o seu valor e o dos membros da equipa, como dissemina e enriquece o conhecimento e a discussão jurídicos.

Chandra Gracias
10 de Julho de 2020

Entrevista a Cristiana Pereira[1]

https://youtu.be/_zZMGUY-tCQ

[1] Professora Auxiliar na Faculdade de Medicina Dentária da Universidade de Lisboa.



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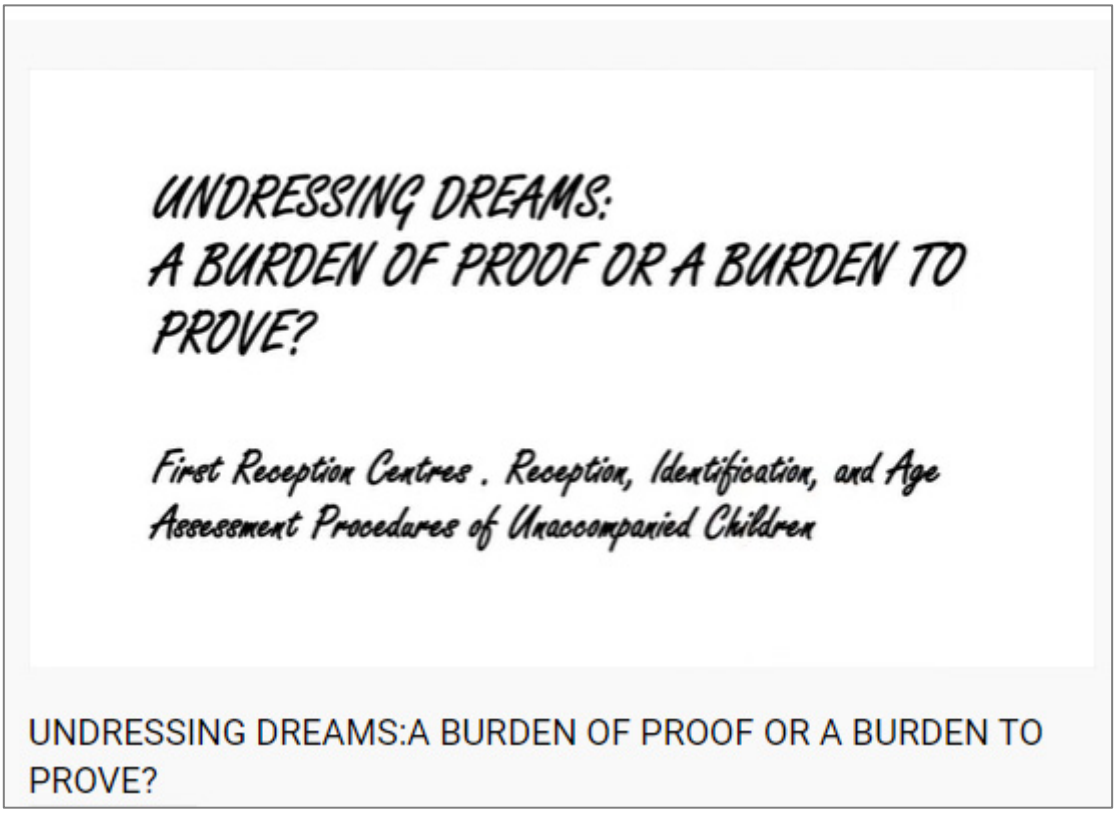

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Undressing Dreams: A burden of proof or a burden to prove? – First Reception Centers: reception, identification and age assessment procedures of unaccompanied children

Team Portugal

Catarina Borges da Ponte | Mónica Gonçalves Martins | Melanie-anne Morais

Accompanying Teacher

Chandra Gracias

CENTRO
DE ESTUDOS
JUDICIÁRIOS

UNDRESSING DREAMS:

A BURDEN OF PROOF OR A BURDEN TO PROVE?

First Reception Centers:

reception, identification and age assessment procedures of unaccompanied children

Portuguese Team

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Tutor: CHANDRA GRACIAS

Our first thank you note is addressed to our tutor, teacher and friend, Dr. Chandra Gracias, Judge Trainer at the Center for Judicial Studies, to whom we are truly grateful for the opportunity, for her eternal kindness and for the encouraging way in which she has always supported us and our work, in such difficult times as the COVID era was for us.

Thank you is also due to the Center for Judicial Studies, in the person of its Director, Mr. Judge Counselor Dr. João da Silva Miguel, especially for all his support listening to our concerns and time winning efforts that allowed us to finish and submit our work.

List of Abbreviations

APD recast	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013
AT	Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. (or 'anti-trafficking directive')
BIC	Best interests of the Child
CACR	Portuguese Refugee Children Reception Center
CAR	Refugee Reception Center
CFR	Charter of Fundamental Rights of the European Union
CPR	Portuguese Refugee Council
CRC	United Nations Convention on the Rights of the Child
Dublin Procedure	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing 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 (recast)
EASO	European Asylum Support Office
ECHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EECIT	Portuguese First Reception Center
EU	European Union
Eurodac	European Asylum Dactyloscopy Database
INMLCF	Portuguese National Institute of Forensic Medicine and Forensic Sciences
IOM	International Organisation for Migration (United Nations Migration Agency)
MS	Member States
RUM	Resolution of the European Parliament of 12 September 2013 on the situation of unaccompanied minors in the EU (2012/2263(INI)
RCD recast	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). Also known as the 'reception conditions directive' recast
SEF	Portuguese Immigration and Borders Service
TEU	Treaty on European Union
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
1951Geneva Convention	United Nations Convention Relating to the Status of Refugees 1951 (and the Protocol Relating to the Status of Refugees 1967)

Summary: I. Introduction 1. Methodology **II. Procedures for unaccompanied children 1.** Reception **2.** Identification **3.** Age assessment **a.** Concept and framing. The need for age assessment. **b.** Criticism of the age assessment proceedings **c.** Burden of proof or a burden to prove? **d.** Building a path to a better solution – some suggestions **III. Conclusions IV. Bibliography**

I. Introduction

The current thinking, legislative spirit and jurisprudence of the EU Institutions and MS are driven by the CFR, which is the sole legal instrument of the EU that contains a specific article related to children's rights: article 24. For the first time, children gained a voice, and it finally became mandatory in the EU.

The roots of this article can be found in the CRC, the contents of which are taken as true principles concerning children, such as the principle of the BIC and the principle of the child hearing. The adoption of the CFR was the first significant leap advancement in this field, followed by the respective implementation, with the Treaty of Lisbon[1], which changed the constitutional and procedural circumstances of the EU, stating, as a strand of its foreign policy, a new general goal: the protection of children's rights – cf. articles 3, paragraphs 3 and 5, of the TEU.

To accomplish the full evolution, it was also essential to disclose the agenda for children's rights and to ensure the approval of the directives[2].

The CFR became binding on the EU with the implementation of the Treaty of Lisbon, on the 1st December 2009, meaning that, from that date on, it benefitted from the same legal force and legal security as the Treaties – article 6, paragraph 1, TEU. It respects for the competences of the EU, the principle of subsidiarity and the rights established in the ECHR and the CJEU jurisprudence, the costumes, and the Convention for the Protection of Human Rights and Fundamental Freedoms.

And the legal spirit of humanism and solidarity in the EU became even more evident.

The CRC (Article 1)[3] defines childhood by reference to age: «*A child/minor is any person below 18 years of age*». Age is, therefore, an essential element of a child's identity.

Knowing his/her age grants the child, in western cultures, and in the eyes of international protection, simultaneously, the right to develop his/her personality (articles 1, 7 and 8 of the CRC), and the right to a special protection (articles 21st to 24th of the RCD recast[4]).

[1] Official Journal of the EU nr. 2012/C 326, de 26-10-2012, pages. 1-45 (consolidated version of the TEU).
[2] «*An EU agenda for the rights of the child: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*», COM (2011) 0060 final, Brussel's, 15-02-2011, e «*EU Guidelines for the promotion and protection of the rights of the child*», Brussel's, de 10-12-2007.
[3] As well as paragraph II. a. in the Appendix to Recommendation CM/Rec (2019)11, and paragraph 1 of the General Recommendations of RUM, and article 2 (l), of the APD recast and article 2 (d), of the RCD recast.
[4] Official Journal of the EU nr. L 180/96, 29/06/2013.

But, in order to have those rights, children should prove their age or submit themselves to age assessment proceedings, through which they enjoy the rights established under the CRC.

Going through the different MS of the EU we can already say that the age assessment is a complex process and differs from MS to MS, noting that individual rights (of children and young people who arrive as migrants or asylum seekers) are often not respected during these procedures.

With regard to children, the age assessment procedure has to safeguard the child's right to development and should only be conducted if it is in the best interests of the child[5].

The age assessment process contains several amendments, such as the (in)sufficient motivation, «*the limitations of the methods in use concerning intrusiveness and accuracy, fragmented estimations based only on the physical appearance, the primary use of medical methods, repetitive examinations being conducted on the same applicant in different MS and a low implementation of key safeguards in the process have been identified and addressed in several publications*»[6].

The aim of our paper is to discuss best practices in age assessment procedures for unaccompanied children, to achieve a legal procedure that is appropriately in accordance with the rule of law but mostly in the **BIC**, preventing the erroneous classification of minors as legal adults. Also, we seek to debate if it really is necessary to submit (all) children to these proceedings and to suggest some tools to minimize their negative impacts.

In conclusion we summarized some recommendations and tools for the implementation of the BIC when assessing the age of a person, from a multidisciplinary and holistic approach, as suggested by EASO.

Methodology

Having defined reception, identification and age assessment procedures of unaccompanied children as the subject of this article, we established the age framework between of 14 to 18 years old, especially because this age range is the most common in unaccompanied children, arriving in Europe[7].

We followed EASO's universe of States, and, when referring to MS, we consider EU MS, Ireland, the UK and also Switzerland and Norway.

One of our main concerns was which methods were being implemented in the age assessment procedures, taking into account the UN Committee on the Rights of the Child's General Comment nr. 6 [8] namely the non-medical methods and medical methods in place.

[5] Shaped in Articles 24 CFR, 6, a), European Convention on the Exercise of Children's Rights**,** 7 Geneva Declaration of the Rights of the Child 3 and 9, paragraph 3 CRC, Paragraph 1, 3, Recommendation nr. 2013/112/EU of the European Commission, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Resolution 1810(2011) of the Council of Europe's Parliamentary Assembly, Paragraphs 1, 3, 5.2, 5.3, 5.5, 5.12, 5.14, 6.12, and in the Recital and in Paragraph I.2.b., of the Recommendation CM/Rec(2019)11 of the Committee of Ministers to Member States (on effective guardianship for unaccompanied and separated children in context of migration), amongst other international instruments.

[6] Such as in the EASO Practical Guide on Age Assessment, 2nd Edition, page 19, available online in https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf (consulted on the 10th June 2020).

[7] According to the EASO Practical Guide on Age Assessment, page 18.

[8] Which states that the identification of a child as unaccompanied or separated includes age assessment, which should take into account physical appearance, but also psychological maturity.

In order to gain a better insight into the reception, identification and age assessment procedures of unaccompanied children, semi-structured interviews were conducted with a representative of SEF, a representative of EASO, with written replies, and with a Professor from the INMLCF, in a recorded interview.

II. Procedures for unaccompanied children

1. Reception

It is not hard to imagine how frightening it must be for an unaccompanied child the arriving at the border of a country, the fear of the unknown must be overwhelming. And it's unquestionable that an **unaccompanied child**[9], by virtue of his/her age alone, is in a particular **vulnerable situation**, requiring special care and protection.

The possibility of having been exposed to extreme forms of violence is not hypothetical, it is practically a certainty, like the risk of military recruitment, forced marriage, genital mutilation, that may have occurred in the country of origin as well during the migratory journey. And even when they arrive in the European territory, they remain at risk of exploitation, trafficking, as well as physical, psychological and sexual abuse. These concerns become even more acute when we talk about unaccompanied girls, children with disabilities[10] [11] [12], or when (we are talking about) sexual identity, sexual orientation or gender expression.

This dramatic and worrying reality explains why protecting children in these cases, and especially unaccompanied children, and ensuring that their best interests are respected, is a **priority for the EU**[13].

The EU looks for the development of fair policies, support and care practices appropriate to the needs and capabilities of unaccompanied children, like the **RCD recast** that establishes standards for the reception of applicants for international protection. Although MS have some freedom to define their own standards, all the MS should take into account, always, the **principle of BIC**[14], that runs through entire Directive[15] (article 23), in line with the **1989 CRC**[16], and the CFR[17], and also with the **RUM**[18].

[9] The RCD recast defines «*unaccompanied minor*» as «*a minor 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 a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member State*»

[10] Article 24 of the CFR guarantees all children in the EU a general right to protection. Article 3 guarantees all individual in the EU respect for their physical and mental integrity, while Article 26 recognises the right of persons with disabilities to benefit from measures to ensure their integration and participation in community life.

[11] Convention on the Rights of People with Disabilities (CRPD) was ratified by the 25 EU Members States in September 2015.

[12] At the EU are several directives protect children with disabilities from violence, Directive 2011/93/EU on combating the sexual abuse, sexual exploitation of children and child pornography and Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (Victims' Rights Directive) aim for a certain level of harmonisation of criminal law provisions, including regarding support for child victims, reporting of crimes and prosecuting offenders.

[13] In 2017, 20.000 unaccompanied children arrived in the EU (UNCHR, UNICEF, OIM, Refugee and Migrant Children in Europe, Overview of Trends (2017). In Portugal, SEF registered the entry of 455 children who applied for international protection.

[14] The Declaration of New York on Migrants and Refugees, 19th September, reinforced the idea that when dealing with children, their best interests must be considered at all times.

[15] Considering (9), reinforced by Article 11/2.

[16] Article 3 CRC.

[17] Article 24 CFR.

[18] Consolidated version published on the Official Journal of the EU nr. C 93/265, 09th of March 2016.

In fact, having a look at the whole process we have to conclude this principle is fundamental in all actions and decisions where children are concerned, as is the **principle of non-discrimination** (no child can be privileged, punished or deprived of a right or guarantee due to his race, color, sex, religion, nationality or ethnicity, and when the child applies for asylum, must be ensured full equality in access to applicable procedures, which should be fair, equitable and effective), and the **principle of hearing the child**, the interest and opinion of the unaccompanied child must be taken into account, and the child must be informed of all possible options, as well as the consequences that may help he/she to make a decision.

Therefore, when an unaccompanied child arrives at the First Reception Center, the MS must provide all unaccompanied children with required information, within a period of 15 days (maximum) after they have lodged their application for international protection (Article 5), and considering the BIC principle, there should be special attention to provide **information** in a language that the unaccompanied children can understand, avoiding extensive information at the reception intake, and according to the child's needs and maturity level, the information must be provided in a special manner; (these needs and maturity are assessed individually by a child psychologist or social workers experienced in working with children)[19].

As mentioned before, the opinions of children should be heard and they can be involved in the decision-making process, especially in the designation of the **representative[20],** if the decisions taken do not take into account the children's opinion, the reasons should be properly explained to the children.

The principle of the BIC must also be considered when **reallocating** or **transferring** unaccompanied children to different housing alternatives (Article 24), taking into account the individual situation of the child, in particular age, maturity and the gender (e.g. transgender persons) as well as the cultural, linguistic and religious background of unaccompanied child. Considering the phase of the asylum procedure, the MS can provide different types of housing, e.*g*. transit centers, first/initial reception centers or special facilities for applicants in the Dublin procedure.

In the Portuguese case[21], if the unaccompanied child is 16 or younger, after filling an asylum application, the child is referred to *Centro de Acolhimento da Criança Refugiada* (Reception Center), in an open regime, at the same time that the Family and Juvenile Court is informed to designate the representative, and adopt the measures for the promotion and protection of children, and is also requesting to the Court to validate the referral to the Reception Center.

[19] See the **RUM**.

[20] There is no uniform definition of the term 'representative'. The Article 2(j) RCD recast defines the representative as 'a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary'

[21] Lei n.º 26/2014, 5th of May, (Asylum Law), which changed the Lei n.º 27/2008, 30th of June, establishes the conditions and procedures for granting asylum or subsidiary protection and the status of asylum seekers, refugees and subsidiary protection, transposing RCD regarding unaccompanied children, and there is a difference in procedures based on child's age, in line with the Article 21 of RCD.

In the case of unaccompanied and undocumented children who declare to be *minors of age*, although over 16 years old, they may remain[22] [23] in the *Centro de Instalação Temporária* (Temporary Installation Center) for some time in order to verify their identity/age and to obtain a referral from the appropriate Reception Center from the Family and Juvenile Court[24]. In these cases, the stay at the Temporary Center should not exceed 7 days[25].

However, according to very recent news, this 7-day limit is not being respected. In 2019, the average waiting time was 59 days, which is very worrying, and has been criticized by **UNHCR** and **ECRE**[26].

According to the AIDA Country Report in Portugal over the **detention of children**: «*In July 2018, following media reports on detention of young children at Lisbon Airport, and remarks by the Ombudsperson and UNICEF, the Ministry of Home Affairs issued an order determining, among others, that children under 16 years old (whether accompanied or not) cannot be detained in the CIT for more than 7 days. According to the information available to CPR, for the whole of 2018, a total of 24 unaccompanied children, of which one later determined to be an adult after a second-stage age assessment, were detained at the border for periods ranging from 1 to 15 days (on average 6 days). The information available to CPR regarding 51 children accompanied by adults reveals that they were detained at the border for periods ranging between 1 and 59 days (on average 16 days). While CPR has observed a tendency for the decrease of detention periods to which children were subjected following the order issued in July 2018 by the Ministry of Home Affairs, this practice remains concerning in light of international standards that prohibit any immigration detention of children*»[27].

Some numbers of asylum seekers in Portugal[28]:

Asylum seekers communicated to CPR and identified as vulnerable: 2017-2018		
Category of vulnerable group	**2017**	**2018**
Unaccompanied children	41	67
Accompanied children	194	219
Single-parent families	67	53
Pregnant women	17	9
Elderly persons	2	3

[22] The possibility of detaining migrants is provided for the Article 5 (f) of the European Convention on Human Rights, as well for the Article 27 (c) of the Portuguese Constitution. As for children, Article 37 of the Convention on the Rights of the Child states the detention can only be used as a measure of last resort and will last as short as possible.

[23] Case of ***Rahimi c. Greece***, C- 8687/08, ECHR, «*The detention of minors is decided for as short a period as possible (and not longer than 25 days or in exceptional situations not longer than 45 days) when it is established that alternatives to detention cannot be applied. Unaccompanied minors are kept in detention facilities supervised by the police until they are subsequently transferred to hostel accommodation. While every possible effort is made to trace the minor's family, a guardian is appointed to ensure the protection of the minor and his/her interests*».

[24] It should be noted that the detention of children in a migratory context is not (yet) expressly prohibited by international law or EU law, (for example the Directive 2008/115/EC that establishes the common rules and procedures in Member States for the return of illegal staying of national of other countries, that allows the detention of children). However, it is discouraged by Recommendation Rec (2003) 5 of the Committee of Ministers General Comment nr. 6 (2005) of the Committee on the Rights of the Child and in Paragraph 13 of the RUM, so the measure of detention of an unaccompanied child must have certain limits as any measure of detention can only be applied if the best interests of the child are safeguarded, in *ultima ratio* and after considering all possible alternative measures, following a fair procedure, the maintenance of the family unit is guaranteed and it can never entail the placement of children in conditions such that they may be subjected to torture, inhuman and degrading treatment.

[25] Order of the Portuguese Minister of Internal Administration, of 24 July 2018.

[26] Jornal Público, 17 June 2020, page 14.

[27] Compliance with the RUM, Strategic guidelines, paragraph 13.

[28] (AIDA, 2018, p. 50).

2. Identification

Despite continuously changing, age is an innate characteristic of one's identity. Changes in age may result in specific rights and obligations, with monumental implications for children[29], for example being considered an adult when turning 18 years old.

However, the age of 18 is not always the determining factor for acquiring new rights and obligations. Depending on national legislation, military service, age of emancipation, minimum age of criminal responsibility, the age of consent for marriage or the age for employment or sexual relations, may be reached at an earlier chronological age. As part of the personal status, age defines the relationship between the state and the person and consequently determines Articles 7 and 8 of the CRC state parties' age-related key obligations, where all children should be registered at birth and provided with documental evidence of their identity. Nonetheless, «*low birth registration rates in countries of origin is one of the reasons why international protection applicants may arrive in the EU without documents or with documents that are considered to be unreliable*»[30].

In Europe, «*age assessments are carried out primarily with children and young people who arrive as migrants or asylum seekers. They are generally initiated when a young person does not carry identity documents, due to the significant number of children and young people arriving from third countries who were never registered at birth (…) Age assessments are also conducted where the authenticity of the identity documents is questioned, where a person challenges the age established in a country of transit or where that age is questioned by the authorities of the country of arrival*»[31] [32].

A person recognised as a child should have access to proper care and benefit from a best interest's determination for the identification procedure. A person recognised as an adult should benefit from support according to their individual requirements[33].

The **RCD recast** specifies that: «*standards for the reception of applicants [that] suffice to ensure [applicants for international protection] a dignified standard of living and comparable living conditions in all MS*»[34] - compliance with paragraph 11 of the RUM.

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[29] «*The implications for children can be monumental. Their official "invisibility" increases their vulnerability and the risk that violations of their rights will go unnoticed. For example, without documents to prove their age, children are more vulnerable to underage recruitment into fighting forces, to being exposed to hazardous forms of work, to early marriages. They are also more vulnerable to being treated as an adult rather than a child or juvenile in criminal proceedings, and when seeking international protection as asylum seekers*», in *Age assessment practices: a literature review & annotated bibliography*, UNICEF, 2011, p. 1. Also, article 18 of the RUM, and the principle of *non-refoulement* (article 3 of the Convention against Torture and other cruel, inhuman or degrading treatment or punishment).

[30] In: *Practical guide on age assessment - Second Edition*, EASO, 2018, page 16.

[31] In: *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, CoE, 2017, page 6-9.

[32] «*Lack of birth registration and ID cards leads to greater opportunity for abuse of the system by law enforcement officials, plaintiffs and defendants either processing children as adults (to avoid complications or secure a conviction) or adults as children (to benefit from leniency in sentencing and improved conditions in juvenile rehabilitation centers*)», in: *Age assessment practices: a literature review & annotated bibliography*, 2011, UNICEF, page 1.

[33] In: *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, CoE, 2017, page 9.

[34] In: *Guidance on reception conditions: operational standards and indicators*, EASO, 2018, page 6.

Applicants for international protection are in general in a vulnerable position, due to the uncertainty of their status in a foreign country and often their experiences in the country of origin and journey.

The **reception officers** should be aware of and able to identify special needs, that should be recorded after they are detected and communicated to the relevant interested parties, in order to provide necessary guarantees and support. **Unaccompanied children** may have special reception needs. An unaccompanied child is a child who arrives in the territory of the MS unaccompanied by a responsible adult and during the time he or she is not effectively being cared for by such a person, including the child left unaccompanied after he or she has entered the EU territory[35] [36].

Besides that, the MS must **assess, identify and address** the special needs of those applicants in a timely manner and ensure that identification is also possible at a later stage if vulnerabilities are not apparent earlier[37].

In the **Portuguese case**, when before unaccompanied children between the ages of 16 and 18 years old, communication is immediately made from the reception at the EECIT to the Small Criminal Court of the jurisdictional area, Public Prosecutor's Office, and to the Family and Juvenile Court, referring to any evidence that this person attained the age of majority. In the case of children up to and including 15 years old, their installation in EECIT is not allowed, so the situation is immediately communicated to the Public Prosecutor's Office at the Family and Juvenile Court, and their entry into national territory must be promoted, and the child is taken into a host institution that the Court determines.

This practice is not common to all EU MS [38].

In cases where there is a lack of documentary evidence (such as passports, ID documents, residence cards or travel documents, other countries' religious or civil certificates, with any reference to the age of the applicant), authorities may be uncertain about the age of the person. When there is no documentation and the claimed age is not supported or is contradicted by elements of evidence assembled by the authorities, doubts are considered to be substantiated. Consequently, when the age is unknown and there are substantiated doubts, authorities may need to assess the age to determine whether the person is an adult or a child.

