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# THEMIS ANNUAL JOURNAL 2020

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# FOREWORD

**MARKUS BRÜCKNER**  
EJTN SECRETARY GENERAL



It is with great pleasure that I present the 2020 *Themis Annual Journal*, the second issue of a publication that is helping to propel the highly acclaimed EJTN THEMIS competition to new levels and give the opportunity for the EU magistrates to present their original approaches in European law.

Themis has a long legacy of success. The event was created, financed and run from 2006 to 2009 by two EJTN member institutions – Portugal’s Centre for Judicial Studies (CEJ) and Romania’s National Institute of Magistracy (NIM). In 2010, the competition became an EJTN activity and the steps were then taken to adapt and enlarge its format to the needs of the new generations of magistrates.

EJTN steadfastly believes in the need to keep developing a common European judicial culture and building mutual trust. THEMIS is a veritable treasure in the EJTN training offer for future and early-career judges and prosecutors in order to contribute to these overall goals. This competition answers the need to have a holistic approach to judicial training by cultivating practitioners’ knowledge, skills and attitudes.

The recent period has been a great challenge for all of us, but we adapted quickly and organised the semi-final rounds in an online format. I hope you all have taken this opportunity to learn new skills and discover how you approach uncertain situations. I believe that the EU judges will need to not only master the EU law but also the IT tools and new technologies that are becoming an integral part of the judiciary. After watching the video presentations prepared by the teams, I am delighted to see that they have mastered the challenges of a totally remote way of working. Unfortunately, the participants did not have the chance to meet in person and have the true Themis experience.

Also, in its first online version, the THEMIS competition is open to future European countries’ magistrates undergoing entry-level training within the judicial profession. It remained a platform for debating legal topics, sharing common values, exchanging new experiences, discussing new perspectives and practicing judicial skills.

Like every year, the THEMIS competition consists of four semi-final rounds where up to 11 teams, each accompanied by a tutor, compete with each other. The eight best teams are selected from the semi-final rounds, by juries composed of renowned European judges, prosecutors and scholars, and proceed to the competition’s grand final round. The THEMIS competition enables approximately 200 participants each year to deepen their understanding of EU law topics and to interact with other European judicial trainees.

Each year’s THEMIS competition featured four semi-final rounds consisting of three stages, with one stage being the preparation of a written paper. Here we come to the essence of this publication. Each participating team must present a written text on any subject related to the topic of the semi-final round in question. Papers should contain new ideas, critical appreciations or proposals regarding European law and professional ethics. This element of the competition produces an array of brilliant, innovative and diverse papers. It shows how different legal cultures and different perspectives on challenges faced by the judiciary are brought together under the construct of European unification.

The best written papers are selected by the jury members and published in this official EJTN publication, the *THEMIS Annual Journal*, which will be issued annually after the completion of each year’s semi-final rounds.

I am grateful to all the teams for their efforts in participating in THEMIS, to the jurors for their hard work when assessing and selecting the best of the best and finally to my colleague and member of the EJTN Secretariat, Mr Arno Vinkovic, for managing the THEMIS competition and for all of the enthusiasm and hard work put into its implementation.

I wish you all a pleasant and engaging reading of this unique publication!

A handwritten signature in black ink that reads "M. Brückner". The signature is written in a cursive, flowing style.

**Markus Brückner**  
Judge, EJTN Secretary General

# OVERVIEW

**ARNO VINKOVIC**  
THEMIS PROJECT MANAGER



The highly acclaimed THEMIS Competition, open to future EU magistrates undergoing entry-level training, presents an event for debating EU topics, soft-skills learning and development of practicing judicial skills.

In 2020, the topics addressed were the following:

- EU and European Criminal Procedure
- EU and European Family Law
- EU and European Civil Procedure
- Judicial Ethics and Professional Conduct
- Grand Final: Access to Justice

## DESCRIPTION OF ACTIVITY

The EJTN THEMIS Competition is a unique contest format, open to judicial trainees from across Europe. It is designed to develop the critical thinking and communication skills of future magistrates from different European countries. The competition is a forum of discussion on different European law topics, including international judicial cooperation in criminal and civil matters, judicial deontology and human rights.