In the absence of contradicting evidence over the applicant's physical appearance, behaviour and psychological maturity, age assessment may not be necessary. However, if there is contradicting evidence based on the applicant's physical appearance and the documentation that indicates that he or she is a child, an **age assessment** could be required [39].

[35] In: EASO practical guide on age assessment - Second Edition, EASO, 2018, page 15.

[36] Article 2 of the Council Resolution, 26 June 1997, on unaccompanied minors of age who are nationals of third countries, states that «*Member States may, in accordance with their national legislation and practice, refuse admission at the frontier to unaccompanied minors in particular if they are without the required documentation and authorizations. However, in case of unaccompanied children who apply for asylum, the Resolution on Minimum Guarantees for Asylum Procedures is applicable*».

[37] In: EASO guidance on reception conditions: operational standards and indicators, EASO, 2018, page 39.

[38] «Approaches for obtaining information on the applicant's age are implemented before resorting to age assessment procedures: 21 EU+ states usually attempt to obtain information before deciding to conduct an age assessment (…); 2 EU+ states attempt to obtain information during age assessment (…)», in: EASO practical guide on age assessment - Second Edition, EASO, 2018, page 108

[39] In: EASO practical guide on age assessment - Second Edition, EASO, 2018, page 17.

Therefore, there is a need to **recognize best practices** to implement a concrete identification procedure at EU level, as a vector of the Common European Asylum Legislation, as well as a **needed common training**, implementing a **multidisciplinary approach** by the reception officers in the field (as recommended in the RUM, paragraph 15).

3. Age Assessment

a. Concept and framing. The need for Age Assessment

The age of the applicant is a material fact - as defined in the *EASO practical guide on evidence assessment* module, and material facts «*are (alleged) facts that are linked to one or more of the requisites of the definition of a refugee or person eligible for subsidiary protection.*»[40]. So – as mentioned above – unaccompanied children must prove their age in order to benefit from the afore mentioned rights (RUM, paragraph 18) and to be given asylum and refugee status – article 4, paragraph 3 of the Council Resolution 26 June 1997.

In order to prove their age, they must present evidence (that many times they don't have[41]), and such evidences must be credible[42]. When in doubt, they must undertake age assessment proceedings, in order to find out their chronological age.

Age assessment proceedings can be non-medical (interviewing, documents, visual assessment based on physical appearance) or medical, which can be radiation free (physical examination and sexual maturation observation, dental observation, MRI and ultrasound), or non-radiation free (imaging of bones or teeth).

The methods based on physical examination and sexual maturation observation include, in male applicants, observation of the penile and testicular development, pointing out the existence of beard, pubic and axillary hair, and the development of the laryngeal prominence. Referring to female applicants, it includes the observation of the breast and the hip's development, and also pointing out the existence of axillary and pubic hair.

There is also a different proceeding - the multidisciplinary and holistic approach - that combines many of those methods, which is the one recommended by EASO.

The EASO exhorts MS to analyze the available evidence first (the above mentioned documents) and to consult common databases (like the Schengen Information System, Eurodac or Interpol's Stolen and Lost Travel Documents). Then, MS should cross examine the applicant's relatives' documents, in order to estimate

[40] *Apud* EASO Practicle Guide on Age Assessment, page 26, footnote 21.
[41] Hindering factors to age information: non registration, due to public policies or uses in the countries of origin, or due to birth place (rural one) or to belonging to a minority group (tribes, …), and also the origin country being in war or armed conflict (or other circumstances that inhibit the origin states to document the birth). According to the United Nations information, available online on https://unstats.un.org/unsd/demographic/CRVS/VS_availability.htm (consulted on the 10th June 2010), also referred to, by the EASO Practical Guide on Age Assessment, cit., page 18, less than 10% of African countries reported all the live births.
[42] «*Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.*», paragraph 11 of Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, Office Of The United Nations High Commissioner For Refugees Geneva.

or to confirm the age of the applicants – although recommending precautions, in order not to jeopardize the children's safety. Only when those methods aren't reliable or complete enough, should MS adopt age assessment proceedings in circumstances of substantiated doubts – not merely for simple doubts. There is no legislation that sets the standards the exams should observe, nor the techniques that should be used[43].

In Resolution 1810 (2011), of the Council of Europe's Parliamentary Assembly, Paragraph 5.10., as well as in Paragraph 15 of the RUM, it is crystal clear that the assessment should not be intrusive. Meaning that no proceedings should interfere with the child's dignity and right to integrity[44], and also with his/her private or intimate life[45], nor with his or her autonomy of decision – RUM, paragraph 15.

And the EASO has different practical Guides – which are extraordinarily complete and clear, containing the best methods, urging MS not to use intrusive methods– especially those that include nudity (also discouraged by Resolution 1810 (2011))[46] – and advising giving applicants claiming to be children the benefit of the doubt, firstly suggested by the RUM, paragraph 15 (as well as paragraph 5.10 of the Resolution 1810), from the moment they arrive until their age is accurately estimated. Also, the Guide, compliance with paragraph 15 of the RUM, recommends an escalation of preferences to be followed when choosing the age assessment proceeding adequate for a specific child, taking into account his/her vulnerability and history.

The problem is that MS don't always apply the good practices proposed by the EU, and particularly by the EASO, and aren't obliged to do that.

Referring to the **Portuguese situation**, although genitalia observation wasn't used in the past, this changed in 2019 with the publication of a procedural note from the INMLCF, including that proceeding in the methods to be used, which represents regressing. Nevertheless, the most common medical method used in Portugal is related to dental observation and imaging, which isn't influenced by ethnicity or previous history (except for some specific pathologies that can delay dental development), and so has a smaller margin of error, when compared to other medical proceedings.

b. Criticism of the age assessment proceedings

It isn't possible to determine the exact age of a person. The margin of error is still big (and not necessarily used in favor of the applicant) and the method's accuracy depends on the age gap, on the applicant's history[48] and on race, ethnicity, nutritional variations, social background and the gender. So some

[43] Although, in 2011, in the Council of Europe's Parliamentary Assembly on the 15th April 2011, the MS were exhorted to develop of «*common guidelines on the assessment of the best interests of the child* […and] *age assessment*».
[44] 1st Paragraph of the European Convention on Human Rights, and Articles 3 and 37 of CRC and 1 and 3 of CFR, and Paragraph 15, of the RUM.
[45] Articles 6 and 8 of European Convention on Human Rights.
[46] See also the Council of Europe, Children's rights division, *Age Assessment Report: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration* (henceforth, Age Assessment Report), consulted on the 10th June 2020.
[48] EASO recalls that traumatizing situations can cause acceleration or delay on the child's development. Actually, post-traumatic stress disorder may cause premature biological ageing of between 5 years and 10 years of age - LADWIG, K-H., BROCKHAUS, A.C., Baumert, J. et al., *Post-traumatic stress disorder and not depression is associated with shorter leukocyte telomere length: findings from 3 000 participants in the population-based KORA F4 study,* Ouellette, M.M. (ed.), PLOS ONE, 2013, 8(7), e64762. doi:10.1371/journal.pone.0064762. *apud* EASO *Guide on Age Assessment*, p. 48

methods aren't adequate for every age gap[49]. It is for this reason that MS shouldn't adopt a standardized method. Instead, they should take into account the particularities of each case and then, through a multidisciplinary team and preferably through a multidisciplinary approach, adopt the most adequate method.

The EASO Age Assessment Guide (page 13) states that age assessment shouldn't be used as a routine practice – it should be the exception, and a reasoned one.

The non-medical proceedings are, evidently, the most suitable ones[50], although sometimes they are not accurate (for instance, when they are not based in documents). The x-ray methods (carpal x-ray and collar bone and pelvic bone x-ray) may cause far-reaching consequences, especially when not adopting the right method, and for that reason they have been restricted in France (since March 2016).

Besides that, some methods are too intrusive - especially those involving nudity, observation and anthropometric measurement of intimate parts of the applicant's body, which should not be used, in the view of the EASO and according to the article 25 of the APD recast. And specifically when the applicants have been through risky situations or subject to abuse. This philosophy is adopted by Malta and Italy and sexual maturity observation is absolutely prohibited in France[51]. But there are many countries still using them[52].

When intrusive, the assessments violate the right not to be submitted to degrading treatment or torture (article 3 of the European Convention on Human Rights) and the intimacy of private and family life (article 8 of the European Convention on Human Rights), and also children's dignity (first paragraph of the European Convention on Human Rights) and right to integrity – articles 3 and 37 of CRC, and 1 and 3 of CFR, and paragraph 15 of the RUM.

c. Burden of proof or a burden to prove?

Articles 4, paragraph 3, of the Council Resolution, 26th June 1997, 4, paragraph 3, c, of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 and the recital 24 of the APD recast – and, in Portugal, article 79.º of Law nr. 26/2014, the 5th of May –, establish that children must prove their age in order to obtain Refugee status or Subsidiary Protection. Besides that, the **APD recast**, in its Article 25, paragraph 5, and paragraph 5.10, of Resolution 1810 (2011) determine the presumption of minority, if substantiated doubts persist after age assessment examinations.

Nevertheless, the benefit of the doubt referred to by the Practical Guide on Age Assessment, that should temper the proceedings and should lead to the avoidance of medical examinations, is only established in the paragraph 5.10 of the Resolution 1810 (2011) and in paragraph 15 of the RUM, but wasn't included in any Directive.

[49] In the Case of ***Abdullahi Elmi and Aweys Abubakar v. Malta*** (Applications nr. 25794/13 and 28151/13), page 20, one can read a quote from a report entitled "*Unaccompanied Minor Asylum-Seekers in Malta: a technical Report on Ages Assessment and Guardianship Procedures*", issued by Aditus, a local NGO, which says: «*Most experts agree that age assessment is not a determination of chronological age but rather an educated guess. There are risks that due to the inaccuracy of age assessment techniques, persons claiming to be minors may have their age mis-assessed*».
[50] RUM, Paragraph 15.
[51] EASO Age Assessment Guide, cit., page 36.
[52] 11 states use physical development assessment, and 7 use sexual maturity assessment - EASO Practical Guide on Age Assessment, page 58.

As we all know, Recommendations and Resolutions consist of *soft law* sources, and as such are not binding (article 292, of the Treaty of Functioning of the European Union) – unlike Directives. So we can conclude that if MS don't follow the *soft law* instrument[53], **the presumption of minority only applies after the examination proceedings have been completed and doubts persist**. Which results in children bearing the burden of proof.

The EASO says that this is not so (page 69, Practical Guide on Age Assessment, cit.), evoking the EASO evidence assessment module, and Recital 25, Articles 12(a), 13, 2 (a) and 25 of the APD, and Article 4 (1) of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted (recast). . For the EASO, it is a shared burden of proof. We understand that children aren't asked to demonstrate their age with certainty[54], or beyond a reasonable doubt. But with no (binding) rules, there is no guideline on where the doubt is bearable and where it isn't… So, with all due respect, we cannot agree with a shared burden of proof. Not with the current lack of binding legislation.

Children have to bring documentation (when existing), elements that can demonstrate their age, and have to be convincing in an interview. If they don't accomplish a reliable, flawless version of their age, they must submit themselves to examinations. And only before an inconclusive result, or before a reasoned refusal, will they benefit from the presumption of minority (if the State doesn't decide otherwise).

Children that don't speak the language, don't recognize the culture, sometimes can't understand what is happening and that have been traumatized enough to be spared from invasive examinations[55].

So, in our modest opinion, **the problem is the lack of a binding rule**, that keeps a standard on age assessment for all MS. There are almost only *soft law* instruments, which may not be followed – or, in fact aren't followed[56]. In fact, the presumption of minority is established only by a single Directive (APD recast, article 25 (5))[57], but it only comes into force after examinations have been conducted, because the benefit of the doubt isn't determined in a binding legal instrument[58].

So what good can a presumption do if it is brought after violating all the above mentioned rights of the applicant?

Concerning this matter, we highlight ***Abdullahi Elmi and Aweys Abubakar v. Malta*** (Applications nr. 25794/13 and 28151/13), 22 November 2016, concerning two children (asylum-seekers) that were in detention

[53] According to the EASO Practical Guide on Age Assessment, cit., page 38, only 16 states apply the benefit of the doubt.
[54] Paragraph 3 of the Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, of the Office of the United Nations High Commissioner For Refugees Geneva.
[55] In this matter, we evoke the Case of ***Yazgüi Yilmaz versus Turkey*** (Application nr. 36369/06), 1st February 2011, in which a girl had to undertake a gynecological examination, without her guardian's consent.
[56] According to the EASO Guide on Age Assessment, page 58, currently, there are at least 11 states using physical development assessment, and 7 using sexual maturity assessment, besides other practices discouraged by EASO, mentioned in the same source.
[57] As well as the right to information and the obligation of an informed consent (of the child and of his/her representative).
[58] According to the EASO Practical Guide on Age Assessment, page 28, two states don't even apply the benefit of the doubt. Germany applies but only after exhausting all the assessment proceedings available, and the decision must be made by court - Oberlandesgericht (Higher Regional Court) Karlsruhe, Decision dated 26 August 2015 — 18 UF 92/15 (EASO, cit., p. 87).

(despite the Recommendation Rec (2003)5 of the Committee of Ministers of the Council of Europe, to MS, on measures of detention of asylum seekers, adopted by the Committee of Ministers on 16 April 2003, and of General Comment nr.6 (2005) of the Committee on the Rights of the Child and of the RUM, paragraph 13) while waiting for the outcome of their age assessment procedures. The ECHR has deferred their complaint, concerning the lack of conditions, degrading treatment during detention and also the length of the age assessment results, but failed to point out that the benefit of the doubt should have been respected whilst waiting for the result. And this is justified by the nature of that benefit: it isn't mandatory. Also, the EASO Practical Guide on Age Assessment (page 31), although recommending that the application not be refused without reason and that the applicant should not be presumed to be an adult only because of a refusal, leaves the interpretation of the refusal to a case-by-case basis, which creates arbitrariness.

Note that the **APD recast**, in its article 25 (5, c) and in the last paragraph, has a negative formulation of the rule (it says the refusal should not be an obstacle to the international protection application, if it is the unique motive), when it should demand that no decision against the minor should be taken due to a refusal. Some countries extract conclusions against the children from their refusal[59] which consist of a degrading treatment, prohibited by article 3 of the European Convention on Human Rights.

There are recommendations, but, once again, no binding legal instrument (since the Directive is sparse on this point). The *in dubio pro refugio* or *in dubio pro minore,* previous to age assessment, is not contemplated in the Directives. This reinforces the idea of a burden of proof borne by children.

d. Building a path to a better solution – some suggestions

Facing the facts at hand, we aim to offer some suggestions for the EU, in order to find a way to avoid – if not to exterminate – these bad practices and violations of human rights and of children's rights. We were inspired by the EASO Guides, and the consulted bibliography, by the interviews we conducted and also by our own beliefs on a better proceeding.

We humbly suggest that EU issues a **binging legal instrument on these matters**, specifically implementing some practices EASO recommends, and also some new ideas. We propose establishing:

1. A **binding benefit of the doubt,** that begins from the moment of arrival until such time as the age assessment is concluded. This means that the applicants are treated as if they were children, and only if proven they aren't, the States treat them as adults. Representing the **subsidiary nature of age assessment** – only a substantiated doubt should trigger the proceedings[60].
2. A **binding preference for non-medical proceedings and establishing a mandatory scale of preferences to be followed, and, whenever possible, also to adopt**, a holistic and multidisciplinary

[59] Only 15 Member States «*give the applicant the possibility to refuse age assessment, regardless of the method*», three states don't even recognize the possibility of refusal, six states conclude the applicant is an adult if he/she doesn't offer a reason for the refusal or additional elements that prove the childhood, fourteen states take the refusal into account, and six states automatically consider the applicant to be an adult when he/she refuses age assessment. (EASO Practical Guide on Age Assessment, cit., page 32).

[60] As suggested by EASO Age Assessment Practical Guide, page 47, and the RUM – paragraph15.

approach, with trained experts, rather than a sectioned one (as establishes by the RUM, paragraph 15). Also, it would be of great importance to raise awareness in the entire community, including teachers, reception authorities, social workers, judicial staff, etc.

3. A **binding prohibition of intrusive methods**[61], **or**, at least, **the demand of a judicial order in adoption of medical proceedings**. Medical proceedings would therefore be used as *ultima ratio* and only after a court order.[62]. The decision on which judiciary entity has authority in this matter could be left to the MS' discretion – whether it is the Public Prosecutor, or the Judge. **The court's decision must consider** the margin of error in the examinations, the actual need for them, the available documentation and other evidences, and the principle of proportionality (intrusiveness *versus* accuracy and need). And the proceedings should take place «*in a friendly and safe atmosphere*»[63].
4. A **mandatory right to appeal from the decision over the applicant's age** – only in this way can we ensure the right to an effective remedy (article 13 European Convention on Human Rights)**.**
5. A **Double vulnerability principle**[64] **matched with mechanisms to avoid secondary victimization** via invasive proceedings, if not abolished. Children are vulnerable human beings, but some of them, in addition to being children, also suffer from other vulnerabilities – such as having been victims of abuse, or having been through risky situations, or have a disability… We call those situations double vulnerability cases, and must be identified and treated accordingly. Since those methods can re-traumatize children (creating a secondary victimization)[65], especially when they are in a double vulnerability situation, that (combined with their particular circumstances) should determine how the assessment will evolve, in matters such as the exact examination they will be put through, the gender of the interviewer or the expert, etc.. On this particular point, we believe in creating the proper atmosphere in the examination rooms that could reduce the stress children are exposed to[66].
6. A **standardized screening form** to evenly identify vulnerability factors and guide the assessment, incorporated in the best interests´ assessment suggested by the EASO, and also to give standards for estimating the applicant's age.
7. **Urgency in the judicial proceedings and the age assessment procedures**[67], keeping in mind that children's time isn't the same as the adults'. They *ticktack* a lot quicker, so urgency is the only way to assure the right to an effective remedy and to a fair trial (articles 6 and 13 of European Convention on Human Rights)[68]. Concerning this, we recall the Case of ***Mugenzi v. France*** (Application nr. 2260/10),

[61] Already recommended by Paragraphs 5.10 of the Resolution 1810(2011), 15 of the RUM, and article 25 of the APD Recast.
[62] There are too many rights in jeopardy to be a decision in the doctors' hands – even if they are specialists.
[63] Age Assessment Report, cited.
[64] Already granted – although with a different nomenclature – in article 21 of the RCD recast, and included in the RUM (paragraph 1).
[65] See paragraph 15, of the RUM.
[66] In Portugal, although there aren't rooms adapted to children, the professionals are trained to create an involvement that helps children to be more loose and relaxed.
[67] The RUM, in its paragraph 20, exhorts for the need to prioritize the asylum proceedings, as well as the article 4, paragraph 2 of the Council Resolution of 1997, but don't specify the age assessment procedures.
[68] In Portugal, age assessment reports are ready in 2 to 7 days. 2 days in urgent cases – such as situations including detention – and a few more days in the other cases.

10th October 2014, that shows us how these procedures can take a long time and be harmful to the applicant. In this case the two applicants (separated from their family) claimed to be 15 and 17 years old and the medical proceedings took two years, which is neither-acceptable, nor useful, time for children or youngsters. Similar circumstances can be found in the Case of ***Abdullahi Elmi and Aweys Abubakar v. Malta*** (Applications nr. 25794/13 and 28151/13), and in the Case of ***Mahamed Jama and Moxamed Ismaaciil and Abdirahman Warsame v. Malta*** (Applications nr. 52160/13 and 52165/13).

8. The ***in dubio pro refugio or in dubio pro minore*** **principle when the margin of error is bigger than the difference between the estimated age and the age of 18 years old**. Which means limiting the maximum estimated ages to submit children to medical examinations: if an assessment proceeding has a margin of error of two years, for instance, it shouldn't be used in a child that is apparently 19 years old (or 17), because it won't dispel the existing doubt. Is these cases, if there is no other proceeding available, the applicant must be presumed to be a child. Also, when age assessment is undertaken (because age differences are bigger than the margin of error) the principle should demand using the margin of error in favor of the applicant[69].
9. The **Denmark's institute of the *bisidder***, that consists of a person who is appointed by the Red Cross to be present at the examinations of unaccompanied children, when the assessment is made before appointing a guardian[70].
10. The **obligation of giving the child concrete information, in his/her native language**, in a child-friendly manner, considering the age range and the implications of the proceedings and of the refusal[71].
11. **Minimum standards of written information reports[72], in order to avoid redundancy,** that only contributes to secondary victimization and to contradiction, which are very common in Dublin Regulation cases. It should be mandatory for MS to include in the reports the margin of error of the assessment used[73], and to include it in a clear and friendly manner. In addition also an obligation to give the applicant written information about the outcome and reasons[74]. A *non-redundancy* principle and a principle of mutual recognition in between MS should be established. Summoning the Tampere spirit, there should be true freedom of circulation (also) for these official documents, that should be recognized without a specific previous and lengthy proceedings, or a repetition of the assessment.

[69] Age Assessment report, cited, page 29.
[70] EASO Age Assessment Practical Guide, page 27.
[71] The paragraph 5 a), of the article 25 of the APD Recast already establishes the obligation to inform children about the age assessment proceedings and the refusal's consequences, but doesn't demand the use of the children's native language, nor the use of a child-friendly explanation. It also doesn't demand the MS to inform children about the consequences of the age assessment proceedings *per se*.
[72] In Portugal, the interviews consist in an anamnesis, which sometimes is sparse, mainly because of the lack of information existent in the age assessment request.
[73] In Portugal, all the reports have the margin of error and use more than one method (within the same assessment proceeding – for instance, four types of dental imaging approach) in order to expose the accuracy of the estimate. In Portugal, in «*the period between 2009 and 2013 age estimations have been performed on 82 unaccompanied asylum seeking children whose given ages were queried by SEF, to the South Branch of INMLCF*», in *Age Estimation of Unaccompanied Minors: A Portuguese Overview*, PEREIRA, Cristiana, 2015, p. 2.
[74] Which hasn't happened in the above mentioned cases of ***Abdullahi Elmi and Aweys Abubakar* v. *Malta* and *Mahamed Jama and Moxamed Ismaaciil and Abdirahman Warsame v. Malta*.**

III. Conclusions

In recent years, due to the large migratory flow of refugees, the EU has been heavily concerned with the development of protective and non-discriminatory policies, especially when it comes to unaccompanied children, like the RCD, always taking into account respect for the principle of the BIC, that runs through the entire Directive (article 23), in line with the 1989 CRC, and, the CFR, the principle of non-discrimination and the principle of hearing the child.

As childhood continues to be understood in different ways by different societies and where low birth registration rates still exist in countries of origin, whilst documentation of a person's age is fundamental for securing protection, we consider there is a need to recognize best practices in order to implement a concrete identification procedure at EU level, as well as a needing of common training, implementing a multidisciplinary approach by the reception officers in the field.

Children's rights (listed in the RCD Recast and paragraph 18 of the RUM) depend on proof of their age. When they cannot do this properly, they must undertake age assessment proceedings, which vary from state to state. Since the presumption of minority only comes into force after age assessment proceedings, we believe the burden of proof is assumed by children, with the exposure of their bodies.

Age assessment can be very intrusive and truly can offend fundamental rights of the applicants, claiming to be children. The lack of binding legal instruments only contributes to the arbitrariness in the choice of the proceeding and in the management of the child's situation until the chronological age is estimated.

Despite the sentiment that has been growing throughout Europe, MS still have practices that offend children's rights, specifically integrity, dignity and right to privacy, and family life, and to their best interest, submitting them to degrading treatments – which are against the CFR, CRC, the above mentioned Directives, the RUM and the European Convention on Human Rights.

We believe some of the mentioned methods should be abolished or at least decided by a Judge or a Public Prosecutor. We also suggest that a binding legal instrument should be issued, containing guarantees to applicants claiming to be children.

Finally, we note that the ECHR jurisprudence cannot demand the observation of the benefit of the doubt because it also is reduced to *soft law* instruments, and that guarantee could really make a difference when an applicant, claiming to be a child, is detained or is treated, in other ways, like an adult.

Compliance with all the Recommendations and Resolutions mentioned, in which EU regrets some failure in securing children's rights, we believe we don't always have to submit children to these methods. We dream of a(n European) world with no burden of proof borne by children('s bodies).

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CENTRO
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THEMIS COMPETITION 2020

SEMI-FINAL B

EU and European Family Law

FIRST PLACE

TEAM PORTUGAL

Catarina BORGES DA PONTE | **Melanie-Anne MORAIS** | **Mónica GONÇALVES MARTINS**

Tutor: Chandra GRACIAS

29 June - 1 July 2020

Held online in accordance with the e-Themis rules

Judge Markus Brückner
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2.
Apresentação da Equipa

Accompanying Teacher

Alexandre Au-Yong Oliveira

CENTRO
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SEMI-FINAL A

From Strasbourg to Luxembourg,
A Contribution To Untangle European Case Law Regarding Ne Bis In Idem

Auditores:
CAROLINA BELO LUCAS
INÊS LOPES FURTADO
MARIANA QUEIRÓS MARQUES

Alexandre Au-Yong Oliveira*

O texto que se segue é da co-autoria das Auditoras de Justiça do 35.º Curso Normal de Formação de Magistrados do Centro de Estudos Judiciários (CEJ), **Carolina Belo Lucas**, **Inês Lopes Furtado** e **Mariana Queirós Marques**, e foi elaborado no âmbito do concurso Themis. Coube-me a mim a honra de ser o docente responsável pela participação da delegação portuguesa do CEJ e é em tal qualidade que agora escrevo esta breve introdução.

O texto, denominado "From Strasbourg to Luxembourg, A Contribution To Untangle European Case Law Regarding *Ne Bis In Idem*", complementado com uma apresentação vídeo, foi defendido online pelas Auditoras na meia-final A - Cooperação Judiciária em Matéria Penal - que ocorreu, via plataforma Zoom, nos dias 7 a 9 de julho de 2020.

O trabalho das Auditoras alcançou o **2.º lugar,** num total de 10 trabalhos, que foram avaliados por um júri composto por 3 reconhecidos especialistas da área. A equipa portuguesa logrou, assim, a par da equipa primeira classificada (Hungria), a passagem à Grande Final, prevista para os dias 3 a 6 de novembro em Bonn, Alemanha.

Os trabalhos em competição foram apresentados por formandos das magistraturas apoiados pelas respetivas escolas, oriundos de diversos países da União Europeia e de outros países europeus, em concreto, Portugal, Hungria, Roménia, França, Itália, Polónia, Estónia, Espanha, Croácia, Bósnia e Herzegovina.

O elevado nível geral dos trabalhos apresentados a concurso revelou, tal como vem sendo habitual no concurso Themis e, em particular, no domínio da cooperação internacional em matéria penal, um grande investimento por parte dos participantes, impulsionados, em regra, pelas diversas escolas nacionais.

Cremos que este ano o mérito de todos os participantes é acrescido devido às circunstâncias excecionais criadas pela pandemia de Covid-19. Manter um elevado nível de motivação e ritmo de trabalho neste contexto muito particular foi, certamente, extremamente difícil para cada um dos participantes.

* Juiz de Direito e Docente do CEJ.

No que toca ao texto das Auditoras portuguesas, gostaria de salientar a extrema dificuldade do tema tratado – o princípio *ne bis in idem* – e a profundidade do respetivo tratamento, com a análise crítica dos recentes desenvolvimentos na jurisprudência do Tribunal Europeu dos Direitos Humanos e Conselho da Europa e do Tribunal de Justiça da União Europeia.

O tema tratado, se bem que responde a um problema fundamental – o de não ser julgado repetidas vezes pelo mesmo facto ou, porventura, pelo mesmo desvalor ou ilícito - é certamente um dos mais complexos já a nível interno, quando tentamos responder o que deve considerar-se um "mesmo crime" à luz do art. 29.º, n.º 5 da nossa Constituição.

Este problema inevitavelmente agudiza-se quando tentamos "combinar" vários ordenamentos legais entre si, em especial ao nível da União, no seio do qual se pergunta o que constitui um "mesmo delito" ou "*same criminal offence*" à luz do art. 50.º da Carta dos Direitos Fundamentais da União Europeia, os "mesmos factos" ou "*same acts*" à luz do art. 54.º da Convenção de Aplicação do Acordo Schengen ou ainda "uma infração" ou "an offence", para os efeitos previstos no art. 4.º do Protocolo 7 anexo à Convenção Europeia dos Direitos Humanos. Se multiplicarmos todas estas expressões ou conceitos pelas demais línguas oficiais dos Estados Membros (num total de 24 línguas) e depois tentarmos pensar todos os ordenamentos jurídicos em simultâneo, talvez tenhamos um vislumbre da essência do problema tratado pelas corajosas Auditoras do 35.º Curso do CEJ!

É, pois, este o tema tratado pela equipa portuguesa no texto que se segue, tema difícil e complexo, tecnicamente exigente, e que, por isso, só elevadas personalidades poderiam sequer querer compreender em profundidade.

Alexandre Au-Yong Oliveira
CEJ, Lisboa, 10-07-2020

Vídeo da apresentação

Themis Presentation - Portuguese Team 2020

https://youtu.be/vtzdsz_LN4k

CENTRO
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2.

2.1.

From Strasbourg to Luxembourg, A Contribution To Untangle European Case Law Regarding *Ne Bis In Idem*

Team Portugal

Carolina Belo Lucas | Inês Lopes Furtado | Mariana Queirós Marques

Accompanying Teacher

Alexandre Au-Yong Oliveira

CENTRO
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JUDICIÁRIOS

FROM STRASBOURG TO LUXEMBOURG

A CONTRIBUTION TO UNTANGLE EUROPEAN CASE LAW REGARDING *NE BIS IN IDEM*

TEAM

Trainee Judge Carolina Belo Lucas

Trainee Judge Inês Lopes Furtado

Trainee Prosecutor Mariana Queirós Marques

TUTOR

Judge Alexandre Au-Yong Oliveira

2020

EUROPEAN UNION

«Ten years ago on 1 December, the full force of the EU's Fundamental Rights Charter came into play. This landmark bill of rights for the EU has the power to make a difference. One decade on, it is yet to reach its full potential. This is changing, slowly but surely».

Building on 10 years of the Fundamental Rights Charter
1 December 2019

INDEX

I. Introduction

Only 230km separate the main guardian of the European Union treaties from the foremost guardian of the European Convention on Human Rights. Perhaps this short distance is not a matter of chance. Strasbourg and Luxembourg are getting closer as the Union expands to the east.

It would be a useless task, because doomed to failure, to try and cover the full scope of the *ne bis in idem* discussion in this brief essay. Therefore, we will limit ourselves to trying to answer an apparently simple question: does the circumstance of a person being subject to a duplication of proceedings, although of a different nature, in respect of the same facts, fall within the scope of protection of the principle under consideration?

The right not to be prosecuted or punished twice for the same offence is a fundamental principle of criminal law. The principle of *ne bis in idem* has two key components: the *bis* and the *idem*. Even though the discussions around the notion of «same facts»[1] and the meaning of being «definitely»[2] convicted or acquitted have not yet vanished (although softened), the question mark on knowing if a given proceeding has criminal nature and if there is therefore an existing duplication of proceedings is still very much in bold.

Although the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU) both refer to «criminal proceedings», it is important to clarify the nature of the offenses at stake and specifically determine whether they qualify as criminal or not.

The increasing autonomy and importance given to administrative sanctions, especially in the areas of tax and competition law, environmental policies and public security, and the possible overlapping of these offenses with criminal law has been claiming in-depth studies on this topic. In fact, the description of the same conduct in an identical manner in both branches of law, entails that the legal framework applicable to the facts, falls simultaneously within the scope of Criminal Law and Punitive

[1] The CJEU issued the following five decisions regarding the meaning of «same facts»: *Van Esbroeck* (C-436/04, judgment of 9 March 2006), *Van Straaten* (C-150/05, judgment of 28 September 2006), *Gasparini* (C-467/04, judgment of 28 September 2006), *Kraaijenbrink* (C-367/05, judgment of 18 July 2007), *Kretzinger* (C-288/05, judgment of 18 July 2007).

[2] Regarding the meaning of definitive decision, the CJEU issued the following eight cases: *Gözütok and Brügge* (C-187/01 and C-385/01, judgment of 11 February 2003), *Miraglia* (C-469/03, judgment of 10 March 2005), *Van Straaten*, *Gasparini*, *Turanský* (C-491/07, judgment of 22 December 2008), *Mantello* (C-261/09, judgment of 16 November 2010), *M.* (C-398/12, judgment of 5 June 2014), *Kossowski* (C-486/14, judgment of 29 June 2016).

Administrative Law, leading to a proliferation of offenses and sanctions concerning the same reality or phenomenon.

The fact that the protection granted in respect of similar facts is so scattered and there is a variety of entities competent to apply dubious sanctions are factors that obviously increase legal uncertainty. Indeed, the need to identify and classify the legal framework under which sanctions should be applied represents a challenging exercise in defining the limits of those two branches of law.

Both the ECtHR and the CJEU have developed the topics that we have outlined above, leaving the national courts the task of applying the internal legal system in terms that are compatible with the fundamental rights under the Convention and the Charter.

Therefore, this essay focuses primarily on the case law of the ECtHR and the CJEU regarding the *ne bis in idem* principle, with the view of presenting, in a necessarily brief and concise manner, the relevant legal framework, decisions of the Courts, and some conclusions on the interpretation of the principle.

This essay also analyses the absence of uniformity in the interpretation and use of diverse criteria in addressing identical situations by the two different courts, which leads to the conclusion of a need to reach a compromise solution in order to avoid the significant margin of discretion that exists in an area that needs to be of freedom, security and justice.

Finally, this paper sustains the need of an harmonization on the approach to the *ne bis in idem* principle adopted by both Strasbourg and Luxembourg Courts in order to set out the exact boundaries of both the criminal and administrative domains.

II. The principle of *ne bis in idem* – legislative dispersion

The right not to be tried or punished twice is an old principle common to the internal legal systems of the civil law traditions of the Member States (MS) of the European Union, and to the common law legal tradition, generally known as «double jeopardy».

In some Member States, the principle is expressly foreseen at a constitutional level, as in Cyprus (article 12.º, § 2), the Czech Republic (article 40.º, § 5 of the GR-Declaration), Estonia (§ 23), Germany (article 103.º, § 3)[3], Lithuania (article 31.º), Malta

[3] Wolfgang Schomburg, *Germany, concurrent nationaland international criminal jurisdiction and the principle ne bis in idem*, Revue internationale de droit pénal 2002/3-4 (Vol. 73), pages 941 to 964.

(article 39.º, § 9), Portugal (article 29.º, n. º 5), Slovakia (article 50.º, § 5), Slovenia (article 31.º)[4] and Spain (article 25.º, paragraph 1)[5].

Other legal systems adopt the principle in their relevant criminal statutes. In fact, the *ne bis in idem* principle can be found, at the level of procedural codes, in Belgian (article 360.º)[6], France (368.º)[7], Greece (article 57.º)[8], Italy (article 649.º)[9], Poland (article 17.º § 1, point 7)[10] and Romania (article 10, paragraph 1, point j))[11], whereas in The Netherlands[12] it is foreseen in article 68.º of the Penal Code. Unlike in these Member States where the principle is expressly foreseen in legal statutes, in the case of Finland the principle is based on customary law and provisions setting forth the legal consequences of *res judicata*.

As we can sense from these legal frameworks, there is no doubt about the paramount importance that the Latin adage plays in the criminal law and practice of EU Member States.

In the European Union, the first transnational *ne bis in idem* rule appeared in the Convention Implementing the Schengen Agreement (CISA)[13], namely in Articles 54 to 58, which states: «a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being

[4] A general approach of the principle in Slovenian law can be found in Ivan Bele/Vid Jakulin, *Slovenia ne bis in idem*, Revue internationale de droit pénal 2002/3-4 (Vol. 73), pages 1071 to 1089.

[5] In Spanish Constitution, although the principle of ne bis in idem is not expressly formulated, it is rather understood – according to repeated case law – as part of the principle of classification and legality. *Vide*, Consejo Superior de Investigaciones Científicas - *Spanish Yearbook of International Law – 1993/1994*, Martinus Nijhoff Publishers, vol. III, p. 409.

[6] It's interesting to notice that Belgium changed its internal legal system twice – in 2012 and in 2019 - in order to be compatible with the case law of ECtHR and CJEU. The first law that reconciles the Belgian legislation with supranational case law established the *una via* principle in the prosecution of tax offences and in administrative penalties of a criminal nature. This is relevant since the law became effective in the post-*Zolotukhin* but pre-*A & B Norway* period and before the CJEU's judgments in *Åkerberg Fransson* and *Menci*.

[7] Laurent Desessard, *France, les compétences criminelles concurrentes nationales et internationales et le principe ne bis in idem*, Revue internationale de droit pénal 2002/3-4 (Vol. 73), pages 913 to 940.

[8] Ilias Anagnostopoulos, *Greece, ne bis in idem*, Revue internationale de droit pénal 2002/3-4 (Vol. 73), pages 965 to 979.

[9] Mario Pisani, *Italie, le principe ne bis in idem au niveau international et laprocédure pénale italienne*, Revue internationale de droit pénal 2002/3-4 (Vol. 73), pages 1017 to 1029.

[10] Leszek Kubicki, *Pologne, les compétences criminelles concurrentes nationales et internationales et le principe ne bis in idem*, Revue internationale de droit pénal 2002/3-4 (Vol. 73), pages 1037 to 1050.

[11] Bogdan N. Bulai, *Romanian national report on the subject concurrent nationaland international criminal jurisdiction and the principle "ne bis in idem"*, Revue internationale de droit pénal 2002/3-4 (Vol. 73), pages 1051 to 1064.

[12] André Klip/Harmen Van Der Wilt, *The netherlands non bis in idem*, Revue internationale de droit pénal 2002/3-4 (Vol. 73), pages 1091 to 1137.

[13] CISA was based on the Schengen Agreement from 14 June 1981, concerning the gradual abolition of controls at common borders. It was signed on 14th June 1985 by the Governments of the Benelux States, the Federal Republic of Germany and the French Republic and, at this point in time, it is signed by thirty states.

enforced or can no longer be enforced under the laws of the sentencing Contracting Party».

Later, the principle was also established in the two catalogues of fundamental rights of the European Union, namely in Article 4(1) of Protocol 7 annexed to the European Convention on Human Rights and in Article 50 of the Charter of Fundamental Rights of the European Union, respectively under the headings: «right not to be tried or punished twice» and « right not to be tried or punished twice in criminal proceedings for the same criminal offence».

The main distinction between these two provisions concerns its geographical scope. While the ne *bis in idem* embodied in the Convention has a primarily domestic scope, restricting its protection to decisions given by national authorities, the principle depicted on the Charter also applies to decisions made by other States, preventing the renewal of the judgment against the same person when there is a definitive decision on the same facts outside the national territory. This restriction to the domestic level was confirmed by the ECtHR several times**.** In fact, the expression «under the jurisdiction of the same State» limits the applicability of Article 4 of Protocol no. 7 to the national level. Consequently, claims regarding duplication of proceedings involving more than one State have been declared inadmissible by the ECtHR[14].

It should be noted that all EU Member States have joined the ECHR[15], giving their nationals the right to submit claims to the ECtHR, either for acts or omissions of the States that, under domestic law, breach the provisions of the Convention, or when States implement an EU standard in terms that could potentially violate the rights provided for in the legal act protected by the Strasbourg Court.

[14] In this regard, pursuant to its constant case-law, the ECtHR declared the applicant's claim in the case *Krombach v. France* (application no. 29731/96) incompatible *ratione materiae*, under Article 4 of Protocol No. 7. This case concerned the applicant's criminal conviction in France for events in respect of which he claimed to have been previously acquitted in Germany. The Court held that Article 4 of Protocol no. 7 did not prevent an individual from being prosecuted or punished by the courts of a State Party to the Convention on the grounds of an offence of which he or she had been acquitted or convicted by a final judgment in another State Party. Since the applicant had been prosecuted by courts in two different States, namely Germany and France, Article 4 of Protocol No. 7 is not applicable in the present case.

[15]As to the application of Protocol no. 7 of the ECHR, it is important to bear in mind that Austria, Germany, Italy and Portugal made declarations and France made a reservation. In fact, Portugal made the following reservation: by "criminal offences" and "offence" in Articles 2 and 4 of the present Protocol, Portugal understands only those acts which constitute a criminal offence under its internal law.

Finally[16], in the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States[17], *ne bis in idem* appears as a cause of mandatory non-execution of the European arrest warrant (Article 3, no. 2)[18], prescribing that the executing judicial authority shall refuse to proceed with the European arrest warrant «if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State».

III. Strasbourg and the European Convention of Human Rights: article 4 Protocol no. 7 of ECHR

Article 4, Protocol no. 7, of the ECHR stipulates that «no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State».

Thus, the *ne bis in idem* principle requires the fulfilment of the following three criteria: (i) both proceedings (administrative and criminal) shall have a criminal nature, (ii) the offence shall be the same in both proceedings and (iii) a duplication of proceedings must occur. First of all, for the purposes of this essay, we need to determine the extent of the expression «criminal nature».

A preliminary approach to this concept was developed by ECtHR, for the first time, in 1976 in the *Engel and Others v. the Netherlands* case[19]. Under the scope of this case, the ECtHR established three criteria - which became known as the *Engel criteria* - for determining that concept, based on the meaning provided for in Article 6, paragraph 1 of the ECHR.

Thus, in order to determine whether a sanction has a criminal nature, it is important to take into account the legal classification of the offence in the internal legal system of the State, the nature of the offense and, lastly, the degree of severity of the

[16] In what regards international judicial cooperation in criminal matters, *ne bis in idem* appeared as an impediment to cooperation, at first, in article 9 of the European Extradition Convention of 1957, as a cause for refusal of extradition. Subsequently, it was foreseen in articles 53 to 57 of the European Convention on the International Validity of Criminal Judgments of 1970.

[17] Framework Decision no. 2002/584 / JHA, of the Council, of 13 June.

[18] In *Gaetano Mantello* case, regarding the definition of the same facts, the CJEU confirmed that article 3 (2) of the Framework Decision on the European Arrest Warrant should be interpreted in accordance with the case law relating to article 54 of CISA.

[19] Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

sanction with which the offender is punished, being therefore alternative and not necessarily cumulative criteria (*Sergey Zolotukhin v. Russia*, *Jussila v. Finland* and *Mihalache v. Romania*)[20]. While the first criterion does not raise doubts, the second and third criteria need to be further analysed.

As regards the second criterion, that is, the nature of the offense, it is important to consider the *Grande Stevens v. Italy*[21] judgement, which addressed actions involving market manipulations, punished by Italian law, simultaneously by CONSOB[22] and the Courts. In this case, the ECtHR understood that the interests protected by the rule, that is, the integrity of financial markets and the maintenance of public confidence in the safety of economic transactions, are protected under criminal law and, therefore, the nature of such proceedings was beyond the administrative scope.

The third *Engel* criterion is extremely broad and uncertain which entails that it comprises not only sanctions involving the deprivation of liberty[23], but also moderate or high pecuniary sanctions[24]. For instance, in cases *Klein v. Austria*[25], *Luksch v. Austria*[26] and *Banfield v. the United Kingdom*[27], the ECtHR found not to be of criminal nature, and therefore no violation of article 4, in cases where the disciplinary measures applicable consisted in losing the right to practice as a lawyer or a temporary suspension of practicing as an accountant or even a dismissal of a police officer and forfeiture of his pension. Also, in *Seražin v. Croatia*[28], the measures following the applicant's conviction in a minor offence proceedings on charges of hooliganism, whereby the applicant was forbidden to attend certain football matches and required to report to the nearest police station when the relevant sports events were taking place, the Court considered there was no violation of *ne bis in idem* principle. In contrast, the ECtHR found that there was a violation of *ne bis in idem* in a case where the applicant was convicted of aggravated drunk driving and

[20] Application no. 14939/03; 54012/10; 73053/01. In fact, the cumulative nature of the criteria depends on whether the Court is able to reach a clear conclusion on the nature of the sanction.
[21] Application no. 18640/10.
[22] Commissione Nazionale per le Società e la Borsa is the Italian government authority responsible for control the Italian securities market.
[23] In Sergey Zolotukhin v. Rússia, the applicant was found guilty of an administrative offence and sentenced to three days' administrative detention. Four months later, Mr. Zolotukhin was charged and convicted, in the respect of the same behaviour, under the regular criminal code. In Maresti v. Croatia, the applicant was convicted for the minor offense of «disorder» for forty days imprisonment. He was also charged for inflicting physical injury in the course of the same behaviour. In virtue of such behaviour, he was sentenced to a one-year prison term. The forty days previously imposed were deducted from the one-year sentence, but still, the ECtHR considered there was a violation of article 4, Protocol no. 7.
[24] Reflecting this lack of definition: cases *Ruotsalainen v. Finland, Nilsson v. Sweden, Matyjek v. Poland* and *Knut Haarvig v. Norway*.
[25] Application no. 57028/00.
[26] Application no. 513/05.
[27] Application no. 6223/04.
[28] Application no. 19120/15.

of driving without holding a driving licence and, subsequently, his driving license was seized for 18 months[29].

Specifically in what regards the duplication of criminal proceedings, it is mandatory to highlight the case *A and B vs. Norway*[30] that led to a significant change[31] in the ECtHR case law by lowering the level of protection of the *ne bis in idem* right, which had already achieved a very satisfactory standard in the previous *Grande Stevens v. Italy* decision.

A and B were two taxpayers from Norway and both owned overseas companies. In June 2001 both companies acquired a percentage of the shares in another company and then sold them for a substantial higher price. Neither of them declared their revenue on such acquisitions to the Norwegian tax authorities. By doing so, both of them failed to pay taxes in the total amount of 32.5 million NOK. As a result of such behaviour, and within the scope of a tax inspection, A and B were convicted and sentenced to payment of a fine. Subsequently, they were also prosecuted, convicted and sentenced to imprisonment in criminal proceedings for tax fraud.

Surprisingly, the ECtHR considered that it was not a violation of *ne bis in idem*. To that end, the court argued that both the administrative and criminal convictions were based on the same facts (*idem*), despite the additional factual element «fraud» present in the criminal offence. The Court also added that the criteria should not be and could not be the order in which the respective proceedings - administrative and criminal - were conducted, but the relationship between the two offences (sufficiently close connection in substance). The Strasbourg Court has also taken into account the connexion in time between the administrative proceedings and the criminal proceedings and considered they were almost simultaneous and interconnected (sufficiently close connection in time). Additionally, the Court also considered that the Norwegian double track enforcement system should be disregarded since the applicants knew that it was possible for them to be criminally convicted and also have a tax penalty imposed. In conclusion, the Court decided that the restriction of *ne bis idem* was not disproportionate or unnecessary considering the close connexion between the proceedings in both cases.

In other words, despite the fact that the ECtHR invoked the *Engel criteria*, it did not limit itself to assessing whether both sanctions applied to the applicants were of a

[29] Nilsson v. Sweden (application no. 73661/01).
[30] The case concerned two taxpayers who submitted that they had been prosecuted and punished twice – in administrative and criminal proceedings – for the same offence.
[31] As rightly said by the Advocate General Campos Sánchez-Bordona, on his conclusions to the *Menci* case, from CJEU.

criminal nature. Instead, it took «a step forward» (or a «step back», depending on the perspective) and considered it possible to combine an administrative sanction with a criminal sanction, despite both having a criminal nature, provided that there was a sufficiently close connection in substance and in time between the two proceedings.

In regards to the connection in time, the ECtHR considered it not to be mandatory for the two proceedings to run at the same time, stating, however, that this simultaneity will facilitate the assessment of whether the principle is being violated or not. As to the connection in substance, the ECtHR presented the following four possible assumptions:

1. The complementary purposes of the proceedings and their relationship with different aspects of the social misconduct involved.
2. The duality of the proceedings in law and in practice, where this is a foreseeable consequence of the same challenged conduct.
3. The complementary running of the proceedings avoids as far as possible any duplication in the collection and assessment of the evidence, through adequate interaction between the various authorities.
4. The penalty imposed in the first proceedings is taken into account when the penalty is imposed in the proceedings that run secondly, so that the penalty imposed on the individual concerned does not entail an excessive burden.