A genuine enthusiasm exists for the THEMIS Competition. In 2020, 26 teams competed in the year's four semi-finals. Each semi-final had three stages: a written paper on a topic relevant for the subject of the semi-final; a video presentation; and, a discussion with the jury and other teams. Adapting to the online format presented the challenge for many of the teams, but even in the given circumstances we wanted to preserve the high standards of the competition. The participating teams were able to display their creativity in making engaging content that also included short feature films, animated movies and even coded game algorithms. This has proven that the issues concerning EU law can also be approached in new formats and that the future of the judicial training is open to new horizons.

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



**eSemi-final A**  
TEAM PORTUGAL: *A Contribution to Untangle European Case Law Regarding Ne Bis In Idem*



**eSemi-final B**  
TEAM PORTUGAL: *Undressing Dreams: A Burden of Proof or a Burden to Prove?*



**eSemi-final C**  
TEAM SLOVENIA: *Precarious Work in the New Era of Gig Economy and Forum Shopping*



**eSemi-final D**  
TEAM FRANCE: *How Judges Think? Understanding and Addressing Judicial Biases*

In Hindi, *TAJ* means 'crown' and this journal presents the selection of best publications in a given THEMIS year and the highlights of teamwork and originality in judicial work. Themis should be an experience of having awareness of personal limitations in variety of forms (writing, presentation, discussion, teamwork) and understanding the ways and the future skill set you will need to overcome them. Judicial work is more than an expertise, it is a true skill and craft which requires continuous training and finetuning. For many of the Themis participants, this is their first leap in the judicial world. Therefore, EJTN encourages its members to provide their trainees the THEMIS experience.

I would like to take this opportunity to thank Judge Markus Brückner, EJTN Secretary General and Ms Carmen Domuta, Head of EJTN Programmes Unit, who have supported the idea of the Themis Annual Journal and have done their best to make it a reality. Also, I would like to thank all the jury members, who provide deeper understanding of the topic and share their experience in it; the tutors and the national coordinators, who are year by year becoming better in their work and giving better results while working each year with different teams. At the end, I would like to thank the participants, who have invested their most valuable resource, their time in preparation for the competition. This period was a great test of all of us in both professional and personal uncertainty. We should all be aware that uncertain times will also come again in the future. Therefore, we are the ones who need to adapt and get the best out of the new circumstances. This year's semi-finals have proven that is possible.

All of us hope we have managed to provide you an experience, a THEMIS experience, that you will remember and be proud of.



## SEMI-FINAL A

# EU AND EUROPEAN CRIMINAL PROCEDURE

### PARTICIPATING TEAMS

BOSNIA AND HERZEGOVINA, CROATIA, ESTONIA, FRANCE,  
HUNGARY, POLAND, PORTUGAL, ROMANIA, SPAIN

1<sup>st</sup> place: Team Hungary  
2<sup>nd</sup> place: Team Portugal  
3<sup>rd</sup> place: Team Romania

### Selected papers for TAJ

Team Croatia

Team Poland

Team France



07-09 JULY 2020, ONLINE

# JURY MEMBERS

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## DAVID J DICKSON (UK)

HEAD OF EXTRADITION, SCOTTISH PROSECUTION SERVICE

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It was a pleasure to participate and chair the jury in semi-final A of the Themis competition. This year posed a number of challenges with the event being online. These were most acute for the teams who, one can only imagine, found it difficult to socially distance while seeking to develop an in-depth study of an area of importance to EU criminal law and procedure and then present that in video form. Some of the teams showed imagination in their video presentations and may yet have an opportunity to demonstrate their formidable talents in video production in other fora. For the jury it was an equally unusual experience.

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However, the greatest impact was the inability to meet in person. For those of us who work daily in judicial cooperation, the networks of colleagues and friends we have developed are invaluable to ensuring we carry out our daily tasks as best we can for the benefit of the public we seek to serve and protect. It is at events such as the Themis semi-final where the seeds of friendship, mutual understanding and cooperation are nourished. We must acknowledge the hard work of all those at the EJTN in their drive and commitment to ensuring the Themis took place this year and was not cancelled, none more so than our compère Arno Vinkovic. Arno brought his legendary wit and light touch to the event encouraging the participants to make the most of the event but to enjoy it.