This means that, according to the ECtHR, as long as the administrative and criminal sanctions are a result of an internal consistent system of justice, it is possible for an offender to be punished twice for the same acts, even if both are criminal in nature, without implying a violation of *ne bis in idem*.

The conclusion reached by the ECtHR was heavily criticised, namely by judge Paulo Pinto de Albuquerque. In a strongly critical voice, the Portuguese (former) ECtHR Judge argues that double jeopardy should be avoided and that applying criminal sanctions in the context of an administrative procedure seriously jeopardizes the offender's defence rights. Therefore, he concluded with a dissenting opinion expressing that, as a result of this decision, «*ne bis in idem* loses its *pro persona* character (…). It is no longer an individual guarantee, but a tool to avoid the defendants manipulation and impunity (…). After turning the rationale of the *ne bis in idem* principle upside down, the present judgment opens the door to an unprecedented, Leviathan-like punitive policy based on multiple State-pursued proceedings, strategically connected and put in place in order to achieve the maximum possible repressive effect».

The judge also criticized the Court's «proximity test» saying that it is very ambiguous and arbitrary and also pointing out inconsistencies in applying it in the past case-law.

IV. Luxembourg and the Charter of Fundamental Rights of European Union: article 50 CFREU

Article 50 of the CFREU stipulates that «no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.».

When questioned on how this article should be construed, the CJEU considered that a situation would be considered as infringing the *ne bis in idem* principle if both proceedings (administrative and criminal) have a criminal nature, the defendant is the same person[32], the facts are the same and a final decision is issued.

Once again, our study will focus on the criminal nature of the proceedings. In this regard, the CJEU has already confirmed the possibility of a Member State to impose criminal and administrative penalties regarding the same facts, which is commonly known as the double-track enforcement system.

As a matter of example, the *Åkerberg Fransson*[33] proceedings addressed the case of a Swedish citizen who was subject to an administrative procedure concerning irregularities with the payment of VAT and, under such proceedings, was ordered to pay a fine. Later, the Swedish government initiated a criminal procedure against the same citizen for the same facts.

These case were brought before the CJEU which considered that both penalties can only be simultaneously applied as long as the administrative penalty has no criminal nature.

Thus, in order to understand the scope of *ne bis in idem* in what regards the combination of administrative and criminal sanctions, it is important to determine, once again, the content of the concept «criminal nature». In this regard, in the *Bonda*[34],

[32] Until now, there was only in one judgment in which the CJEU interpreted the meaning of the «same person» requirement with regard to the relation between natural person and legal person. It was the *Orsi and Baldetti* case (C-217/15 and C-350/15, judgment of 5 April 2017). In this case, the tax penalties were imposed on two companies with legal personality, whereas the criminal proceedings relate to Mr Orsi and Mr Baldetti, who are natural persons. The CJEU found that the tax penalties and the criminal charges concerned distinct persons. Therefore, the condition for the application of the *ne bis in idem* principle appears not to be satisfied (paragraph 21 and 22).

[33] Case C-617/10 (26-02-2013).

[34] Case C-489/10 (05-06-2013).

Åkerberg Fransson and *Menci*[35] cases, the CJEU followed the *Engel criteria* of the ECtHR case law. In fact, in line with the ECtHR, the CJEU stated that those criteria should be applied alternatively, which means that it is not necessary that the facts at stake qualify as a crime under national law. Quite the contrary. They may be qualified as an administrative offense but, given the nature or severity of the sanction, actually constitute, in substance, a criminal offence.

However, the overturning of ECtHR case law would come to significantly influence the CJEU, as in the *Menci* case, where an Italian citizen was convicted under an administrative procedure for failure to pay VAT, being ordered to pay a fine equivalent to 30% of the outstanding tax. As in the *Åkerberg Fransson* case referred to above, also in this case the Italian government subsequently initiated a criminal procedure against the same citizen based upon the same facts. However, as opposed to the *Åkerberg Fransson* case, the CJEU clarified that the administrative sanction applied to Mr. Luca Menci had a criminal nature because, despite the *nomen iuris* given by the Italian law, article 50 of the CFREU also applies to situations where national law considers the breach as merely administrative but, in substance, in light of the two other requirements established by the CJEU, the sanction had a criminal nature. By doing so, the CJEU clarified that despite both sanctions having a deterrent purpose, the distinguishing factor lies in the fact that the criminal sanctions also have a punitive purpose. This means that if a sanction has this punitive purpose it shall be considered as having a criminal nature. Thus, since what is relevant is to assess whether the sanction applied has a punitive nature or not, the CJEU considered the fact the citizen had already been convicted to pay 30% more than the outstanding amount of the tax as a criminal sanction.

In view of the above, we could be led to conclude that the CJEU after considering that the administrative sanction is, in fact, criminal in nature would simply apply the *ne bis in idem* principle and exclude the double-track enforcement system by not allowing the same offender to be convicted twice for the same facts. However, surprisingly, this was not the route taken.

In fact, until 2016 and as explained above on the *Bonda* and *Åkerberg Fransson* cases, the CJEU, using the *Engel criteria* created by the ECtHR as its reference, concluded that it was possible to duplicate sanctions provided that the administrative sanction was not actually a criminal sanction, which meant that if both proceedings were

[35] Case C-524/15 (20-03-2018).

criminal in nature, the offender could not be punished by both of them, for then the *ne bis in idem* would be violated.

However, after 2016, deeply influenced by the *A and B vs. Norway* case of the ECtHR, despite concluding on the criminal nature of both sanctions applied, the CJEU considered that, even so, the offender could be punished twice. This means that, notwithstanding the existence of a double jeopardy situation, *ne bis in idem* could be restricted based on the provision of Article 52 (1) of the CFREU[36], which raises inevitable consequences.

With regard to the restriction of rights (and freedoms) set forth in the CFREU, article 52, paragraph 1 of this legal instrument foresees that any restriction of those rights must be provided for by law, must respect the essential content of those rights and freedoms and must comply with the principle of proportionality, which means that such restrictions shall only take place when necessary and effectively address objectives of general interest recognized by the Union or the need to protect the rights and freedoms of third parties. This means that, in order to be possible to recognize the legitimacy of the double-track enforcement systems, the sanctions applied to offenders have to comply with those requirements.

When questioned about the compatibility of those systems with EU law, in the *Menci* and *Garlsson Real Estate SA*[37] cases referred above, as well as in the *Di Puma and Zecca*[38] case, the CJEU considered that the sanctions were provided for by law and complied with the essential content of the *ne bis in idem* principle. Furthermore the CJEU argued that both sanctions would only be applied successively under very strict and exhaustively defined conditions and that the double sanction pursued objectives of general interest, as it aimed to protect, in the first case, the payment of taxes, namely VAT, as foreseen in the Directive 2006/112/CE of the Council, from 28th November 2006, and in the second and third cases, the integrity of the financial markets, as foreseen in the Directive 2003/6/CE of the European Parliament and the Council, from 28th January 2003. Consequently, the CJEU considered that the administrative and criminal sanctions under

[36] In *Spasic* (Case C-129/14), the CJEU extensively discussed the application of article 52, no. 1 as a general clause for the restriction of fundamental rights foreseen in the Charter.
[37] Case C-537/16 (20-03-2018).
[38] It is important to note that in the *Di Puma and Zecca* cases (Cases C-596/16 and C-597/16), the Italian government intended to apply a monetary administrative sanction, in spite of a previous final criminal judgment of acquittal on the grounds that those same acts had not been established. Here, the CJEU considered that there would be a violation of the proportionality principle. Under these circumstances, the bringing of proceedings for an administrative fine of a criminal nature would clearly exceed the necessary means to achieve the underlying general interest, which corresponds to the protection of the financial markets integrity and public confidence in financial instruments.

consideration were merely complementary measures. As regards the principle of proportionality, the CJEU considered that it had been respected as the law provided clear and precise information about the conditions under which the double jeopardy would occur, limiting the penalty to what was strictly necessary and assuring that the sanctions did not exceed the seriousness of the violation.

V. European Case Law on *ne bis in idem*: critical assessment

Having analysed the paths taken by the ECtHR and the CJEU so far, as regards the duplication of administrative and criminal proceedings, we conclude that, at this point in time, both the case law from the ECtHR and the CJEU are in accordance in the sense that they both admit that the *ne bis in idem* is not breached when, based upon the same facts, the same person is convicted with a criminal sanction and an administrative sanction, provided that the latter does not have a criminal nature in the light of the *Engel* criteria. In respect of this particular topic, we have no objection.

The issues begin when we try to determine and densify the concept of «criminal nature».

Firstly, we will address the answers given by the ECtHR.

This Court, when questioned about the possible violation of *ne bis in idem*, has revealed a rather erratic position, going back and forth. Consequently, we have to conclude that legal uncertainty in these situations can easily be felt, as in the different domains in which this problem has been raised, we find, quite surprisingly, different legal solutions in cases with very similar profiles. In fact, in the face of very similar factual situations, the ECtHR ends up considering that some violate *ne bis in idem* and, in other identical circumstances, it considers the opposite. On the other hand, at a time when the CJEU had already followed the ECtHR case law in the *Sergey Zolotukhin v. Russia* and *Grande Stevens v. Italy* cases, the Strasbourg Court decided to abruptly change the path of the *A and B v. Norway* case law, by introducing the possibility of restricting the fundamental right not to be punished twice for the same fact. However, this was done in such an ambiguous way that it does not obtain the much desirable legal certainty.

When suggesting the possibility of cumulating sanctions of a criminal nature depending on whether there is a *sufficiently close* connection in time and in substance as a criterion for the restriction of *ne bis in idem*, provided for in article 4 Protocol no. 7, the ECtHR opened the door to ambiguity and for arbitrariness.

As for the connection in time, the ECtHR states that the proceedings are not required to run at the same time, admitting, however, that this simultaneity will ease the assessment of whether the principle is violated or not. Therefore, we do not know to what extent and under what circumstances the non-simultaneity of the proceedings allows, even so, the *ne bis in idem* not to be breached.

Regarding the connection in substance, namely with regard to the "complementary purposes of the proceedings", once again the ECtHR does not clarify what should be deemed as being a complementary procedure. For this Court, it is enough that the administrative offence and the criminal offence are seen as complementary parts of the same response of the punitive system (the so-called "coherent whole" [39].). But how do we measure this complementarity? Is it enough that the laws of the relevant State consider, expressly or tacitly, the duplication of certain sanctions as part of a single punitive response?

As a result, to assess the existence of the connection in time and the connection in substance, the ECtHR merely provides guidelines, and only under the specific case will it be possible to assess whether or not there is a sufficiently close connection between both proceedings.

As for the answers provided by the CJEU, at first, in the *Bonda* and *Akerberg Fransson* cases (both prior to the turning point expressed by the ECtHR in *A and B v. Norway*), the Court acknowledged that there was solely no violation of *ne bis in idem* in situations where the nature of the sanctions was different. However, as of the *Menci* and *Garlsson* decisions (already taken after the ECtHR judgement in *A and B v. Norway*), the CJEU started to concede the possibility of adding criminal sanctions to the same person based upon the same facts without this implying violation of *ne bis in idem*, provided that the general clause on the restriction of fundamental rights provided for in article 52 (1) of the Charter is respected. Therefore, the CJEU questioned the general criteria provided for in Article 52 (1) to conclude that the restriction of the *ne bis in idem* principle, with regard to the duplication of penalties applicable under VAT payment obligations[40] and in cases of market manipulation[41] is legitimate because:

1. It is set forth in law

[39] LASAGNI, Giulia; MIRANDOLA, Sofia, «The European *ne bis in idem* at the Crossroads of Administrative and Criminal Law» in Focus: Sanctions in European Criminal Law. Eucrim. The European Criminal Law Associations Forum, issue 2/2019, pages 126 to 135, available at https://eucrim.eu/articles/ne-bis-idem-and-tax-offences/, page 2.

[40] Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

[41] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

2. It does not violate the essential core of the *ne bis in idem* right

3. It is proportional, insofar as it proves to be necessary

4. It pursues objectives of general interest recognized by the European Union

However, we allow ourselves to disagree with the conclusion advocated by the CJEU. In fact, we do not see how admitting the duplication of sanctions is compatible with the essential core of *ne bis in idem*. The *ne bis in idem* prohibition is one of the oldest guarantees that citizens have in relation to the State's power of punishment. Indeed, as a principle with origins in ancient times, *ne bis in idem* originated from the Latin formula *bis de eadem re ne sit actio* which means, literally, that there should be no double action on the same thing and essentially aims to guarantee both individual and collective legal certainty. Therefore, what is at stake is the protection of the individual against possible abuses by the State, preventing the government bodies from arbitrarily exercising their *ius puniendi* against a person who has already been criminally tried for a certain crime. Thus, we fail to understand how the fact that a person being convicted with criminal sanctions for the same facts can be compatible with the essential core of *ne bis in idem*.

We therefore conclude that the fact that *ne bis in idem* is provided for in several international standards[42] does not mean that it entails more protection or even an adequate and effective protection. Indeed, the pluralism of protection systems in the European area can have this paradoxical effect that we are witnessing today regarding the interpretation of the fundamental right not to be tried twice for the same fact.

As stated, from the moment the two European courts began to deal with identical matters, respectively in the light of Article 50 of the Charter and Article 4 Protocol 7 of the Convention, the result was the weakening of constitutional guarantees of EU citizens.

Furthermore, the opposite decisions taken by both Courts, increases the legal uncertainty and creates a considerable margin for discretion. The issue regarding the applicability of article 50 arises if the State has a double track enforcement system when imposing an administrative penalty and a criminal penalty on the offender for the same facts. The problem becomes even more acute when the administrative penalty also has a punitive nature: is the article 50 applicable to punitive administrative sanctions or otherwise to any combination of criminal and administrative sanctions? Our answer must

[42] In this regard, it should be noted that, although the EU has not formally joined the Convention, Article 52 (3) of the Charter balance the level of protection of fundamental rights which are simultaneously provided for in both legal regulations, without prejudice to the Union law provide more extensive protection.

be positive, otherwise the *ne bis in idem* principle would be, or will be, breached. In fact, most of the case law of both Courts involve both an administrative – tax – sanction and a criminal sanction. Article 50 gives a wider protection regarding the *ne bis in idem* principle than most States do. By doing so, it applies both to criminal and administrative sanctions. Secondly, we must not forget that Article 4 of the Protocol no. 7 to the European Convention of Human Rights also includes this principle and is now construed as applying to both administrative and criminal sanctions, according to the *Engels*[43] criteria.

Further, the following question arises: how does a State determine[44] if the administrative sanction has a punitive nature? «*Sanction* amounting the market interest rate is only of compensation nature, as it only compensates the lost earnings, and, from the wrongdoers point of view, he has to pay the "interest for lending the funds from the state". The part of the "sanction" which exceeds the market interest is then of the nature of real sanction for non-compliance with the statutory obligations. [45]»

We do not call into question that the two courts should undertake and mature a commitment on their case law even more so considering that the provisions under analysis call for integrated solutions. Furthermore, this consistency is without doubt important in a legal system under construction, such as the European Union, serving to consolidate its foundations and creating a more solid policy on fundamental rights.

However, we do not believe that the path to be followed should be the one chosen in the decisions we have highlighted. In fact, forsaking the highest level of protection of fundamental rights, reflected in the paradigmatic *Grande Stevens v. Italy* (ECtHR) and *Akerberg Fransson* (CJEU) judgements, means violating Article 53 of the Charter, which guarantees that the highest possible standard of protection should apply. Additionally, following the understanding that Article 53 also contains a non-regression clause[46] with regard to fundamental rights, by admitting a "step back" in the protection formerly given to the *ne bis in idem* principle, notably in terms of the prohibition of duplication of criminal sanctions, the Courts are ignoring this "constitutional" command of the Union.

We cannot accept the sanctions are merely complementary measures, as the Courts affirm since we are not talking about two measures in only one proceeding. It is

[43] Engel and others vs. Netherlands.
[44] CJEU C-617/10, decision of 23 December 2010.
[45] Radvan, Michal and Schweigl, Johan, Penalties in Tax Law in Light of the Principle Ne Bis in Idem (October 1, 2016). Etel, L., Poplawski, M. Tax Codes Concepts in the Countries of Central and Eastern Europe. ed. Bialystok: Temida, 2016. p. 399-410. ISBN 978-83-62813-88-9, available at SSRN: *https://ssrn.com/abstract=2846695.*
[46]SOFIA OLIVEIRA PAIS, European Union Law Studies, p. 129.

not new that we can apply two sanctions for the same facts to the same person, as long as they are accessory of one another. The problem here is that we have two different proceedings punishing the same person for the same facts in different moments.

The ECtHR is aware of this argument, so that this Court came up with the «sufficiently close connection in substance» and «sufficiently close connection in time» concepts. By doing so, the Court is stating that it is like we are towards one proceeding instead of two, when that is not the reality. If, in light of the legality principle, one MS prescribes that a certain conduct is a crime, making use of its power of *ultima ratio* which resides in *ius puniendi*, it makes no sense to say that they complement each other. In our point of view, the penalty should fully exhaust the sanction of the conduct.

Although some MS have a double-track enforcement system, others do not, so permitting that those may breach the *ne bis in idem* when financial and economic interests of the European Union are at stake, is violating another principle: the equality principle between Member States and their citizens.

By uncritically following the ECtHR, the CJEU allows those who claim the subordination of one court to another to have a voice as they perceive the ECtHR as the legitimate and true guardian of fundamental rights in Europe, while underlining the merely symbolic (and redundant) role of the Charter and choose the Convention as the only true European bill of rights.

Although we understand the criticism, we obviously cannot agree with this position. We are of the opinion that the two courts should maintain their independence in the field of fundamental rights for two main reasons.

First of all, although they are similar, Articles 50 of the CFREU and Article 4 of Protocol no. 7 ECHR do not entirely match. As we have seen, the scope of application *ratione materiae* is different, insofar as the *ne bis in idem* of the Charter can be applicable on a transnational level, preventing a person who is convicted in one MS from being also convicted in another MS for the same facts, while the *ne bis in idem* of the ECHR is strictly domestic, preventing the State from exercising its *ius puniendi* twice.

Secondly, it is important to underline that the scope of the Charter and that of the ECHR are different, and thus the functions of both courts will also be different. The breach of the rights provided for in the Convention and additional protocols means that individuals may submit a claim with the ECtHR in order to seek the conviction of the State that has violated their fundamental rights. Thus, the decisions of the ECtHR do not necessarily translate into a change in the internal legal systems of the States, consequently allowing for repeated violations of the same right by the same State. On the other hand,

the CFREU has been elevated to primary EU law since the Treaty of Lisbon, a circumstance that causes that the courts of final instance in the MS[47] are required to proceed with a preliminary ruling whenever the compatibility between the Article 50 of the CFREU and domestic law is disputed, which may occur, namely, in the case of States that have a *doppio binario* system.

We note that, as the case law of the CJEU is not fully consistent in respect of this matter, States will not be able to raise the *acte claire* or *acte eclairé* principle in order to avoid the preliminary ruling[48]. In the absence of a fully consolidated interpretation based on case law, the national court is required to refer the matter back to the CJEU[49], under penalty of default in the light of Article 258 TFEU. If it fails to do so, this may entail, at the level of international human rights, a violation of the right to a fair trial and due process, which may lead, paradoxically, to the conclusion that the decision of the national court not to proceed with a preliminary ruling may be challenged before the ECtHR, on the grounds of a breach of Article 6 of the ECHR.[50]

In view of the above, in addition to the role of protecting fundamental rights, the CJEU is also responsible for harmonizing the interpretation of the national rules of law of each MS with the Charter, being the decisions issued by this Court binding upon the MS, and thus creating actual procedural obligations for the MS.

All things considered, it is now time for us to humbly try to provide an answer to the problem. We do not believe that the solution should be to follow the interpretation provided by the ECtHR in *A and B v. Norway*. In our view, granting an extremely modest level of protection of the *ne bis in idem* principle as well as carrying out a case by case assessment of the possibility of restricting the applicability of the principle based on the criterion of Article 52 (1) of the Charter or the case law background of the ECtHR, leads to a dangerous legal uncertainty, violating the non-regression clause in the field of human rights and preventing the highest possible level of protection of fundamental rights from being reached, which culminates in a decrease of the procedural guarantees of the Citizen.

The adoption of different paths by the ECtHR and the CJEU in respect of the solution to be given to double-track enforcement systems will also not solve the problem. The ECtHR would continue to follow a line of ambiguous judgements, preventing the judges of national Courts from having a clear mindset in a matter as relevant as the

[47] C-6/64, Costa v. ENEL (15-07-1964).
[48] Alexander Betz, *Die Vergassungsrechtliche Absicherung Der Vorlageplitcht apud* Jónatas Machado, European Union Law, Gestlegal, 2018, p. 725.
[49] C-337/95, Christian Dior SA (04-11-1997).
[50] Walter Frenz, *Handbuch Europarecht apud* Jónatas Machado, cit., p. 731.

procedural guarantees provided by *ne bis in idem*. On the other hand, the CJEU would continue to follow a somewhat schizophrenic decision-making process of the ECtHR, not allowing States to adjust their domestic laws in terms that are compatible with primary EU law, while maintaining the need to flood the CJEU with preliminary rulings concerning the same *de facto* and *de jure* grounds.

In view of the above, we do not envision any other solution[51] than to reject the limitation of the *ne bis in idem* principle and maintain the level of protection set in the *Åkerberg Fransson* case by reference to the original general case-law of the ECtHR (eg. *Great Stevens v. Italy* and *Sergey Zolotukhin v. Russia*). In fact, the clause provided for in Article 52 (3), *in fine*, aiming at a uniform construction of the rights that are simultaneously provided for in the Charter and in the Convention, states that the interpretation conferred must match the interpretation given by the ECtHR, but this does not prevent EU law from providing more extensive protection[52].

On our side, we have Paulo Pinto de Albuquerque, (former) judge of the ECtHR, and Manuel Campos Sánchez - Bordona, AG at the CJEU. One might say that we couldn't be in better company.

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[51] These three hypotheses were advanced by Advocate General Campos Sánchez - Bordona on case C 524/15, delivered on 12 September 2017, p. 61.

[52] The reference to the Convention covers both the Convention and the Protocols Annexed to it and the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union.

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THEMIS COMPETITION 2020

SEMI-FINAL A

EU and European Criminal Procedure

SECOND PLACE

TEAM PORTUGAL

Carolina Rita BELO LUCAS | **Mariana QUEIRÓS MARQUES** | **Inês LOPES FURTADO**

Tutor: Alexandre OLIVEIRA

6 - 9 July 2020

Held online in accordance with the e-Themis rules

Judge Markus Brückner
Secretary General of the
European Judicial Training Network

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3.
Apresentação da Equipa

Accompanying Teacher

Patrícia Helena da Costa

CENTRO
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Apresentação
Vídeo
Trabalho final

SEMI-FINAL C

Walking in the Matrix: comment on the European Parliament Resolution of 16 February 2017, regarding legal personality of Artificial Intelligence

Auditores:
AQUILINA RIBEIRO
ANDRÉ SILVA PINTO
MARIA PAULO REBELO

Patrícia Helena Costa *

A apresentação realizada pelos Ex.mos Srs. Auditores, denominada "*Walking in the Matrix: comment on the European Parliament Resolution of 16 February 2017, regarding legal personality of Artificial Intelligence*", partiu da Resolução do Parlamento Europeu de 16 de fevereiro de 2017, instrumento que contém recomendações dirigidas à Comissão a respeito de disposições de Direito Civil sobre Robótica.

O trabalho centra a sua análise no tema da responsabilidade civil por danos causados por robôs e, em particular, na possibilidade, aventada pela Resolução, de ser criado um estatuto jurídico específico para os robôs a longo prazo, de modo a que, pelo menos, os robôs autónomos mais sofisticados possam ser considerados como detentores do estatuto de pessoas eletrónicas responsáveis por sanar quaisquer danos que possam causar e, eventualmente, aplicar a personalidade eletrónica a casos em que os robôs tomam decisões autónomas ou em que interagem por qualquer outro modo com terceiros de forma independente.

Após uma introdução explicativa do que é a Inteligência Artificial e as potencialidades e riscos que a mesma oferece, o trabalho em apreço desenvolve uma apreciação crítica das possíveis soluções que podem ser equacionadas para resolver o problema da responsabilidade civil, conjugando os instrumentos europeus já disponíveis com os princípios gerais da responsabilidade civil, fazendo apelo a Doutrina e corpos legislativos nacionais e estrangeiros, concluindo finalmente com uma proposta sobre qual, na sua visão, será o sistema mais adequado.

O tema escolhido é, como facilmente se intui, muito atual e de elevada relevância para o contexto do judiciário em geral e do Direito Civil em particular, suscitando questões que não apenas de Direito estrito, mas também do que seja o sentido do Direito e de Pessoa.

* Juíza de Direito e Docente do CEJ.

Os Srs. Auditores realizaram um trabalho profundo de investigação, seja quanto aos aspetos científicos da inteligência artificial, seja quanto à abordagem jurídica, a qual foi complementada, na defesa oral do trabalho, com a atualização da informação que entretanto se foi tornando disponível, nomeadamente ao nível de relatórios e iniciativas no seio das instituições da União Europeia.

Ao longo de toda a preparação, apresentação e defesa final, foi patente o espírito de equipa e colaboração entre os Srs. Auditores, todos participando ativamente, não podendo deixar de se realçar a especial dificuldade que a atual situação de pandemia, e consequente confinamento/afastamento social, colocou à concretização de todo o seu trabalho, constrangimentos que foram, porém, superados com eficácia.

O trabalho global apresentado 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 rigor técnico, tomando posição sobre os vários pontos de conflito e expondo-os de forma transparente e maturada.

Igual cuidado foi revelado na preparação de questões a serem colocadas a todas as restantes equipas, abrangendo temas muito variados.

Revelaram, finalmente, à vontade na língua inglesa e boa capacidade de comunicação, em postura serena, simples e cativante, mostrando-se assim, e em síntese conclusiva, como muito positiva a sua participação neste concurso.

13 de julho de 2020

Vídeo da apresentação

Walking in the Matrix (Themis Competition)

https://youtu.be/lebtSuU9_hE

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3.1.

Walking in the Matrix: a comment on the European Parliament Resolution of 16 February 2017, regarding legal personality of Artificial Intelligence

Team Portugal

Aquilina Ribeiro | André Silva Pinto | Maria Paulo Rebelo

Accompanying Teacher

Patrícia Helena da Costa

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Walking in the Matrix: a comment on the European Parliament Resolution of 16 February 2017, regarding legal personality of Artificial Intelligence

Aquilina Ribeiro

André Silva Pinto

Maria P. Rebelo

Abstract:

In this paper, we analyse the European Parliament Resolution of 16 February 2017 recommending the Commission on Civil Law Rules on Robotics to consider the implications of all possible legal solutions for the use of artificial intelligence (AI), namely a specific legal status for robots through the creation of a legal personality *tertium genus.* Recognizing the importance of the subject, our paper discusses how the existing legal European framework can be applied to the current state of the art of AI and how the concept of *electronic personality* deals with the protection of EU citizens and consumers detected gaps, concluding that other alternatives rather than the e-person concept appear more adequate.

Keywords:

Artificial intelligence, e-person, electronic personality, civil liability, European Union, European Parliament Resolution of 16 February 2017.

Summary

1. Introduction

Artificial Intelligence (AI) can be defined as a broad area of computer science that makes machines operate as if they had intelligence on their own[1]. There have been many qualifications on the nature of different kinds of AI, but *narrow AI* and *general AI* are unanimously recognized as two basic concepts[2]. Artificial Narrow intelligence (ANI) is a reality that already lives hand-in-hand with modern society, being present in items such as our smartphones (with "characters" we have become used to call *Alexa* and *Siri*) or smart cars. This kind of technology consists of «computer software that relies on highly sophisticated, algorithmic techniques to find patterns in data and make predictions about the future», focusing on isolated tasks. As for General Intelligence (AGI), it refers to «computer software that can think and act on its own», and even outperform humans in intelligence tasks[3].

The main question arising from this technology concerns *machine learning*: the robot's ability to learn and decide as a result of human coding[4]. This ability to "think" is firstly handed by human creation and, afterwards, the machine develops itself to attain an optimal response to given challenges, sustained on its basic coding (operating based on given examples with correct answers or note [supervised and unsupervised learning, respectively][5]). This kind of technology

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[1] «Research in this area includes robotics, computer vision, nature language processing and expert systems. AI can simulate the information process of human consciousness, thinking» - XIN, Yang [et al], *Machine Learning and Deep Learning Methods for Cybersecurity*. [online] *In* **IEEE Access**, vol. 6. pp. 35365-35381, 2018, doi: 10.1109/ACCESS.2018.2836950, [consult. 2020-06-10] available at https://ieeexplore.ieee.org/abstract/document/8359287.

[2] Some authors identify other types of AI. For more, see JAJAL, Tannya D., *Distinguishing between Narrow AI, General AI and Super AI*. [online] [consult. 2020-06-10] available at https://medium.com/@tjajal/distinguishing-between-narrow-ai-general-ai-and-super-ai-a4bc44172e22; Forbes, *7 Types Of Artificial Intelligence*. [online] [consult. 2020-06-10] https://www.forbes.com/sites/cognitiveworld/2019/06/19/7-types-of-artificial-intelligence/

[3] RAJ, Manav/SEAMANS, Robert, *Primer on artificial intelligence and robotics*. [online] Article nr. 11, 2019. [consult. 2020-05-20] available at https://jorgdesign.springeropen.com/articles/10.1186/s41469-019-0050-0; JAJAL, Tannya D., *Distinguishing between Narrow AI, General AI and Super AI*. [online] [consult. 2020-06-10] available at https://medium.com/@tjajal/distinguishing-between-narrow-ai-general-ai-and-super-ai-a4bc44172e22.

[4] «ML is a branch of AI and is closely related to (and often overlaps with) computational statistics, which also focuses on prediction making using computers. It has strong ties to mathematical optimization, which delivers methods, theory and application domains to the field. ML is occasionally conflated with data mining [12], but the latter subfield focuses more on exploratory data analysis and is known as unsupervised learning» - XIN, Yang [et al] , *Machine Learning and Deep Learning Methods for Cybersecurity*. [online] *In* IEEE Access, vol. 6. pp. 35365-35381, 2018, doi: 10.1109/ACCESS.2018.2836950, [consult. 2020-06-10] available at https://ieeexplore.ieee.org/abstract/document/8359287. «Machine learning (…) is about making computers modify or adapt their actions (whether these actions are making predictions, or controlling a robot) do that these actions get more accurate, where accuracy is measured by how well the chosen actions reflect the correct ones» - MARSLAND, Stephen, *Machine Learning: An Algorithmic Perspective*. 2nd Edition. Boca Raton, Florida (USA): Taylor & Francis Group, 2015. ISBN 978-1-4665-8328-3, Page 4.

[5] Supervised learning consists in a training set of examples with the correct responses (targets) that is provided to the AI, where the algorithm generalizes to respond correctly to all possible inputs, learning

makes it possible for AI to debate and argue, to detect disease and to reproduce musical or painting techniques, among other capabilities, all based, firstly, in human coding.

Even though scientists all around the globe look forward to developing General AI, only time will tell if this last stage will ever reveal itself. But this foreseen future opens the gates to many challenges regarding civil liability and criminal guilt, since the possibility of awareness or consciousness of AI will surely put human legal personality into a whole new perspective. As it happens, this huge question mark on legal personality is already being discussed by the European Union, especially since machine learning has been perceived as something that can act in the total absence of human interference, making decisions that can be unpredictable to the programmers themselves and cause damages to people and property[6].

Recognizing the possibility of such technological development, on February 16, 2017, the European Parliament adopted a Resolution with recommendations to the Commission on Civil Law Rules on Robotics[7], suggesting the Commission to analyse and consider the implications of

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from examples; unsupervised learning, in its turn, works without any correct responses, making the machine operate based in similarities between the inputs so that inputs that have something in common are categorized together. There can also be reinforcement learning, which is placed between supervised and unsupervised learning, where the algorithm gets told when the answer is wrong, but does not get told how to correct it, forcing the machine to explore and try different possibilities until it achieves the correct answer; and evolutionary learning, corresponding to the process of adaption of the machine to improve survival rates – MARSLAND, Stephen, *ob. cit.…*, pages 5-6.

[6] There are many known accidents caused by AI. The case of the Uber/Tesla fatal crash in march 2018 was one of them, where a person was hit by a car in autopilot (The New York Times, https://www.nytimes.com/2020/02/25/business/tesla-autopilot-ntsb.html). Also, in 1981, a worker was killed in Japan by a machine after being identified as an obstacle to its performance, which proceeded by removing the worker from its path with a hydraulic arm, causing his death instantly (The Guardian, https://www.theguardian.com/theguardian/2014/dec/09/robot-kills-factory-worker); in 2007, in South Africa, a military robot cannon "went out of control" due to a software failure and started shooting randomly, killing 9 soldiers and injuring others (Wired, https://www.wired.com/2007/10/robot-cannon-ki/).

[7] After such document was adopted, a several number of other important initiatives took place, such as the Expert Group on Liability and New Technologies report on "Liability on artificial intelligence and other emerging digital technologies", on 21.11.2019 (https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608); the PE Resolution on automated decision-making processes: ensuring consumer protection and free movement of goods and services, on 12.02.2020 (https://www.europarl.europa.eu/doceo/document/TA-9-2020-0032_EN.pdf), The Commission's White Paper of 19 February 2020 on Artificial Intelligence - A European approach to excellence and trust" and "Report on safety and liability implications of Artificial Intelligence, the Internet of Things and robotics", on 19.02.2020 (https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf), the First draft report do Legal Affairs Committee with recommendations to the Commission on a Civil liability regime for artificial intelligence, on 27.04.2020 (https://www.europarl.europa.eu/doceo/document/JURI-PR-650556_EN.pdf), and the çast draft report do Legal Affairs Committee with recommendations to the Commission on a Civil liability regime for artificial intelligence, on 05.05.2020 (https://www.politico.eu/wp-content/uploads/2020/05/EuropeanParliamentCivilLiabilityAI.pdf). Notwithstanding the importance of the evolution registered on this topic, our paper is focused on the beginning of the problem and on the discussion of the main problems such Resolution raised.

all possible legal solutions for the use of AI, namely «creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently» - §59 f) of the Resolution[8].

We must underline that, when stating the need of the "e-person", the Resolution stresses that Asimov's Laws (the three law of robotics) should operate as the base of the making and interpretation of the Law, noting that these principles should be directly applied to robot creators, producers and users. Said rules are the following: *i)* First law: A robot may not injure a human being or, through inaction, allow a human being to come to harm; *ii)* Second law: A robot must obey the orders given it by human beings except where such orders would conflict with

[8] In january 2020 there was a Legislative initiative procedure (no. 2020/2014(INL)), submitted by the Rapporteur Axel Voss, proposing a Civil liability regime for artificial intelligence.
This Draft Report aimed to stablish the basic legal framework for all types of Artificial Intelligence systems, considering that even though sector specific regulations for the broad range of possible applications are preferable, a horizontal legal framework based on common principles was deemed necessary to establish equal standards across the Union and effectively protect our European values.
One of the most important proposals was differentiating high risk and low risk AI-systems, and the regime applied to both technologies; high risk AI-system means «a significant potential in an autonomously operating AI-system to causa harm or damage to one or more persons in a manner that is random and impossible to predict in advance; the significance of the potential depends on the interplay between the severity of possible harm or damage, the likelihood that the risk materializes and the manner in which the AI-system is being used». Giving this, high risk AI-systems would fall under the scope of a strict liability regime, while the latter would be studied under fault-based liability.
The difference stablished between the definitions described seems to makes sense to us considering the evolution of this technology, as well as a different liability regime for both types.
However, the draft also raises some criticism.
One of them is the definition of deployer, as being the person who decides on the use of the AI-system, exercises control over the associated risk and benefits from its operation. This definition implies that the deployer would only make sense when applied to companies that use AI-systems in their activities, controlling the risk and benefiting directly from it. Therefore, there are some questions about the cases when the entity that exercises control over the risk doesn't benefit from the operations; besides, consumers would never be considered as deployers, since they do not master the technology in order to be able to control the associated risk (which is the decidion making of the machine). In our opinion, this concept needs to be clarified.
Also, this proposal does not consider the duty to watch or monitor by the deployer or producer, meaning that he is not obliged the software or make any updates into the system. In fact, even if the deployer acted with due diligence, the proposal states that the deployer cannot argue the that he/she took diligence in order to prevent damages in order to exonerate himself from liabilty. This means that, if there is no advantage to take from the obligation of due diligence, the deployer may be tempted to simply abandon the technology, leaving it unsupervised and investing in new AI-systems. This solution does not seem to obey the principle of prevention in liability's framework; so, instead of exempting the deployer from liability, it would be more befitting that the compensation should be reduced if due diligence is proven. By this means, the deployer will maintain interest in providing efficient updates to prevent damages.

the First Law; *iii)* Third Law: A robot must protect its own existence as long as such protection does not conflict with the First or Second Law[9].

These laws, extracted from Isaac Asimov Science Fiction literary works, are without a doubt of great value to the ethical discussion on robotics. However, it has been issued that these laws need to be updated, since the reality of AI goes beyond the concept of human-like machines that were at the root Asimov's idea[10]. In fact, some kinds of AI only have potential to harm property: just take the example of *blockchain*, where the algorithm used to reach consensus between participants could encounter an error, compromising all the following transactions in the chain ahead[11]. We can also think about supervised machine learning algorithms used in banking for detection of loan or payment frauds, which may be undeveloped and, therefore, unable to detect new risks and means of fraud, causing severe damages in the economic system[12].

These examples clearly demonstrate that AI can create endless dangers that go beyond humanoid androids harming humans, vindicating European regulation concerning the specific applications of each technology.

Therefore, considering the legal questions underlined, our study aims to discuss the legal adequacy of the extension of legal personality to artificial intelligence as proposed by the European Parliament, that is, the creation of "e-persons". In order to do so, our work will analyze how the current legal framework offered by the European Union can be applied to AI, and how the concept of *electronic personality* would address eventual existing gaps in the protection of EU citizens and their rights.

2. Ordinary rules on civil liability suitability to address the questions arised by AI

2.1. Introduction

[9] TOBE, Frank, *Asimov's laws of A.I.* [online] [consult. 2020-06-10] available at https://www.therobotreport.com/isaac-asimovs-3-laws-updated/

[10] ANDERSON, Mark Robert, *After 75 years, Isaac Asimov's Three Laws of Robotics need updating* [online] [consult. 2020-06-09] available at https://theconversation.com/after-75-years-isaac-asimovs-three-laws-of-robotics-need-updating-74501.

[11] Blockchain was created to become a secure system for conducting and recording financial transactions (think of bitcoin, for example), but it has been widened to other goods and properties, such as houses and cars. This technology follows five attributes, one of them being the consensus-basing of every transaction where consensus algorithms are used. For more, see GUPTA, Manav, *Blockchain for dummies*. 3rd. IBM Limited Edition. [online] New Jersey: John Wiley & Sons, Inc, 2020. ISBN: 978-1-119-62196-6, [consult. 2020-06-10] pages 11, available at https://www.ibm.com/uk-en/blockchain/what-is-blockchain.

[12] MEJIA, Niccolo, *AI-Based Fraud Detection in Banking, Current Applications and Trends* [online] [consult. 2020-06-10] https://emerj.com/ai-sector-overviews/artificial-intelligence-fraud-banking/.

One of the main issues brought up by the Resolution regards the question of whether general rules on civil liability are good enough to handle robots responsibility for their acts or omissions when the cause of the damage cannot be traced back to a specific human, namely their creator. After all, damages caused by AI robots are not exactly a rarity[13]. Once we recognize the power of machines to act autonomously, questions inevitably arise regarding their responsibility. It's time to start thinking about a new set of principles and rules that clarify the matter, are adjusted to its specifics and adapted to these new actors (§AB)[14]. In fact, whenever a robot causes damage, there will always be a wide range of variables that must be taken into account: the robot has an internal product called software; and a set of external products called hardware, which can assume a causal link with the damage; there is the person who gives instructions and commands to the robot; and the person who ends up benefiting from the robot's performance; etc. The heterogeneity of all possible situations makes the imputation scheme difficult, bearing in mind that the situation must be understood in the light of the different types of control and the influence exerted by each of those types on the robot.

In a society mainly built on the *tolerable risk paradigm* (based on the cost-benefit binomial), and not so much on precaution (under penalty of technological stagnation), a certain degree of risk must be allowed, as long as that risk can be compensated by the construction of strict liability institutions (risk) and other intermediate solutions[15].

In this context, the European Parliament Resolution provides for the following liability schemes to be taken into account[16]: *i)* AI supported by producers and owners; *ii)* compensation funds

[13] Nuno Sousa Silva, in his work, also points out the fatalities that took place in Japan and South Africa, already described (see footnote 6), also reporting other occurrence similar to the first, now in 2015 and in Germany (SOUSA E SILVA, Nuno, *Direito e Robótica - A First Approach (Robots and the Law - A First Take),* June 21, 2017, page 18).

[14] Moreover, the Resolution also establishes the assumption that, regarding robots that can take autonomous decisions, ordinary rules will not be sufficient to assess legal liability for damages they cause as it would not be possible to determine the responsible party (§AF); likewise, that those insufficiencies were a fact not only on civil liability grounds, but also on a contractual level (§AG).

[15] SILVA, *ob cit,* page 19. However, in this game of economics, finding an adequate scheme of liability implies safeguarding yet another focus of interest: private investment in technology. Indeed, one of the main implicit reasons behind the proposal of the European Parliament Resolution to consider the recognition of an AI's electronic personality is the need to find a system that protects investment creation in the digital economy market from which the AI is one of the biggest examples. The construction of this area of admitted risk, separated from the responsibility of the producer, appears as the only way for Europe to emerge as a internationally competitive market in the face of Chinese, Japanese and American hegemony. Thus, the aim is to remove the producer (creator / programmer) from the artificial intelligence (creature / software), and, if on the one hand it seems justified by the autonomy and the decision making recognized to the machine, or convenient to maintain a continued economic investment in the sector, on the other hand, it translates in a total lack of responsibility for the product they built and created themselves.

[16] This scheme closely follows the suggestions offered by the Expert Group on Liability and New Technologies Formation on their Report on Liability for Artificial Intelligence and other Emerging Digital Technologies.

guaranteeing compensation not only for situations not covered or excluded by insurance; *iii)* limited liability of the manufacturer, programmer, owner or user if they contribute to the compensation fund or jointly contract adequate insurance; *iv)* creation of a general fund for all intelligent robots; *v)* insurance that the link between each robot and its fund is identified by an individual registration number in the European Union; or, *vi)* creation of a specific legal status for responsible electronic persons[17].

2.2. Liability using third parties

One of the most immediate possible answers to this problem could be found in the responsibility for the use of an auxiliary third party, either through *mandatory responsibility*[18] or *vicarious liability*[19].

For example, in Portuguese academia, some authors argue that mandatory responsibility is not applicable in these situations, on the grounds that the robot does not know its own imputation sphere. The argument is not false, but it does not consider that a legislative evolution that leads to the attribution of legal personality to AI should make us rethink the application of the institute, which represents a strong argument for a broad and updated interpretation of the norm[20].

By contrast, from the point of view of vicarious liability, there seems to be greater legal openness to frame the robot under the normative provision and qualify it, by extensive interpretation or even analogy, as being in a commission relationship. After all, all things

[17] Unlike the Draft Report recommendations on civil law rules and robotics (2015/2103 (INL)), which suggested the possibility of creating a damage repair guarantee fund for cases not covered by any insurance, the Resolution goes further by assigning a more relevant role to compensation funds: rather than being mere subsidiary supports, these compensation funds should not serve only to grant compensation for situations not covered by insurance contracts (§58 of the Draft).

[18] As in article 800.º of the Portuguese Civil Code: "*The debtor is responsible to the creditor for the acts of his legal representatives or of the people he uses to fulfill the obligation, as if such acts were practiced by the debtor himself.*".

[19] As in article 500.º of the Portuguese Civil Code: "*Anyone responsible for any commission is liable, regardless of guilt, for the damage that the commissioner causes, as long as the obligation to compensate also falls on the latter.*".

[20] Cf. SILVA, *ob cit;* BARBOSA, Mafalda Miranda, *Robots advisors and civil liability*, Revista de Direito Comercial, 2020*, page* 51. As the author states, "In the same way that, in terms of subjective criminal responsibility, several problems can be posed with regard to guilt, from the point of view of contractual responsibility, we take the risk of being able to rebut the presumption of guilt contained in article 799 CC, not even posing the problem of possible liability through article 800 CC, since it also presupposes the subjectification of the third party to be used in the course of their business activity". Furthermore, from the moment the robot is not endowed with subjectivity, ie, personality, it is seen only as a work tool of the debtor, just like so many others, so, ultimately, only the behavior of the debtor will be relevant for the assessment of responsibility. If liability will be assessed only on the basis of the debtor's conduct, there will be a presumption of guilt that burdens him at contractual level, which can only be removed by himself if he demonstrates that he has fulfilled all the duties of care imposed by good faith, such as surveillance or clarification (*Idem*, page 61/62).

considered, it does not seem to make much sense to treat differently a subject who makes use of a commissioner to pursue a certain activity or function from one who makes use of a machine or a robot to obtain precisely the same result. The former being held responsible if his commissioner makes a mistake and causes damage, it does not seem reasonable that the same user of another's workforce is no longer so when these duties are delegated to machines or robots. There is a common benefit that can be extracted from any of the activities carried out that does not justify such disparity and inequality in regimes.

However, as a scheme based on the fault of the agent, it is poorly connected with the operating system of robots. The truth is that, at the present date, there are no established models regarding the way these technologies should work and interact, that is, a certain standard of conduct that can be framed in watertight frames on what is permitted and prohibited for an AI. Its natural characteristic of progressive and exponential learning gathered from its experience and practical interaction, and the possibility of making its own decisions from it, even if it extrapolates the lines previously defined in the computational code that underlies it, make it difficult to successfully achieve adequate guilt based responsibility[21].

Like the compulsory responsibility scheme, however, the same difficulties arise regarding the problem of imputability of a robot; although, likewise, criticisms of this difficulty are also repeated[22].

2.3. General compulsory liability clause

Compulsory liability could be considered in broad terms and under the general liability clause, without the necessary reference to the existence of a commission relationship. The imputation would be made, at least at the Portuguese level (and in other European legal systems the solution is very similar), through the concept of the general duty of care. For this purpose, it would only be necessary to impose certain duties (built by law or by jurisprudence) in the design and construction of a robot under the responsibility of the producer, duties of use, conservation and direction by the user, or even generic duties of care and contact by third parties who interact with robots. At the level of business robotics, for example, there already exist a series of schemes and standards of care to be implemented, such as sensors that immediately turn off

[21] Unlike the operation of traditional computational engineering, machines with artificial intelligence have their own characteristic of unpredictability, unknown in that traditional model. This quality is fundamental in the analysis of liability schemes as it interferes with the measure of guilt of the agent who creates or uses the said robot. To the extent that the robot is given a progressive and open-learning capacity, its behavior can therefore become unpredictable.

[22] SILVA, *ob cit,* page 20/21

the machine as soon as it detects human activity close to the robot's workplace, or rules regarding the robot's intervention space, limiting it to a specific handling area[23].

On the other hand, as causation is a fundamental element in assessing responsibility, it has to be admitted that the causal element, whenever relationships with intelligent robots are at stake, can often not be found in relation to any of the actors in the process (machine, producer, user, etc.), much like what happens with human beings. It is what is called "unpredictable pathology", which can very well happen with individuals, exonerating them from responsibility – just think of the intense and unexpected thunderstorm or heavy fog that made it impossible for the driver to avoid the accident. The same formulation can be applied to entities gifted with AI[24]. Whenever the vices or defects cannot be directly linked to the negligent or guilty conduct of the programmer or user, which may occur specifically in the case of judgments called by the machine that may not have been reasonably foreseeable, it makes it impossible to operate any liability.