There was a wide range of topics with several being topical and relevant to current practice ranging from an examination of hate crime, suggested improvements to the effectiveness of the European Arrest Warrant, the vastly underused European Supervision Order and conditions of detention within the European Union. However, of particular note is that three of the ten teams considered the issue of the victims in cases involving sexual abuse. These papers considered national and European case law, national legislation and European and International Conventions. In doing so, these teams showed a depth of knowledge and understanding of sensitive and timely issues: does national domestic law and European law do enough to support the victims of crime, do enough to encourage the reporting of these heinous crimes, to provide adequate support to the victims during the investigation and trial phase of the proceedings and avoid secondary victimisation. With such open and inquisitive minds our futures are safe in the hands of these future judges and prosecutors.

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## CHRISTINE GÖDL (AT)

JUDGE, FEDERAL MINISTRY OF CONSTITUTIONAL AFFAIRS,  
REFORMS, DEREGULATION AND JUSTICE:DEPARTMENT  
FOR INTERNATIONAL CRIMINAL LAW

---

For the first time and caused by the worldwide Corona Pandemic, the Themis Semifinal A has been organised in an online format. It was the work and dedication of Arno Vinkovic who made it possible to arrange this online-format despite of challenging circumstances. Instead of presenting their subject in front of a jury, teams had to submit a video-presentation and to discuss their topic in an online conference which - in times of social distancing - has been an additional challenge. The use of electronic tools for a format like Themis has been a great and interesting experience but can only substitute partially what Themis stands for: to meet colleagues from other jurisdictions in person, to create contacts and friendships and to discuss ongoing legal issues in an international field. The topics chosen by the teams have been very actual, dealing with prison conditions, addressing the issue of support of victims of crime to hate crime and exploring possibilities to improve EU legal instruments like the European Supervision Order and the European Arrest warrant.

In the video-presentations and during the discussion with the jury, teams showed their ability of working together as a team even when social distancing which underlined their capability to give their best and find a solution even in difficult times. For the jury, discussing and deciding in an online format has been a new experience as well and with the help of electronic tools, we found an efficient way to exchange our views on the presentations. Beside the impressive knowledge and dedication of our younger colleagues and future judges and prosecutors, this years Themis Semifinal A proved that international work is also possible and effective in extraordinary times and that despite of the valuable support of electronic tools, meeting in person cannot be valued high enough.

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## PETROS ALIKAKOS (GR)

PRESIDENT OF THE COURT OF FIRST INSTANCE AT  
IOANNINA, NATIONAL SCHOOL OF JUDICIARY

---

It is the third time that I am participating as a juror in the great THEMIS competition. It is great because it gathers future judges and prosecutors from all over the European Union. The first time it was Ethics, second Family law, and now Criminal law. For the last two competitions I had the pleasure to collaborate with Arno Vinkovic. Arno has endorsed the competition with love and dedication. This time was more difficult because the whole semi final was online. For the secretariat and Arno to shape all the contests online. For the participants to give their work in an environment of social distancing. For the jury to be accurate and fair from distance. I think we managed it in the end: every party showed its best to keep the level of THEMIS high and to come up to its standards.

This year in semi final A (EU criminal law) we had ten teams and they gave us a wide range of topics. From hate crime and the ne bis in idem in criminal cases, to EAW and ESO, sexual crimes and femicide crimes and to the conditions of the detention in the EU. The outstanding was that each team tried hard to give solutions to several problems: the evidence in sexual crimes, the amelioration of the detention conditions, the broader use of the practical tool of ESO. The video presentations were of a great level and the future judges and prosecutors acted in a nice way to give us the essence of their work. I am proud of them and their work. I am sure that THEMIS is well founded as competition in our European Judicial Training. THEMIS is a nice way to bring together the future of the European Judiciary, so as to say our hopes - as judges and prosecutors - for a better and brighter members of judiciary. I hope for me to have the time and the power to serve THEMIS again in future!