2.4. Owner / User liability

The European Parliament Resolution assumes that, under the current legal framework, robots cannot be held liable *per se* for acts or omissions that cause damage to third parties, since the existing rules on liability cover cases where the cause of the robots act or omission can be traced back to a specific human agent such as the manufacturer, the operator, the owner or the user and where that agent could have foreseen and avoided the robots harmful behavior[25]. It also

[23] SILVA, *ob cit,* page. 23.

[24] We make use of Karnow's teachings here. The law can only punish conducts that the parties could have avoided because they knew or should have known what they would have to do. A person cannot drive a car without having the minimum basic knowledge of handling the vehicle; just as no one can enter an operating room to operate on others without specific knowledge of medicine. Thus, when it comes to liability for negligence, truth is that such institute was built on and designed for - as Karnow says – the Newtonian universe, ie, the one driven by the laws of physics (force, mass and reaction) typical of Newtonian mechanics where the whole effect is attributed to a given cause. The legal system, still designed for these reality frames, ends up forcing the extension of the concept of predictability in this sense. Now, the world in which robots interact and the complexity of their system offers countless combinations of possible interactions that cannot be predicted or anticipated by users or owners. The problem is not exactly ignorance of the law, but rather a question of knowledge limitations. As a way of overcoming this impasse, the author proposes that robots have a progressively more complete database - built on the basis of social interaction, so that the probabilities of unpredictable risks are reduced; similarly to common sense in humans, that often results from the experience lived over the years - and that the human being can promote a more complete and constant interaction with these machines, which will ultimately allow a better understand of the functioning of the machines and increase the predictability of their future behaviors (KARNOW, Curtis EA, *The application of traditional tort theory to embodied machine intelligence*, 2013, available at https://works.bepress.com/curtis_karnow/9/, last seen in 01.06.2020).

[25] The theme is particularly developed by KARNOW, Curtis E.A. in *Liability for distributed artificial intelligences*. The author starts from the example of a well-known artificial intelligence called ALEF, which is an information processing system that will work in a hypothetical intelligent programming environment

recalls that manufacturers, operators, owners or users could only be held strictly liable for acts or omissions of a robot.

The latter assessment (strict liability) points us to the Council Directive 85/374/EEC of 25 July 1985 on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products, which, not surprisingly, is specifically indicated by the Resolution as being one of the key texts taken into account.

Accordingly to this Directive, aimed to protect consumers against damage caused by defective products[26] put into circulation by their producer, the latter shall be liable for damage caused by a defect in his product (article 1 and 3(1)). Although, there are some exceptions regarding damages caused by both a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible for – article 8(2); therefore, the liability of the user of AI, in terms of consumers relations, can only be vindicated when there is fault to the injured person associated with a defect that can still be imputed to the defects of the product[27].

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which handles air traffic control. From here, the author tries to apply the test of "reasonable foreseeability" to artificial intelligence. In his words, "liability in the computer context must depend, as it does in other contexts, on plaintiffs' ability to convincingly argue that a given injury was "reasonably foreseeable". The specific pathological judgment calls made by ALEF are not "reasonably foreseeable", and thus courts should treat them as superseding causes, corresponding to unexpected fog or storms which, in former "natural" contexts, eluded human responsibility" (page 190). For the author, the solution would be to recognize the impotence of this traditional system of crime and causality in certain situations where this risk of error and, consequently, of damage is not predictable, under penalty of making certain people unfairly responsible for damages that they could not have prevented or reasonably anticipated. As well as those risks covered by insurance agencies, the risk associated with the use of artificial intelligence could also be covered and estimated, with users of such robot filing it to a certification procedure that would give an approximate rate of probable risks imposed on the agent. Furthermore, such risk would be determined according to some criteria, in particular the quality of intelligence: the higher, the greater the risk and the consequent premium (page 193).

[26] Regarding the consideration of AI software as a product covered by the Directive, see the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), of 07 May 2018 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0157&from=EN), which states the following: «other contributions obtained in the context of the consultation raise doubts over the adequacy of the definition of product *vis-à-vis* new technological developments, as cloud technologies. Some stakeholders raised the need for an interpretation of the concept of product or an enlargement of the concept of product, including, for instance, some new technological developments such as Artificial Intelligence or cloud technologies, as well as applications. This is particularly relevant in the context of the Directive where the non-tangible element is not included in the product put into circulation by the producer but installed subsequently as a stand-alone feature».

[27] But it is also mandatory to recall article 7 regarding producer's exemption of liability. Consider that the producer shall not be liable as a result of this Directive if he proves that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards (article 7(b)); it's also possible a producer's exemption whenever the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered (article 7(e)).

Considering this, there is a challenging possibility of exemption of producers liability when the AI uses deep learning, coming to solutions that were unpredictable to the producer when creating the product. It is highly probable that either of these situations exclude liability of the producer, since AI is such an innovative technology (and, in some way, uncontrollable).

Besides, since the burden of proof regarding the defect and the causal relationship between defect and damage belongs to the injured person (article 4), this constitutes an enormous gap between the position of the injured person and the producer in a lawsuit, since the first will most likely avoid legal proceedings due to the costs that would be involved in proving these elements[28], which are easily within reach of the latter due to the specific knowledge on these issues.

Given this, it is fundamental to understand how the word "users" mentioned in the Resolution should be interpreted regarding consumers rights. Keep in mind that if the expression is interpreted as imputing liability for damages caused by AI to third parties while being used by consumers that have no control over how the software develops, this could disrupt the protection of consumers rights provided by the Council Directive 85/374/EEC whenever there is an exemption of the producer.

2.5. Producer liability

When searching for legal alternatives to robot civil liability, we can also consider the option set out in the aforementioned Council Directive 85/374 / EEC of 25 July 1985 on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products[29], in what regards producers liability. The general rule of the Directive is that the producer, considered as the one who puts a product into circulation because it is part of his economic objective or is produced in the scope of his professional activity, is responsible for the damages caused by the placing of defective products in the market (article 1).

As we work around some key ideas, such as product[30], defect[31], and causation[32], it is necessary to analyze the peculiar situation of robots in the light of these frameworks. This is not to say

[28] The probable exception to this would only be situations with substantial damages, such as death or substantial damages to property.

[29] We must recall that this Directive emerged in a context where there was an urgent need to face the multiplication of consumer accidents that resulted from industrial and scientific progress, given the insufficiency of the contractual regime to adequately protect consumer rights. The problem was not so much the absence of conformity or defect in the product, but rather in its safety or danger. Thus, it was decided to establish a type of strict liability regardless of fault (cf. CAMPOS, Juliana, *Producer's civil liability for damages caused by intelligent robots under the regime of Decree-Law nº. 383/89, of 6th of November*, *Revista de Direito da Responsabilidade*, Year 1, 2019, page 706).

[30] Although there is no doubt about the qualification of the manufacturer of the robot as a producer for the purposes of the Directive - which can be, among others, the engineer, the programmer, the software

that many of these concepts are absolutely obsolete and outdated, in a context where the growth of robotics and the digital world was still in a very early stage in the 1980s. In any case, they are currently inadequate to represent the spectrum of possibilities and the complexity of the world of AI seen as a product[33]. The creation of this type of "goods" does not fit the

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producer or the hardware producer (cf. EBERS, Martin, *The use of intelligent electronic agents in legal trafficking: Do we need special rules on civil liability*?, Review for Derecho, No. 3, 2016, p. 10, available at: http://www.indret.com/pdf/1245.pdf) –, the same can no longer be said regarding the issue of qualification of artificial intelligence robot as a product. It seems to us that such qualifications will have to operate using the idea of software as a product. If, under the terms of Article 2 of the Directive, it is the purpose of this Directive that 'product' means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable, it seems possible to consider the AI programming code software as a product. As Campos alerts, the decisive criterion will be the incorporation and not the destination or purpose of the asset. "Thus, the *punctum crucis* consists of knowing whether an intelligent robot can be brought back to the product concept. For this purpose, first of all, it is necessary to analyze whether the robot integrates the concept of thing" (CAMPOS, *ob cit*., page 709), which is easily achieved in any national law. Any solution that involves recognizing the electronic personality of these machines will inevitably end up making this conclusion unfeasible (Cf. BARBOSA, *ob. cit.,* page 47).

[31] Take, for example, the idea of defect. As one of the most important normative elements of the Directive, the notion of defect is crucial to assess producer responsibility and is built around expectations regarding the product being purchased by the average consumer. We can ask ourselves, for example, if an intelligent robot capable of making its own decisions completely unpredictable to the initially coded programming could constitute a defective product for the purposes of the Directive. It should be noted that what is at issue here is not an idea of non-conformity, but the lack of security (Article 4 of the Directive). This security naturally does not have to be absolute, but it must be one that can reasonably correspond to the objective expectations of an average consumer, thus reasonably meeting the state of science and technology at the date of the robot's release on the market. As Campos asserts, this situation raises the question of what kind of security can legitimately be considered? The truth is that the current state of science does not yet allow us to understand what level of learning and, consequently, robot's security is to be expected (CAMPOS, *ob cit,* page 711). On the other hand, as Barbosa points out, "the damage caused by robots may not be the result of a design defect or a manufacturing defect. In other words, the idealization of the robot (software programming) may not present any defect, in the same way that, at the stage of manufacturing the mechanism in which artificial intelligence is integrated, there may be no mismatch between the final result and the one that was expected by the producer. The damage caused by the so-called intelligent robot is generated by its autonomous performance, which, far from being a mark of defects, translates into its intrinsic characteristic "(BARBOSA, *ob cit.,* page 48).
In any case, the producer could always be held liable for the breach of information duties, which is so broad that it will include warnings about the danger of the robot, generic and product-specific instructions, care measures to be taken into account etc. As the aforementioned author points out, "the defect is linked to an idea of product safety and that this safety is not absolute, referring to the safety that can legitimately be counted on, where what is intended is not that the robot does not behave with any risk, but that the user can legitimately count on all the risks that its use involves "(BARBOSA, *ob cit,* page 49).

[32] In another example, Article 4 of the Directive provides that the injured party must prove the damage, the defect and the causal link between both. This regime is very poorly compatible with a product whose alleged defect is related to a certain aspect of the software or programming code. The complexity and the high levels of technical expertise in computer engineering and programming, moreover associated with the lack of transparency in the computer market due to the protection of trade secrets and know-how, generate a disproportionate burden on the injured party in relation to the burden of proof of the cause of the damage (proof of causation).

[33] At least it is necessary to promote a distinction between autonomous robots that are defective due to a certain problem of manufacture, design or development, from those cases of robots that cause damage not because of a certain manufacturing defect, but because of a decision resulting from their own

traditional model of product and professional activity under which the Directive relied to build the producer liability regime, which, by the way, basically ends with the placing of the product on the market and subsequent loss of control by the producer. All these notions are "challenged" with the arrival of intelligent robotics and it is necessary to promote an adequate and updated adaptation of the legal norms in place.

On the other hand, the Directive does not impose any obligation on the producer to monitor the product from the moment it is placed on the market. Alas, for the purposes of the Directive, this is the key moment to cut any types of claims that the injured party may have on the producer. As clearly results from article 7 (b), the producer is not responsible if he proves that the defect that caused the damage did not exist at the time the product was put into circulation or that this defect subsequently arose[34]. If this philosophy is maintained in products linked to digital emerging technologies, we will have the incongruous situation of excluding the producer from liability for products whose defect would have been avoided if an adequate update or upgrade had been promoted. At the same time, with the absence of a regulation that provides for and imposes a duty to monitor and update the products in circulation, the Directive is totally inadequate to guarantee a minimum producer responsibility for damages caused by this type of robots.

A last aggravating factor should not be forgotten. This regime is designed to compensate strictly personal damages, resulting from an offense to life or physical integrity, for example, having a significantly restricted scope as to material damages. This results implicitly from regards 5 of the Directive and expressly from article 9, with the definition of damage restricted to that caused by

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autonomy. If, for the former situations, the producer's regime could easily be applied, that is not the case for the latter. Thus, at least with regard to the first hypothesis, there has been a strong concern in the development of safety norms and standards to be observed in the design of industrial robots - motion sensors, emergency buttons etc. In addition, given the importance of the moment of product design, the performance of tests and trials has assumed the greatest importance for producers (CAMPOS, *ob cit,* page 714).

[34] We have, therefore, another problem arising in these cases that is related to the lack of responsibility of the producer for development risks from the moment the product is put into circulation. If, at the time this occurs, the state of the art and computer science would not allow the manufacturer / producer to anticipate the predictability of the conduct that causes the damage, ie, if that defect would not be knowable, the system exempts the producer from responsibility for lack of guilt. By reference to Karnow, Manuel Felício questions if "the producer does not answer for development defects – those that the state of scientific and technical knowledge, at the time when the product was put into circulation, did not allow detection –, because outside the scope of its action and intervention and, therefore, impossible to prevent, should the producer be responsible for those "defects" that, whatever the state of the art, will inevitably occur, even with reduced frequency? To what extent should the producer be liable for the chronic imperfection - of which the creator also suffers - of his creation, bearing in mind that, specifically in the field of driving, it meets all the conditions to overcome it?" (FELÍCIO, Manuel, *Civil liability for traffic accidents caused by an automated vehicle*, *Revista de Direito da Responsabilidade*, Year 1, 2019, page 507).

death or bodily injury[35]. Even when admitting compensation for property damage, it restricts it to the damage caused by the product to something other than the injured party and that is not the defective product itself, and excludes it from the rendering of services[36]. The insufficiency of the current producer responsibility regime to deal with traditional cases is already obvious in itself, and more so in the case of intelligent robots.

2.6. Strict Liability

One of the most coherent alternatives provided by the current liability system appears to be strict liability. In addition to the situations of responsibility for the principal, other normative provisions could be considered. First, the responsibility for the ownership and / or control of a dangerous activity or source of danger[37]. Given the inclusion of indeterminate concepts in the body of the standard, it has been considered that it ends up becoming particularly flexible in its application to new cases. It can be said that the intellectual effort would not be placed so much on the malleability of the norm to allow for extensive or analogical interpretations, but rather on the understanding that the use of robots can be considered as an effectively dangerous activity. Although these machines are mainly aimed at activities that the human being finds particularly annoying, unhygienic or dangerous (3D activities: boring, dirty, dangerous), with the exception of the last case, the truth is that some failure / error in the system / programming code can give rise to significant damage. In any case, it can legitimately be questioned whether these robots, in those remaining activities other than war, fall into the category of sources of danger or dangerous activities in the sense of the law[38].

Alternatively, strict liability regime also admits holding responsible those who have a certain mobile thing in their possession and a duty to watch and monitor it[39]. This hypothesis, too, will

[35] In the interpretation of this precept, the CJEU already had the opportunity to pronounce itself in the sense that the damages that fall outside the scope of article 9 of the Directive, ie, have been silenced by the European legislator, escape the harmonization pursued with this (Case C -258/08, of June 4, 2009; *Société Moteurs Leroy Somer v. Société Dalkia France*). This means that pure economic damages and the compensation of lost profits associated with them, or compensation for damages regarding professional use or for deprivation of use, are not covered (cf. ANTUNES, Henrique Sousa, *Civil liability of the producer : the reimbursable damages in the digital age*, *Revista de Direito da Responsabilidade,* Year 1, 2019, page 1477).

[36] In the digital world, a distinction between the sale of a product and the rendering of a service is not always crystal clear. If the Directive is excluded as a basis for compensation for damages caused by the rendering of AI services, the prior qualification of the contract may prove to be a decisive issue of particular relevance for the injured party.

[37] SILVA, *ob cit,* page 22.

[38] SILVA, *ob cit,* page 22.

[39] This position is very much endorsed by the most traditional doctrine that seeks to allocate responsibility for the use of robots to existing legal mechanisms, without the need to enter into legislative creation. So, for example, RICHARDS, Neil M. / SMART, William D., *How Should the Law Think About Robots ?,* 2013, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263363. The authors, starting from a

emerge as a viable alternative as long as this watchful duty is created on someone. We have already seen that, within the scope of consumer's law, neither the consumer, nor the seller, nor the producer were expressly designated to perform these duties. Dependent on a rule imposing this need for surveillance, it would be necessary to create *ex novo* such a rule for the consumer (ultimately, the user of the product), under penalty of the regime not being applicable. This duty cannot be achieved implicitly from the right to property, not least because its extent must be defined in concrete. However, it will not be a solution without criticism: the fact that we are facing an autonomous being with decision-making abilities may not always allow an adequate capacity for surveillance under the responsibility of its owner. It is admitted that, at the end of the day, only the concrete configuration of the robot will allow us to understand in what terms this surveillance can be performed successfully.

In yet another hypothesis of strict liability, a parallel between AI robots and animals could be drawn. Contrary to the remaining hypotheses, in this case the core of the difficulties is related to the methodological effort to go beyond the letter of the standard and include machines where it is written animals. It could be said that the possibility goes far beyond an extensive interpretation, falling halfway between a teleological extension and an analogical application of the precept. Thus, with the exception of AI that is specifically identified with motor vehicles[40],

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notion of robot as a mere material instrument, a tool identical to any other, try to demystify the need to change the current regime under the pretext of the emergence of artificial intelligence. At the same time, they seek to frame the responsibility for the use of these tools under either the liability of the manufacturer or producer, or the responsibility derived from the control of sources of danger. Regardless of whether the autonomy is progressively greater, there is always a connection between inputs (commands) and outputs (robot behavior), so there will always be a causal determination of their conduct and, therefore, it is possible to conceive it as a mere tool at the service of a person. The authors warn, however, that as the robot will not understand the same input in an identical way twice, this different behavior in apparently similar situations is erroneously understood as "free will". But even with technological development, these robots are neither completely autonomous, nor completely remote controlled. They conclude that "while this mental agency is part of our definition of a robot, it is vital for us to remember what is causing this agency. Members of the general public might not know, or even care, but we must always keep it in mind when designing legislation. Failure to do so might lead us to design legislation based on the form of a robot, and not the function. This would be a serious mistake ".

[40] Consider that, accordingly to the *case José Maria Ambrósio Lavrador and Maria Cândida Olival Ferreira Bonifácio v Companhia de Seguros Fidelidade-Mundial SA, Case C-409/09, 9 June 2011*, when one of the drivers, in fault, collides with another vehicle, there's no limitation for the national law to exclude or limit the right of the victim of an accident to claim compensation under the civil liability insurance of the motor vehicle involved in the accident. This is possible on the basis of an individual assessment of the exclusive or partial contribution of that victim to his own loss or injury. The case reports to a collision between a motor vehicle and a bicycle, ridden by a child who was travelling on the wrong side of the road, in breach of the priority rules, which resulted in the death of the latter. Considering this, the traditional solution makes way to the following consequence in the light of AI technology: in case of an accident between an autonomous vehicle and a human driver, the latter will always be at a disadvantage since no fault can ever be attributable to the autonomous vehicle. The same consequence goes for passengers. Accordingly to the ruling of case *Vítor Hugo Marques Almeida v Companhia de Seguros Fidelidade-Mundial, SA, Jorge Manuel da Cunha Carvalheira, Paulo Manuel Carvalheira, Fundo de Garantia Automóvel, C-300/10, 23 october 2012*, the Council Directive 72/166/EEC of 24 April 1972, Second Council Directive 84/5/EEC of 30

that usually reaps a concrete prediction in the legislation on risk, this hypothesis, although of more remote adequacy, would also appear as a theoretical possibility of holding the robot owner responsible for the damages that it causes. Once again, however, taking the consumer hostage to knowledge that he does not master and to a machine that, like a dog, can make unpredictable decisions that escape the instructions given by the respective owner.

2.7. Cascading private liability schemes

One of the proposals advanced by the European Parliament Resolution concerns the union of mandatory insurance and compensation fund schemes. Insurance that would be supported, again, by the purchaser of the intelligent robot would be a private solution apparently adequate to solve the question of damages caused by it. Eventually, whenever it only covers an amount lower than the damage's, it could be supplemented with compensation funds to the extent of the difference, and to be paid by the producer himself.

Without prejudice to the greater or lesser suitability of each of these types of responsibilities, as some propose, perhaps it would be more appropriate to build a cascading responsibility system that could successively cover the robot, the producer, the supplier, the user and the owner. If, on one hand, this type of scheme clearly provides the injured party with a series of guarantees, it is no less true that, from a theoretical and dogmatic point of view, this system does nothing more than share responsibilities without unifying and singling out the regime in a single imputation model.

3. The incongruity of creating an e-person

There are two entities to which it is customary to attribute legal personality: natural persons and legal persons (or legal entities). Its concession is based on an idea of personality, humanity[41]. It may be questioned whether this is the principle that leads the legal system to grant legal personality to legal persons as well, since they are nothing more than mere legal fiction. The truth, however, is that legal persons exist to the extent of the existence of the respective bodies of direction and management, all of them composed of human beings who,

December 1983, and Third Council Directive 90/232/EEC of 14 May 1990 must be interpreted as meaning that, where two motor vehicles collide giving cause to personal injury to the passenger in one of the vehicles and the event is not attributable to the fault of the drivers of those vehicles, they do not preclude national provisions which allow the limitation or exclusion of civil liability of the insured persons. Therefore, in the light of AI technology, if a conflict arises due to an accident between an autonomous vehicle and a human driven vehicle, a passenger in whether vehicles (whose fault can limit or exclude liability of the insured persons by national law) will always be at disadvantage in comparison to accident between human-driven vehicles, since no fault can ever be attributable to the autonomous vehicle.

[41] We do not ignore the discussions surrounding the granting of legal personality to animals as well, considering the capacity to feel, suffer, have a minimum of conscience, etc.

behind the scenes, give will and lend a voice to those fictitious entities. Collective people act, are capable, do business and exist because, behind this fiction, there are human beings who give it life and represent it organically, following collective or permanent purposes[42]; ultimately, it is because of natural persons that legal persons exist[43].

The Resolution's proposal, however, trades a different path. In §AB, it is assumed that "*the more autonomous robots are, the less they can be considered to be simple tools in the hands of other actors (such as the manufacturer, the operator, the owner, the user, etc.)*"; this paragraph is later complemented by §59 (f), which points out the prototypes of robots deserving protection under the umbrella of legal personality as those who "*make autonomous decisions or otherwise interact with third parties independently*". By these assumptions, it seems to be possible to say that the idea of legal personality is intentionally detached from the human factor that has always been the basis of legal personality. The aforementioned notion of a robot that could be assumed as a center for imputing decisions independent of third parties turns it into a *sui generis* legal actor alongside the individuals and companies that created it; but it also keeps it away from other things that deserve legal regulation, such as animals or tangible / intangible assets, since these are not legally subject or capable of making decisions. This means that AI, being uncontrolled by third parties, has autonomy and its own identity[44].

As it seems, the proposal intentionally departs itself from discussions about consciousness that these robots may or may not come to have[45], even though the European Parliament apparently believes that it is possible to make this leap in 10 to 15 years (§51). Considering the studies on robotics explained at the introduction of this paper, we have serious doubts that this odyssey is achievable, or even justified. In any case, it appears that this question is not really intended to

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[42] FERNANDES, Luís A. Carvalho – *Teoria Geral do Direito Civil*. Vol. I. Lisboa: Universidade Católica Editora, 2009. ISBN 978-972-54-0226-9, p. 417.

[43] BARBOSA, *ob. cit*,, pages 54-55.

[44] Still, the question remains whether, although with increasing autonomy from its creator, this metallic figure, without feelings or conscience, can effectively become an autonomous legal being. This is because the Resolution does not establish any requirement or condition for the attribution of electronic personality to the robot that has any potential to acquire awareness; the existence or absence of internal feelings of the machine becomes irrelevant for the creation of a *tertium genus* of legal entity.

[45] *Cf.* NEVEJANS, Nathalie, *European Civil Law Rules in Robotics*, 2016, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571379/IPOL_STU(2016)571379_EN.pdf: "*When considering civil law in robotics, we should disregard the idea of autonomous robots having a legal personality, for the idea is as unhelpful as it is inappropriate. Traditionally, when assigning an entity legal personality, we seek to assimilate it to humankind. This is the case with animal rights, with advocates arguing that animals should be assigned a legal personality since some are conscious beings, capable of suffering, etc., and so of feelings which separate them from things. Yet the motion for a resolution does not tie the acceptance of the robot's legal personality to any potential consciousness. Legal personality is therefore not linked to any regard for the robot's inner being or feelings, avoiding the questionable assumption that the robot is a conscious being. Assigning robots such personality would, then, meet a simple operational objective arising from the need to make robots liable for their actions*.".

enter the debate, since the Resolution objective is simple: to solve the problem of holding AI accountable for the damage it created, regardless of consciousness or guilt.

As it is not possible to look for an extension of the human personality to the electronic personality, which the Resolution clearly discards, it remains the consideration, as we have seen, of its similarity to legal entities. Such an approach would imply associating the autonomy of the robot to a person who, behind it, would represent it; we would have, as what happens with legal persons, an electronic person (robot) represented by an individual (creator or user). However, we believe this solution is useless as there are more effective ways of solving the problem of liability for damages caused by artificial intelligence, and it is also inconsistent with what are the expectations of artificial intelligence's technology state of the art in the medium term and the increasing freedom and autonomy that they are expected to gain in relation to their creator, who cannot be configured *ad eternum* as a representative of a totally independent entity[46].

At first glance, it seems that, in order to create an electronic personality, it has to assume an independent modality, differentiated from that attributed to individuals – purely natural – or legal entities – purely fictional, but dependent on a representative human element. No analogy with one or the other should be sought, due to the lack of identity of situations.

While the state of the art of emerging technologies in the field of artificial intelligence does not offer certainty about the adequacy and necessity of this solution as an immediate alternative, other schemes of imputation and responsibility will continue to be used to solve these problems, such as its attribution to natural persons who have acquired the robot, or imputing it to its creator / producer. It does not seem, however, that over time these traditional schemes will still provide sufficient or adequate responses.

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[46] *Cf.* NEVEJANS, *ob. cit.*: "*Legal personality is assigned to a natural person as a natural consequence of their being human; by contrast, its assignment to a legal person is based on legal fiction. Legal persons are able to act within the legal sphere solely because there is a human being behind the scenes to represent it. Ultimately, it is, then, a physical person that breathes legal life into a legal person and without which, the latter is a mere empty shell. That being the case, where do we stand with the robot? We have two options: either a physical person is the true legal actor behind the robot, or the robot itself is a legal actor. On the one hand, if we consider there to be a person behind the autonomous robot, then this person would represent the electronic person, which, legally speaking, would - like the legal person - simply be a fictional intellectual construct. That said though, the idea that one might develop such a sophisticated mechanism to produce such a pointless result shows how incongruous it would be to assign legal personality to what is just a machine. Once a robot is no longer controlled by another actor, it becomes the actor itself. Yet how can a mere machine, a carcass devoid of consciousness, feelings, thoughts or its own will, become an autonomous legal actor? From a scientific, legal and even ethical perspective, it is impossible today - and probably will remain so for a long time to come - for a robot to take part in legal life without a human being pulling its strings. What is more, considering that the main purpose of assigning a robot legal personality would be to make it a liable actor in the event of damage, we should note that other systems would be far more effective at compensating victims; for example, an insurance scheme for autonomous robots, perhaps combined with a compensation fund*".

To allow for discussion, if we considered a *tertium genus* electronic personality was the most appropriate legal solution to solve the problem of liability, this option would also have some questionable consequences. In fact, the recognition / creation of a legal personality for artificial intelligences necessarily implies the granting ot rights and duties that must be enforced. However, we cannot help but wonder how we could configure this granting of rights and duties to machines. Don't these have an underlying connection with the idea of the moral and ethics of human beings? Furthermore, how wide could these rights be? Could they have rights similar to those of humans, such as the right to life / non-destruction, the right to work, to receive salary, the right to act in self-defense? It seems that the solution would leave us with more questions than certainties[47]. Even so, it seems to us that future debates on the issue will be focused not so much in whether or not to recognize electronic personality, but on the extension of such recognition[48].

In order to try to overcome this issue, it has been suggested that this electronic personality recognition of artificial intelligences does not necessarily imply the inclusion of all the rights that individuals or companies have. But it must not be forgotten that legal personalities did not started with the full range of rights and duties that they currently have (increasingly extensive civil and criminal liability, full property rights, fiscal, labor and environmental responsibilities higher than individuals; the possibility for legal entities to self-divide, join or create from scratch new legal entities, etc.[49]); so the doubt is legitimate: if the electronic personality starts with civil liability, what path will it take afterwards[50]?

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[47] As an act of publicity, on October 25 2017, Saudi Arabia granted citizenship to the robot *Sophia*. Immediately questions arise about the equal treatment between the legal status of human women and that of a *female robot*, or between foreign workers and *foreign robots*. *Cf. https://www.bbc.com/news/blogs-trending-41761856.*

[48] This question is related, in a parallel situation, to the question of minors, people with profound disabilities, people in a coma or vegetative state, etc. In all of these situations, their ability to exercise their rights is limited, despite the fact that the notion of legal personality is unquestionable, inextricably linked to the human fact. In addition, and particularly in relation to minors, there are rules in which they are excluded from any regime of criminal liability until a certain age.

[49] In the USA, there is even starting some support from the Supreme Court, in the sense that companies have freedom of expression in addition to commercial and advertising discourse. *Cf.* Citizens United *v.* Federal Election Commission, 558 U.S. 310 (2010) and Burwell *v.* Hobby Lobby Stores, Inc., 573 U.S. (2014).

[50] KOOPS, Bert-Jaap & HILDEBRANDT, Mireille, *Bridging the Accountability Gap: Rights for New Entities in the Information Society*, 2010, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647744: "*The constructions of limited legal personhood could evolve into the third strategy* [full personhood with "posthuman" rights]*, namely to change the law more fundamentally by attributing full personhood to new types of entities. This would concern both liability on the basis of wrongful action and culpability and a lawful claim to posthuman rights. Can we imagine that computer agents should be attributed moral personhood in the long term, if they gain the ability to make moral (or moral-looking) decisions, based on self-consciousness (or something that looks to their environment like self-consciousness)?*".

We believe that it would be foreign to the legal system – and even useless – to create an entity with legal personality which is intended to be assigned only responsibilities and duties but no rights. Remember that, when it comes to civil liability, there must be a way to reach the assets of the agent who did the damage to a third party; the institute takes as an assumption that whoever does the damage and becomes responsible effectively has them. This wouldn't be possible if the machine doesn't have any rights; and if the responsible agent has no assets, being civilly responsible is irrelevant (both to the agent and to the victim). How would artificial intelligences assume civil liability and its natural consequence, the obligation to reimbursement of the damage? Either it is accepted that it has no assets – which would imply an absolute externalization of the responsibility of AI to the victim / community / State –, or AI has assets and assumes this cost by itself. And here, again, we have to ask: how could that be done? In the absence of any assets, could the software itself (that is, its own existence) be even considered of economic value (as it is considered nowadays when it is marketed) to compensate the injured person[51]? Putting aside the possibilities for an estate similar to natural persons (unrealistic for the time being[52]), the current options are limited[53]...

Besides the consequences mentioned, focusing on the electronic personality of artificial intelligences as a center for imputing civil liability can lead to another outcome: the immediate exemption of the producer / owner / user of artificial intelligence, who will not be liable because AI will be directly liable for their actions and omissions.

4. Conclusion

Given the legal framework currently in force, the solution regarding liability of AI could somehow overcome the need of the e-personality and actually be solved by a simple set of legislative changes.

[51] We believe that, when admitting so, it would be created a loop where legal personality would inevitably fall into a new slavery system where machines would become servants again, which conflicts with the aim of the Resolution. The evolution of the Law has been in the sense of conferring the right to categories (such as slaves, women, children and legal persons), not the other way around.

[52] Some authors argue that, from the moment an entity has a degree of autonomy sufficient to conclude for the existence of intentions, it should be given personality from the point of view of the law. The point of view is categorical. According to these authors, with empathy and intelligence there will be a personality (and responsibility) that the Law will have to recognize. Less extreme approaches start from the idea of legal fiction, assimilating the robotic / electronic personality to the collective personality where it arose from. Other authors reject this possibility, considering that it results from an unrealistic vision built from science fiction. About this, see SILVA, *ob. cit.,* page 11.

[53] Parallel to these questions, there are ethical and philosophical issues arising from e-personality. Granting personality to AI based in its ability to choose is undignifying to humans as it reduces their value to said ability. In fact, the autonomy of robots is a technological autonomy, based on the potential of the algorithmic combination that is provided to the software. It is, therefore, far from the ethical action of humans on which the person is rooted – BARBOSA, *ob. cit.*.

Briefly, one of the possibilities could be expanding the type of damages covered by the producer's liability regime, so that this regime cover other risk situations regarding artificial intelligence; also, it could be debated if users, owners or guardians could still be held liable for damages caused by AI up to a certain level of risk materialization, that is, with regard to robots that actually involve a particular danger. Besides, there could be the possibility of setting a strict liability regime for the operator according to the type of use given to the robot – for example, if it operates on public or private forums. And there could also be sustained the application of contractual liability for debtors who use AI robots in the course of their business.

The most important aspect to keep in mind, though, is that, in today's society, it does not make sense that the victim is the one to bear the risk for damages suffered by action of an AI. European societies are moving in the direction of always creating some solution that will ensure the victim has some way to obtain compensation (at least for damage to his body and life). European law also follows this line of reasoning, as we can see, for example, in the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, or the Council Directives 72/166 / EEC, 84 / 5 / EEC, 88/357 / EEC and 90/232 / EEC and Directive 2000/26 / EC of the European Parliament and of the Council Directive 2005/14 / EC of the European Parliament and of the Council of 11 May 2005, relating to insurance for civil liability arising from the use of motor vehicles. In all these regulations there is the concern to identify a responsible individual or legal entity and that there is property with sufficient solvency to ensure compensation for potential damages that may arise.

Also, it is possible to conceive the attribution of the obligation to indemnify to the State, either to be financed, or not, by special taxes. In this case, the main concern would be avoiding unequal partition of advantages and disadvantages, namely it should be avoided that users of electronic personalities would benefit from all advantages while the State (and taxpayers) would assume all the disadvantages (as stated the latin proverb, *ubi commoda ibi incommoda*). In addition, it is difficult to see this solution as being socially or politically acceptable at this moment.

The creation of mandatory insurance or indemnity funds could also be considered. This is the simplest and most effective solution to solve the problem of civil liability of artificial intelligence with the current state of the art. As far as possible, it should be ensured that there are sufficient assets for the compensation and, on the other hand, if it is operationalized by special rules of strict liability, we can avoid exclusions of artificial intelligence responsibility.

Nevertheless, depending on its amount and the time of its constitution, it could represent an obstacle to economic development, which the Resolution specifically intends to avoid. Taking autonomous vehicles as an example, European legislation imposes up to € 5,000,000.00 as minimum amount of capital for motor insurance; therefore, if someone, when purchasing an autonomous car, has to pay the purchase price of the machine (something between € 20,000.00 to € 100,000.00) plus the constitution of the machine's equity fund (€ 5,000,000.00), the majority of the population would be excluded from this possibility.

All of this means that, today, many alternatives to the e-person are still easily achievable considering the state of the art of artificial intelligence, although none of the solutions are exempt from criticism and downsides. Who knows what will happen, however, when we reach the stage of sentient robots.

5. Acknowledgment

Our special thanks to our dear tutor, Dr. Patrícia Costa, and to Professor Mafalda Miranda Barbosa, for the precious contribution and availability to the realization of this paper.

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4.
Apresentação da Equipa

Accompanying Teacher

José Quaresma

CENTRO
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Apresentação
Vídeo
Trabalho final

SEMI-FINAL D

CONNECTING WITH THE JUDICIARY
A democratic demand at the dawn of the 21st century

Auditores:
CAROLINA PIRES SEBASTIAN
DIANA VILAS SIMÕES
VANESSA GONÇALVES RIBEIRO

José Quaresma*

O texto que se apresenta foi elaborado pelas Sras. Auditoras de Justiça do XXXV Curso Normal do Centro de Estudos Judiciários, Carolina Pires Sebastian, Diana Vilas Simões e Vanessa Gonçalves Ribeiro. Intitula-se *CONNECTING WITH THE JUDICIARY – A democratic demand at the dawn of the 21st century* e atingiu a semi-final D do concurso Themis.

Tive a sorte e a suprema honra de ter sido escolhido como tutor pela equipa de co-autoras cabendo-me, nesta parte, tecer estas breves considerações de introdução ao que é verdadeiramente relevante: - o trabalho e o tema escolhido.

Quando tomei conhecimento do objecto confesso que fiquei apreensivo. Não seria tarefa fácil a conformação prática daquilo que muitas vezes se apelida de "diálogo impossível". A Justiça e a Comunicação. Os escolhos que se antolham no caminho seriam ainda mais evidentes quando, por um lado, se propõe revelar a Justiça, tantas vezes fechada em ritos próprios e submetida a uma solenidade que exclui a participação da comunidade e, do outro, propondo chamar à demanda o polo destinatário, um receptor geralmente de costas voltadas e de dedo em riste para recontadas ineficiências de um interlocutor que não se conhece, nem se deixa conhecer, pejando o éter relacional de ruído e estática.

Mais difícil seria a empresa quando as autoras propõem isolar diferentes estratégias e diferentes discursos consoante a identidade e aptidões do destinatário. Tudo se alinhando num desígnio último, o de revelar um poder do Estado e as suas decisões, de forma descodificada e isenta, tornando clara a mensagem e justo e fundamentado o exercício de um qualquer subsequente escrutínio crítico.

Como refere Laborinho Lúcio, no prefácio da obra *Justiça e Comunicação: o diálogo (impossível)* [Rita Basílio Simões, Carlos Camponez e Ana Teresa Peixinho, Universidade de Coimbra, 2013] "*(…) são exigências de cidadania a colocarem novas questões em termos de transparência na administração da justiça e a reivindicarem a colocação da comunicação no centro dos pressupostos para a garantia do respeito pelo direito de acesso à justiça e a uma*

* Juiz Desembargador e Docente do CEJ.

tutela jurisdicional efectiva". A nossa zona de conforto é assaltada pela premência de democratizar uma linguagem que julgamos só nossa, perceptível por meridiana decorrência da Lei e escudados na suficiência dos signos e do descodificador mandatado. Mas não chega e tantas vezes o Juiz se sente só e incompreendido, no ressentimento de que a mensagem que julgava enxuta e esclarecedora ter sido desvirtuada e transmutada.

De tudo isto emerge a actualidade do tema e a dificuldade da empresa. Sem consensos prévios trata-se de uma abordagem que não faz vista grossa ao elefante que há muito se encontra na sala e sugere um caminho, submetendo-se à crítica do leitor, às vezes justa, outras nem querendo discutir o tema, condicionado pela premissa que tudo está bem. Iguais mas separados, sem tributos ou *accountability*.

O mesmo universo esteve presente na apreciação do trabalho. Como é natural. Desde os mais receptivos à mudança àqueloutros que julgam a Justiça dotada de imagem imaculada, sem que se revele ou se explique. Um auto de fé, uma certeza ou a persistência do estado de negação.

Serão agora os leitores a apreciar o esforço e a formar conclusões.

Valeu decerto a pena a viagem. É patente o esforço argumentativo, o cuidado na procura e selecção das fontes, as dificuldades acrescidas na tradução das ideias que nascem em português para as expressões da velha Albion. De louvar, sobretudo, a coragem de não ficar alheio à polémica e de engrandecer a discussão, com um sentido de oportunidade e de missão que é tão mais forte quanto as contingências aliadas à COVID 19 estimulavam um passar do tempo mais manso.

Talvez fosse mais fácil manter o silêncio. Talvez fosse mais cómodo acreditar em realidades estanques e que a mensagem apenas se transmite a um destinatário único, por escrito, materializada em decisão formal que não carece de acrescento. Talvez fosse mais fácil tudo, fechando os olhos e a mente e ignorar que, a final, também a Justiça é Comunidade e não há Comunidade sem Justiça. Talvez. Mas talvez assim não seja e se anteveja a utilidade de passar os olhos por este texto cheio de vontade, de coragem, ciente de que não é mais possível manter o papel autista de ignorar evidências.

José Quaresma
CEJ, Lisboa, Setembro de 2020

Vídeo da apresentação

https://youtu.be/MFGAs5rUaLE

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4.
4.1.
CONNECTING WITH THE JUDICIARY
– A democratic demand at the dawn of the 21st century

Team Portugal

Carolina Pires Sebastian | Diana Vilas Simões | Vanessa Gonçalves Ribeiro

Accompanying Teacher

José Quaresma

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EUROPEAN JUDICIAL TRAINING NETWORK

Themis Competition

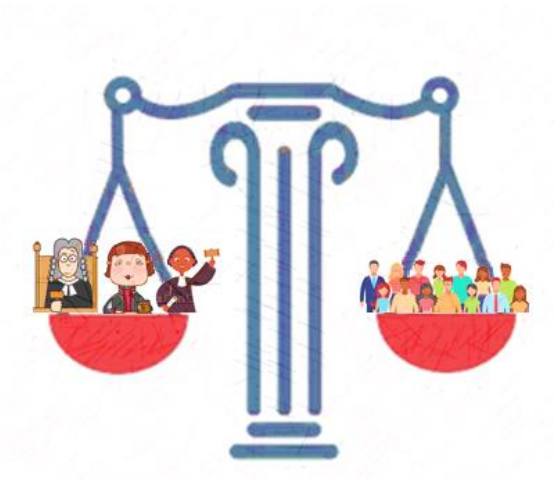
Semi-Final D

JUDICIAL ETHICS AND PROFESSIONAL CONDUCT

22nd.June.2020

CONNECTING WITH THE JUDICIARY

A democratic demand at the dawn of the 21st century



TEAM PORTUGAL

Tutor: José Manuel Lourenço Quaresma

Team members:

Carolina Pires Sebastian / Diana Vilas Simões / Vanessa Gonçalves Ribeiro

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INTRODUCTION

> "*… Justice cannot, as it was in the past, confine itself any longer in an ivory tower, deliver judgements without taking into account how these will be received and understood, and look down at the people and media's agitation with detachment and diffidence*" (CEPEJ, 2018, p. 3).

We are well aware that we were bold when we decided to choose this topic – a lot has been said about this matter, even in previous Themis editions. We do not ignore that several entities[1] still reflect upon this theme on a continuous basis and that the Judiciary of almost every European country has been making efforts to modernize its communication tools and tactics. However, we also believe that:

1. if, even in 2020, all these entities, countries and individual magistrates carry on addressing this matter, it's certainly because it remains a main preoccupation and it is still actual, relevant and pertinent.

2. it is good for the development of our collective knowledge and reflection that we can explore this subject together, with different inputs from different generations, experiences and backgrounds, coming from different European countries;

3. when pushing into the «right» direction, *the more the merrier*.

So, we will contribute to this ongoing debate with our thoughts and ideas, hoping it may be a contribution to a more methodical and adapted approach to this subject.

[1] The European Network of Councils of the Judiciary (ENCJ), the European Commission for the Efficiency of Justice (CEPEJ), the International Network of Judges and the Consultative Council of European Judges (CCJE), among others.

PUBLIC CONFIDENCE IN THE JUDICIARY

As Arthur Selwyn Miller[2] points out «*Public confidence in the judiciary*» is a term that, despite being used a lot (and often employed lightly at discussions), it is still to be defined. Everyone thinks they know what they are talking about but when you ask them to describe it they start to stutter. Of course, one could argue that, nonetheless, anyone could easily recognise it when one saw it.

The same applies to the concept of communication. As John Fiske notes "*communication is one of those human activities that everyone recognizes but few can define satisfactorily*" (Fiske, 1982, p. 1).

Nevertheless, usually the faith in the fairness and independence of the judiciary involves the belief that the judge bestows the decisions in accordance with the law (and nothing more than the law), applied in a «neutral» way.

It is a fact that the trust in the judiciary has evolved over time. We must not forget that not so long ago, way too often, the law wasn't fair to everyone and sometimes law was even the «enemy» to some parts of the population.

Not long ago, in most European countries, the law used to be created and applied by the most elevated stratums of society and, therefore, it tended to be imbued and reflect the values of that stratum and to protect its social power and dominance.

In the verge of the new democratic societies in the post-war Europe and after the democratic revolutions in several European countries (such as Portugal, Spain and Greece), we started to rectify those disparities – by ensuring a more egalitarian access to the judiciary and guaranteeing the law is the expression of the values and interests of the majority of the people.

These structural changes reinforced the trust of the common people in the judiciary – and that's why they trust us to administrate justice in their name.

As the public starts to know more about courts and the judiciary, not only everyone becomes a «judge» but also they begin to ask more of judges, prosecutors and the judiciary – they want to know more, to be better informed, to understand but also to supervise and oversee the exercise of the judiciary power.

[2] Miller, A. S. (1970, Winter). Public Confidence in the Judiciary: Some Notes and Reflections. *Law and Contemporary Problems, Vol. 35, No. 1*, pp. 69-93. Retrieved 06 15, 2020, from https://www.jstor.org/stable/1191030.

In short, accountability.

With that a problem arises - as their primary source of information is not trustworthy and it's unverified (it comes from unspecialized media, from tabloids, from social networks and often from fake news or just from hear-say), Justice remains rather unknown and quite misunderstood by the general public.

People also have a tendency to reproduce some preconceptions, misconceptions and wrong assumptions about the judiciary and the magistrates – we should be aware that, sometimes, this is promoted by some sectors of society that want to undermine the judiciary and to its independence and impartiality.

The old saying «Not only must Justice be done; it must also be seen to be done» is still partially accurate nowadays – now the public demands not only to see, but to really understand. We shall recognise that they are entitled to do so as they have every right to comprehend how justice is done – after all, we just exercise the judicial power in the name of the people.

"*Only by the adoption of sound administrative practices will the courts be able to meet the increased and increasing burdens placed on them. Time has passed when the court system will carry its load «if each judge does his job». There must also be organization and system so as to leave the judge to his job of judging*" (Miller, 1970, p. 70).

This quote belongs to Chief Justice Warren E. Burger, appointed in 1969 by President Richard Nixon and it refers to the reasons why the American justice was taking so long. We think there's still a lot in this sentence that makes perfect sense today, especially if we apply it to the communication needs.

We cannot leave to each judge/prosecutor individually this obligation. We need the judiciary, as a comprehensive and complex system, to take up the task of communication and interacting with the external players.

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BETTER COMMUNICATION, MORE TRANSPARENCY – A DEMOCRATIC DEMAND

In the last few decades we witnessed huge social changes throughout the globe. The world changes by the day – with all the scientific and technological advances and with

the society shifting rapidly – the judiciary faces increasing tensions and new challenges every day.

We need to acknowledge that what happens in the microcosm of the judiciary system affects all the macrocosm of the legal system and, correspondingly, the perception of the democratic institutions globally considered.

Communication is not a choice anymore. It is a democratic demand, that walks side by side with the growing need for transparency and the quest for a better understanding of the judiciary – this constitutes a condition for citizen's access to justice and, consequently, a mandatory imposition to the judiciary.

There is a broadened acknowledge on the risks created by this demand of communication (especially on this new digital era) and the crucial importance of reducing the menaces that arise from utilising the wrong means or tools of communication. In fact, we mustn't overlook that we could, while trying to bring the people closer to the judiciary, undermine their confidence and cast a not so positive image – as stated in the «Guide on Communication with the Media and the Public for Courts and Prosecution Authorities»: "*every alleged mistake is likely to receive a broad attention with harmful consequences for the institutions and those who represent them*" (CEPEJ, 2018, p. 3)

Despite that, we believe it is easy to agree that there is a lot yet to explore on how to use the various tools and means of communication to ramp up the public confidence on the judiciary system, since that is *«(..) of the utmost importance in a modern democratic society. (…) Whereas it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system*», as stated by The Bangalore Principles of Judicial Conduct (Judicial Group on Strengthening Judicial Integrity, 2002).