GLORIA GUDELJ  
KRISTINA KEMEŠIĆ  
DARIJA ŽELJKO



TUTOR: IVA GRADIŠKI LOVREČEK

Team CROATIA

# THE POSITION OF FEMALE VICTIM IN CRIMINAL PROCEEDINGS CONCERNING SEXUAL VIOLENCE:

## DE FACTO AND DE IURE CHALLENGES

The dominant form of gender-based violence is sexual violence against women. This violation of basic human rights has a significant impact on its victims. Women's rights campaigns and social media campaigns that followed them had extremely important role raising public awareness on sexual violence issue. Their engagement forced governments to take this problem seriously which resulted in toughened penalties for sexual violence. Rarely is sexual violence against women regulated as a distinguished or independent topic at the international (UN) and/or regional level. Rather, it is considered within a VAW term. Although different international instruments regulating sexual violence against women have been created further regulation was needed at relevant regional levels. The comprehensive Istanbul Convention was adopted in 2011 which in its 81 articles provides the current legal path for a more efficient prevention of gender-based violence. Relevant provisions in the Istanbul Convention as well as other international and regional standards, are often cited by the ECtHR in its rich case-law. This paper reviews D.J. v. Croatia and A. and B. versus Croatia cases which were brought before the ECtHR. Finally, this paper discusses balancing the confrontational right and victims' rights in criminal proceedings.

### KEY WORDS

Sexual violence against women  
Social environment  
Women's rights campaigns  
Social campaigns  
Case-law  
Confrontational right

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# 1. INTRODUCTION

*We must always take sides.*

*Neutrality helps the oppressor, never the victim.*

*Silence encourages the tormentor, never the tormented.*

Elie Wiesel<sup>1</sup>

The dominant form of gender-based violence is sexual violence against women with most perpetrators being men.<sup>2</sup> The most comprehensive definition of „sexual violence“ is that provided by World Health Organization from its World Report on Violence and Health (2002) defining sexual violence as:

*‘Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances directed against a person and a person’s sexuality, by any person regardless of their relationship to the victim, in any setting. It is characterised by the use of force, threats or blackmail to undermine the well-being and/or life of the victim, or of persons close to the victim.’<sup>3</sup>*

Sexual violence includes physical assault, brutal violation of personal, intimate and psychological boundaries. It has serious physical and physiological impacts on its victims, for example damaging their mental health with depression and post-traumatic stress disorder.<sup>4</sup>

Not so long ago, sexual violence against women was something that was merely whispered about. In the rise of various women’s rights movements such as #MeToo and Time’s Up, the topic of sexual violence against women has become one of the most important issues in the human rights sphere. The #MeToo movement was founded in 2006 when grass-roots activist Tarana Burke sought to create solidarity with and among survivors of sexual violence; she began using the expression „me too“ to promote “empowerment through empathy”.<sup>5</sup> It was founded originally to help black women and girls and other women of color from vulnerable groups but it was celebrities that made it visible and popular using the viral #metoo hashtag on social media. The movement spread all over the world this way with more and more women from different backgrounds coming forward with their own stories about sexual violence. Soon the #MeToo hashtag became the symbol of modern days feminism, the symbol of women fighting against sexual violence and harassment and refusing to stay silent. These movements have inspired a global call for a radical change in attitudes towards sexual violence against women, abuse, harassment and oppression of women. While they have revealed just how deep violence against women is rooted in society, they have empowered a lot of women to break their silence. Sexual violence is still a gender based crime, predominantly against women and girls.

Patriarchal and misogynistic attitudes remain a part of our society when they ought to be in the past. The meta-analysis of 37 reviews conducted by Eliana Suarez and Tahany M. Gadalla, demonstrated that men show a greater acceptance of and belief in classical myths about rape in correlation with hostile attitudes and behaviours towards women.<sup>6</sup> Social acceptance of myths about sexual violence against women contributes to secondary victimization. Secondary victimisation occurs when the victim suffers further harm not as a direct result of the criminal act but due to the manner in which institutions and other individuals deal with the victim.<sup>7</sup> Secondary victimisation may be caused by repeated exposure of the victim to the perpetrator, repeated interrogation about the same facts, the use of inappropriate language or insensitive comments made by all those who come into contact with victims. This is one of the main reasons why the majority of sexual violence cases end up not being reported; because it retraumatizes the victim. These attitudes often result in low rates of prosecution and conviction. This is an issue that requires to be addressed in all jurisdictions. For example, in England and Wales, The Guardian newspaper commenting on the quarterly statistics of the Crown Prosecution Service which has extensively reviewed its approach to cases involving sexual violence wrote “The number of cases referred by the

police for charging decisions fell by 32% in the year to September 2019, while prosecutions by the CPS fell 26% and convictions dropped 21%”.<sup>8</sup> An important factor which discourages sexual violence victims from reporting these crimes is the unsupportive reactions that they typically encounter after reporting it.<sup>9</sup> The fact that the perpetrator is usually someone the victim knows and trusts exacerbates this, making it even harder for victims to report it and seek justice. According to most of research outputs worldwide and in Republic of Croatia (further: Croatia) for each reported case of rape, there are 15 to 20 unreported ones.<sup>10</sup>