It is our understanding and belief that it is the duty of the judiciary system not only to demand the knowledge of the law and law enforcement but to try to guarantee the better administration of justice. Therefore, it has the duty to educate, explain procedures and to inform, so it can guarantee that the knowledge of the law, as well as the access to courts and the judiciary services are reachable by the public. This is a way to guarantee a fair access to justice and thus, a better perspective of the judiciary by the people. On this matter, the Commentary of the Bangalore Principles of Judicial Conduct also states that:

> ***"Public education with respect to the judiciary and judicial independence thus becomes an important function, both of the government and its institutions and of the judiciary itself, for misunderstanding can undermine public confidence in the judiciary.*** *The public may not get a completely balanced view of the principle of judicial independence from the media which may portray it incorrectly as protecting judges from review of and public debate concerning their actions. A judge should, therefore, in view of the public's own interest, take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence."*

And that:

> *"A judge is in a unique position to contribute to the improvement of the law, the legal system and the administration of justice, both within and outside the judge's jurisdiction. Such contributions may take the form of speaking, writing, teaching or participating in other extrajudicial activities."* (Judicial Group on Strengthening Judicial Integrity, 2002).

We believe that this also applies, *mutatis mutandis*, to the judiciary system collectively considered. Accordingly, we shall conclude there is a specific duty for the judiciary itself to promote public education. We must acknowledge our responsibility and take part in this quest of demystifying the courts and turning the law understandable and the justice system reachable.

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A TAILORED COMMUNICATION APPROACH

We are led to conclude the judiciary has to communicate, but that is not the main problem. The real question is how to communicate.

When looking for an answer we must understand that there is not a «public», as an individual concept, but «publics» - the general public, the media (and, inside this group, the specialized media), the judicial actors (such as other magistrates, lawyers, clerks, and so on), the parties in the proceedings, the inmate population, the scholars, academics and students, the politicians, the corporations, the government, etc.

Different groups can have different views about the judiciary, its functioning, its effectiveness and its impartiality driven by their own social experiences and their private, financial or personal interests.

However, we may also have several speakers on behalf of the judiciary, such as professional associations of judges or prosecutors, high councils, courts, spokespersons, administrative authorities and individual judges or prosecutors.

Moreover, they will not all say the same – each one has different topics to address and particular aspects of its activity to express. Some will talk about the working conditions or career development, others about budget and the specific needs to strengthening the judiciary action capacity. Some will discourse about the general principles, while other will intervene when the need to speak about a certain type of cases or about a case in particular arises, and so on.

Each of them may be able to choose which means of communication are more suitable to their needs considering the receiver profile and the message they want to convey – a press release or a press conference, information on their website, a debate or web conference, an interview, a written article or paper, talk directly to the parties or with the media or even use the social networks, if they find it more appropriate.

So, we have: several communicators, different receivers, numerous different ways to communicate and vast possibilities of content or information to transmit. Each combination demands a different approach.

That's why we propose a «tailored communication» approach, to better fit the needs of the judiciary on each scenario and moment.

Accordingly, we will shed some light on this topic and propose a communication strategy to better suit each public.

1. <u>Academics, scholars and students</u>

The judiciary is the heir of a long stroll that usually began in a law school and the law school is not just our «*alma mater*». It is a place of shared knowledge, intense debate and conflicting opinions and points of view. As we all know, this passion for law, morals, ethics and every aspect of judicial life is what makes our collective thinking thrive and the legal system prosper. Thus, we believe we need to nourish and cultivate the communication with the academy.

This communication can assume various formats – conferences, debates, seminars, joint articles and even visits and guided tours. As the CCJE noted: "*Relevant school and university education programmes (not limited to law schools) should include a description of the*

judicial system (including classroom interventions by judges), court visits and active teaching of judicial procedures (role playing, attendance at hearings, etc.). Thus, courts and judges' associations can work in collaboration with schools, universities and other educational establishments to present the judge's specific reasoning in school curricula and in public debate" (Opinion No 7 CCJE, para. 12).

2. Political Power

The judiciary power is independent. However, it does not exist in the «vacuum», it relies on legislative and executive power. In a democratic state, the three powers are independent, but co-dependent, as one cannot fulfill its mission without the others.

As "*the judiciary relies on the others to provide resources and services, in particular on the legislature to provide finances and the legal framework which it has to interpret and apply"* and *"the public relies on the executive to enforce judicial decisions*", arises "*a fundamental need for respectful discourse between them all*" (CCJE, Opinion n.º 18 (2015) - The position of the judiciary and its relation with the other powers of state in a modern democracy, 2015).

a. Executive power

When discussing matters such as budget, working conditions and career development, usually, the judiciary needs to direct its message to Governments, as they are the ones holding the executive power. This type of message normally calls for the intervention of professional organizations of judges and prosecutors, claiming that their demands are met by the political power. It can also call for the High Councils or other bodies in charge of the global administration of justice involvement to attend matters such as administrative issues, the global functioning of the judiciary, its needs and drawbacks.

Depending on the matter and level of conflict, the means of communication can differ – if we are talking about light negotiations, a mere letter, manifesto, or even a meeting can be considered. But if conciliation is not possible and there is need to call for harsher conversations, the judiciary can make use of every communication tool at its disposal – through the press (trying to put pressure on the government[3]), using social media or even choosing to go on strike.

b. Legislative power

[3] We all can agree upon the need to persuade the general public, since the public opinion can easily be manipulated against magistrates, because their income usually is a bit higher than most population and some privileges associated with their function.

As noted by CCJE "(…) *while the legislature provides the legislative framework, it is the judiciary that must interpret and apply it by virtue of its decisions and the executive is often responsible for the enforcement of judicial decisions in the interest of society*" (CCJE, Opinion n.º 18 (2015) - The position of the judiciary and its relation with the other powers of state in a modern democracy, 2015).

As the judiciary needs to apply the law, it makes sense that it can participate in the law making process. However, one cannot overlook the principle of separation of powers (principle of checks and balances), but we need to acknowledge that, as we are the ones who exert the law, we happen to know it, its strengths, weaknesses and soft-spots. We also know which areas require more regulation, and where the law needs to be clarified.

The practice meets the legislative labour, and together aim to create a healthier judicial system, with better laws, adjusted to today's needs – "*The CCJE has stressed the importance of judges participating in debates concerning national judicial policy. In addition, the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system. The expertise of judges is also valuable when it comes to matters outside judicial policy. For example, by giving evidence to parliamentary committees, representatives of the judiciary (e.g. the highest authority of the judiciary or the High Council of Justice) can raise concerns about legislative projects and give the perspective of the judiciary on various practical questions*." (CCJE, Opinion n.º 18 (2015) - The position of the judiciary and its relation with the other powers of state in a modern democracy, 2015).

The judiciary speakers in this matter are usually the same as in the previous point, although the communication is normally made by releasing a public written opinion about a certain legal process before the law is approved, formulating suggestions and recommendations to improve its applicability and effectiveness.

3. Judicial intervenients

a. Other magistrates, lawyers and court staff

In the judiciary no one works alone. Our success depends on a well-oiled system, in which the effectiveness relies on the good functioning of a complex network of individuals that, despite sometimes being in the opposite side of a dispute, need to work together.

As stated by the European Court of Human Rights: "*the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar (see the Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285-A, p. 21, § 54). Regard being had to the key role of lawyers in this field, it is furthermore legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence in them (see the Schöpfer v. Switzerland judgment of 20 May 1998, Reports 1998-III, p. 1053, § 29).*" (ECHR, Partial decision - as to the admissibility of Application no. 53146/99, by Hans Hurter against Switzerland, 2002).

In everyday work relations, especially inside court's walls, communication is the key element. Thus, regardless of the position one occupies in the court hierarchy or in which side of the dispute one stand, everyone should make an effort to ease and simplify the communication.

"Criticism of the judiciary is therefore permissible, to a certain extent (§§ 168 to 170). (...) The Grand Chamber, however, emphasised the importance of maintaining the authority of the judiciary and of ensuring relations based on mutual consideration and respect between the various protagonists of the justice system." (ECHR, Questions and Answers - Morice v. France, Grand Chamber judgment of 24 April 2015, 2015).

At this point, as the public is the other judicial actor, the speakers are, of course, individual judges and prosecutors, and they will talk about a specific case or a particular proceeding – they can talk directly or they can issue a written command or request and, naturally, should communicate their decision using a computer network.[4]

b. Parties in the proceedings

On the course of a judicial process, instead of the traditional distant and inaccessible role of the judge, which requires deference and inspires some fear, he or she must adopt a position of greater proximity to the citizens.

[4] "*The CCJE is of the opinion that constructive relations between judges and lawyers will improve the quality and efficiency of proceedings. They will also help in meeting the parties' needs. (...) The CCJE considers that states should introduce systems facilitating computer communication between the courts and lawyers, in order to improve the service for lawyers and to enable them to consult easily the procedural status of cases. In its Opinion No. 14 (2011) on "Justice and Information Technologies", the CCJE notes that information technologies play a central role in the provision of information to judges, lawyers and other stakeholders in the justice system as well as to the public and the media*." (CCJE, Opinion n.º 16 (2013) of CCJE on the Relations between judges and lawyers, 2013).

The duty to substantiate judicial decisions is of the highest importance. But the legitimation of decisions through the mere legal basis for decisions is not enough. Due to the way the reasoning is carried out, it does not fulfill its purpose. That is because, on account of the language used, the technical concepts it is impregnated with, the extent to which most decisions are characterized, the decision is not apprehensible by the true recipient.

In order to the parties of a judicial process to understand the decision, they need, more often than not, the explanation of the lawyers. But the judicial system must not delegate this essential function, which is an essential component of the duty of justice.

Indeed, the parties of a judicial process must be in position to follow it - so that the parties can make informed decisions about their interests and control how they are being defended - and the existence of lawyers does not exempt the magistrate from guaranteeing those conditions.

Therefore, the judge must be concerned with using the clearest and most understandable language possible. Even if the judge has to resort to legal concepts, he must then explain them.

Moreover, in judicial proceedings, the judge shall adopt a conduct of proximity to people.

The way on which the judicial process takes place, at the procedural level, is also essential for people's confidence on justice. One of the most frequent complaints of justice is related to its slowness. The lack of means and the need for diligence may not allow for quicker decisions, but it will be convenient for people to understand the reasons why the processes take such time. The community in general and the parties of each process in particular, should be informed of these reasons. For instance, for the parties of each process, a cordial word from the judge, explaining the delay on scheduling the hearing, can avoid the discontent and distrust.

The way the process unfolds may be more important for generating people's confidence than the outcome of the process itself.

In fact, studies show it is procedural justice and not the decision itself that is most important to people's confidence: both litigants and the general public can separate one from the other, even when the decisions are not favourable to them[5].

For litigants, the importance of an unfavourable decision weights less than the impact of an unfair procedure.

In addition to the aforementioned speed of proceedings, it is very important to take into account: the integrity shown by the magistrate, the cordial and equal treatment which must be observed in all aspects, namely, in terms of treatment by the magistrate.

Concerning specific proceedings, the communication should be held by the magistrates that are familiar with the case under discussion, but the parties should also be able to find information and clarify their doubts by consulting the websites.

4. General Public:

If the courts administer justice on behalf of the people, it is essential that the people, trust it.

The imposition of authority through force is not effective. People's trust in the judicial system plays an essential role in accepting judicial decisions, in recognizing them as just, and, therefore, to comply with decisions and laws and to cooperate with the judicial system.

The greater the acceptance of the decision, the more valid the rules are recognized, the more obedience to the law, the greater social peace, therefore, the less litigation.

How to increase society's confidence in the judicial system?

As people are more suspicious of what they do not know, knowing the judicial system increases confidence. The question is how to make this knowledge possible. We believe communication is an essential response.

"As the CCJE has noted before, dialogue with the public, directly or through the media, is of crucial importance in improving the knowledge of citizens about the law and increasing their confidence in the judiciary. In some member states, the appointment of lay judges is seen as providing a helpful link between the judiciary and the public. The CCJE recommended in its

[5] A. Allan Lind and Tom R. Tyler, The Social Psychology of Procedural Justice, Critical Issues in Social Justice, Springer Science and Business Media, New York, 1988.

Opinion No. 7(2005) on "justice and society" that the judiciary and individual courts should actively reach out to the media and the public directly. For example, courts should assume an educative role by organising visits for schoolchildren and students, by providing information, and by actively explaining court decisions to the public and the media in order to improve understanding and prevent misunderstandings" (CCJE, Opinion n.º 18 (2015) - The position of the judiciary and its relation with the other powers of state in a modern democracy, 2015).

a. Communication with and through the media

If not everyone is familiar with the judicial system through personal contact or direct experience as a party to a case or an intervener we have to be aware that most people only have indirect knowledge of it.

Mostly, peoples contact with the judicial system is conveyed by the media. Indeed, for most society, knowledge of justice is mediated. Therefore, the judicial system must intervene to avoid this mediation and reduce the risk of misrepresentation.

The citizen must be better informed. They read a mediatic and often misleading title and believe it to be the truth. Even if the news content is correct, if the title is misleading, it is the one that remains. To combat this, a statement, in response, is not enough.

The harms of inadequate media coverage of judicial cases induced by the media are undeniable. For this reason, it is not just a matter of protecting trust in justice, it is a matter of protecting the basic principles of the justice system, of the Democratic Rule of Law, as the principle of the presumption of innocence.

What is most common to observe is a total detachment from the judicial system in relation to what is happening in the media.

The fact that the judges are, for the most part, «unable» to react, to defend themselves, ends up giving the media greater freedom to say what they want without fear of response or retaliation.

The judicial system should not leave in the hands of the media what is known to the public in general. It must act in such a way that the media do not exclusively control public opinion about justice. Especially because what matters most to the media - what sells the most - is what goes wrong in court, not everyday life, not what goes well.

We also need to take into account that, every now and then, there are real misinformation campaigns, orchestrated with the purpose of compromising and subverting the judiciary and the confidence it enjoys from the public.

Likewise, we should note the positive aspects of, in specific cases, try to get «ahead» of the news and lead the narrative.

"While there is a risk in engaging with the media, courts can help avoiding public misrepresentations through active contact and explanation. In so doing, the judiciary can be accountable to the society and ensure that the public perceptions of the justice system are accurate and reflect the efforts made by judges. In this way, the judges can also educate the public that there are limits to what a judicial system can do" (CCJE, Opinion n.º 18 (2015) - The position of the judiciary and its relation with the other powers of state in a modern democracy, 2015).

Consequently, a collaboration with the media should be considered. They need sources, and the judicial system needs that the information transmitted is not only correct, but also properly transmitted, to avoid misunderstandings. If the media do not comply, that is, do not transmit the information correctly, they no longer enjoy the collaboration, which can result in compliance. In addition, the lack of commitment to the truth can be denounced and exposed, which diminishes the credibility of this particular media. Therefore, the creation of this dynamic collaboration can work.

Hence, there is an urgent need to create a closer, healthier and more cooperative relationship between the justice system and the media.

Magistrate training schools can also create protocols that allow relevant lessons to be conveyed to journalists, for example, inviting journalists to conferences, helping them not only to acquire more skills, but also to develop greater sensitivity to legal issues and alert them to the need to clearly separate what is opinion or comment, from what are facts or news.

It is necessary for journalists to understand the judicial phenomenon - not just looking for a loophole that they immediately convey, not properly contextualized.

The judicial system, for its part, has to adapt to the evolution of the times, under penalty of becoming an anachronistic system and increasingly in crisis. In this respect, openness to new communication and information technologies is essential.

First of all, the development of communication skills must be part of a judge's training programme.

Secondly, one cannot continue to try to ignore the media coverage of justice - this is inevitable. What must be done is to take an active role in reducing the negative effects of this media coverage and improve the advantages it offers. As stated, the detachment of justice from these new phenomena represents a failure to fulfill the basic duty to administer justice - since justice is not a closed and impassable space for scrutiny.

- **Special cabinets**

One way to address this problem is by creating a cabinet, within the judicial system, that acts as a link between the courts and the media, with the main objective of making the two speeches compatible, the judiciary and the journalistic. Creating a real dialogue, in which both parties understand the language and the reasons of the other. In short, provide advice on social communication.

Journalists may not master the law and rules of the process; magistrates may not understand the logic and modes of journalistic production. Furthermore, they are prevented by their professional statutes from talking about specific cases. So there has to be an effort, so that the interaction is possible. For information to be correctly transmitted to the population, it is necessary for journalists to know how to do it, and they have to recognize that in certain matters, they do not know it. But, on the other side of the barricade, they cannot find the inaccessibility of the judicial system.

This kind of press office could issue clarifications and public communications, keeping in mind that the way in which a certain information is transmitted must be stripped of opinion, very clear, objective, without any ambiguity that could disfigure the facts to be transmitted, that is, that can lead to a misinterpretation. The communication can assume diverse forms, such as a press release, a press conference, an interview or written responses to written questions.[6]

Social media uses an accessible language, adapting to reach all recipients. If the judicial system does not do the same, it will not succeed. Moreover, a less technical, erudite and conceptual language must be used. Only by using a clearer and simpler language is it possible to obtain the understanding of all the recipients.

[6] Like the ECHR does, with the Q&A publications.

In addition, in order to be understandable, it is also important that the information is concise and long texts should be avoided for this kind of communication.

This office should not only be concerned with the disclosure of the outcome of processes, but also with the way the process itself is transmitted, since the perception of justice and the acceptance of its verdict can be harmed, if the press generated poorly founded expectations as to the solution of the case.

Currently, we are witnessing debates on justice, held on television, where opinion makers assertively affirm their opinions (often without foundation) as if they were absolute truths, finding permeable terrain in people's ignorance. We believe that the judiciary has an obligation to take an active part in these debates, in order to check and correct the information that is badly given and to provide the necessary clarifications.

- **Spokesperson**

Other way of communication with and through the press it is by a mandated spokesperson, that is a designated person authorised to speak on behalf of the Judiciary and that can represent it in institutional communication.

It can be a judge or a prosecutor that is dedicated to this specific task or can be an external person hired for their communication skills and experience.

The spokesperson acts like the «face» and «voice» of the judiciary body he or she represents, and should maintain a cordial, close and constant relation with the media.[7]

The spokesperson should be committed to the same principles, restrictions and limitations as we enounced above for the special communication cabinet.

The court presidents can also assume this role, as they "*fulfil a key role of representing the courts*", and can take an active role communicating with the Council for the Judiciary or a similar body, with other courts, with the prosecution service, with the Bars, with the Ministry of Justice and, mainly, with the media and the general public.

Despite "*the main duty of court presidents must remain to act at all times as guardians of the independence and impartiality of judges and of the court as a whole*", they can take an important role simplifying the communication, especially with the media

[7] Can also be considered to put in place an accreditation system of journalists. This system can help promoting a more specialized media and, as the CCJE notes "*qualified journalists can report on judicial activity in a way that is supposed to be more competent and objective* (…)" (CEPEJ, 2018, p. 16).

(and the general public through, the media), but "*in their relations with the media, court presidents should keep in mind that the interests of society require that the media be provided with the necessary information to inform the public on the functioning of the justice system. However, such information should be provided with due regard to the presumption of innocence, the right to a fair trial and the right to respect for private and family life of all persons involved in the proceedings, as well as the preservation of the confidentiality of deliberations*." (CCJE, Opinion n.º 19 (2016) The role of Court Presidents, 2016).

b. Direct forms of communication

There are also other ways to convey information without requiring mediation that we think the judicial system is neglecting: the use of social networks, mainly, but also the use of websites and other traditional forms of communication.

- **The institutional use of social networks**

As stated in ENCJ Project «Public Confidence and the Image of Justice»: *"The judiciary should update their communication means and systems. Since many people use (only) these social media, the judiciary has to do so too to communicate with different target groups and the general public. The use of social media should enhance the visibility, the publicity, transparency and accessibility of the judiciary and it should serve educational purposes"* (ENCJ, Public Confidence and the Image of Justice - Individual and Institucional use of Social Media within the Judiciary, 2018-2019, p. 17).

As noted above, social networks are increasingly used as a (sometimes unique) mean of communication and information. Hence, the use of social networks is essential to ensure that information reaches everyone: all social structures and all age groups.

It can be used not only to react to a given situation, but also to provide and disseminate important information and to educate.

Regarding the information that can be disseminated, this can be, for example, related to the way the judicial system works, in order to increase transparency.

With regard to the purpose of educating, it should be noted that it is very difficult for lay people to understand the judicial system, especially its concepts and its rites. Even if a person with an interest in knowing more seeks to search for information to try to

understand more, the most likely is that they do not know how to select and interpret the available information.[8]

A correct and appropriate use of social networks, through accessible and comprehensible language, and using interactive ways of transmitting information, can be the solution. So, we consider it is to be applauded the proposal contained in the ENCJ aforementioned report, which reads: *"*(…) *proactive approach–performed through:* (…) *in-depth information to allow people to learn more about the judiciary (how it functions, information related to legal institutions and glossary of legal terms, etc.) using educational materials such as: citizen's guides, videos, multi-media presentation etc*".

Other suggestions made in this project are: *"press summaries, using social media for organising meetings and events for students and pupils to visit courts (prosecutor offices), discuss with and learn from judges and prosecutors and reflecting these meetings on social media, including members of the local public in different projects, introducing topics in the public debate, deliver core messages, using authorities and other public organisms to create networks for developing preventive measures and raising awareness" (idem,* pp. 17-18*).*

All information transmitted must be carefully selected and written. In fact, "*the communication provided by the judiciary should be focused on the independence of the judiciary and of the judgements – aiming to give objective information on the function of the judiciary and to preserve the independence of the judiciary* (ENCJ, Public Confidence and the Image of Justice - Individual and Institucional use of Social Media within the Judiciary, 2018-2019, p. 19).

The institutional use of social networks would also help decrease the need and impetus for magistrates to choose an individual use of this form of communication for this purpose.

There is, nonetheless, a few down sides: the risk of impoverishment of the information has to be reduced to a short and concise summary; the danger that arises if a discussion starts (and the difficulty to follow and control it) and the risk of the trivialisation of Justice.

[8] And that's why it's also of great importance to maintain the institutional websites up to date and with all the relevant information for the general public.

That's why this task should not be left to individual magistrates, but to someone (or a team / cabinet) that has training and experience in this field so that the mentioned risks can be reduced.

Obviously, should be on each judicial institution to choose the strategy that works better for its communication needs and objectives.

- **Website and other traditional means of communication**

Nowadays, almost every judiciary institution has a website and, as we know, most of information search is done on line. That reinforces the importance of an adequate website, with up to date and pertinent information and with a friendly-using interface.

The judicial system must also act so that the public realizes that it is often not in possession of all the information that allows it to form an informed opinion (for example, due to the secrecy of justice).

For instance, creating pamphlets or thematic collections of studies, reports and statistics, containing relevant information, such as explaining new laws, or proposing correct ways of referring to a particular legal concept that is difficult for the general public to understand, which can also facilitate the exercise of journalistic activity in relation to justice.

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CLOSING REMARKS

The globalisation and the revolution in the communications created more active and vigorous societies. Magistrates cannot keep on wearing robes and mantles and hope people recognise authority in them just for that. The old idea of justice and judges as unquestionable and unarguable does not apply anymore in an era where information is much more reachable and everyone has access to the several means of communication.

The respect, authority and trust do not come from the rites, clothes or any paraphernalia used within the courtroom. It comes from our democratic legitimacy. We shall not forget that.

As stated by ENCJ: "*An open and transparent system of justice is a further precondition for establishing and maintaining the Public trust in justice, which is a cornerstone of the legitimacy of the judiciary*" (ENCJ, Public Confidence and the Image

of Justice - Individual and Institucional use of Social Media within the Judiciary, 2018-2019, pp. 6-7).

A solid judiciary power, more transparent and reachable by the people, is a precondition to the reinforcement of the democratic system. We can all agree on the need to strengthen and consolidate democracy in these turbulent times.

Anthony Giddens[9] tells a curious story: A British asked an American how come the American people let themselves be ruled by someone they would not invite for dinner. The American replied, asking the British how would they let themselves be governed by someone who would not invite them for dinner.

It's time for Justice and the Judiciary to free themselves from their ivory tower and to create a future where everyone could and would seat at the same table as the judiciary, and have dinner with a judge or a prosecutor.

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