The impacts of the women’s rights movements have been a great many. More recently there has been a greater willingness by women to come forward. This is why there has also been a significant increase in reported sexual violence cases. The European Union-wide (further: EU) survey on violence against women conducted by EU Agency for Fundamental Rights showed that gender-based violence against women is an extensive human rights abuse that the EU cannot afford to overlook. The survey was based on on interviews with 42,000 women across the 28 Member States of the EU.<sup>11</sup> More than one in two women in Europe have been sexually harassed at least once since the age of 15, and 32% of them declared that the

<sup>1</sup> Wiesel, *Nobel Acceptance Speech*, Oslo, December 10, 1986.

<sup>2</sup> Office for Gender Equality of the Government of the Republic of Croatia, *Rules of procedure in cases of sexual violence*, 2015., at 7.

<sup>3</sup> World Health Organization, *World Report on Violence and Health*, October 3rd, 2002., at 149.

<sup>4</sup> Women’s Room, *Sexual Violence in Croatia 2000-2010*, 2011., at 6.

<sup>5</sup> Thissen, *The #MeToo Social Media Effect and its Potentials for Social Change in Europe, Introduction*, Foundation for European Progressive Studies, October 2019, at 5.

<sup>6</sup> Suarez and Gadalla, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 (11) *Journal of Interpersonal Violence* (2010), 2010, at 2010.

<sup>7</sup> <https://eige.europa.eu/thesaurus/terms/1358>

<sup>8</sup> Barr and Topping, *Police sending a third fewer rape cases to prosecutors, figures show*, *The Guardian*, 30.1.2020.

<sup>9</sup> Suarez and Gadalla, *supra* note 6, at 2011.

<sup>10</sup> Women’s Room, *supra* note 4

<sup>11</sup> European Union Agency for Fundamental Rights, *Violence against women: an EU-wide survey*, 2014., at 3.

perpetrator was a superior, colleague or customer.<sup>12</sup> The European Ombudsman drafted a list of good practices based on a review of the anti-harassment policies in 26 EU institutions and agencies finding that there was a clear link between the boost of the legal fight against harassment and the public focus and discourse on the issue.<sup>13</sup> According to the French Ministry of the Interior, there was a jump in complaints by 20% for sexual harassment and by 17% for rape in France.<sup>14</sup> As only one in eight victims report sexual violence to the police, it is clear that these numbers do not reflect the actual number of victims.<sup>15</sup> In reality, these numbers are far higher.

In Croatia, these global movements inspired awareness campaigns such as „Justice for girls“ and anti-domestic violence campaign „Save me“, both founded to show solidarity with victims of sexual and domestic violence. Supporters of the latter staged protests triggered by the release of five young men accused of harassing, gang-raping and blackmailing a 15-year-old girl in town of Zadar. Different non-governmental organizations, especially The Women's Room – Center for Sexual Right raised awareness with both the Croatian government and public about

the necessity of changes in the legal system and further legislation regarding sexual violence.<sup>16</sup> Acting on the clearly voiced public concern as reported by Amnesty International which found Croatia did not effectively criminalize rape, Croatia subsequently toughened the penalties for sexual violence.<sup>17</sup>

## 2. INTERNATIONAL AND REGIONAL SEXUAL VIOLENCE LEGAL FRAMEWORK

Rarely is sexual violence against women recognised as a distinguished or independent topic at the international - United Nations (further: UN) and/or regional level. Rather, it is considered within a (broader) violence against women (further: VAW) term. Violence against women is not explicitly mentioned in the landmark UN's Convention on the Elimination of All Forms of Discrimination against Women,<sup>18</sup> often described as the international Bill of Rights for women.<sup>19</sup> In 1979, when the Convention on the Elimination of All Forms of Discrimination Against Women (further: CEDAW) was

adopted, VAW was still wrongly perceived as part of the private sphere of life (*'family matter'*) and, having in mind, '... the right to respect for family and private life has historically been interpreted as satisfied by the duty of 'non-interference' in the private and family sphere...;', thus the omission of mentioning this gender-based form of violence in CEDAW is understandable.<sup>20</sup> Back then marital rape was criminalized in only few jurisdictions and sexual abuse of girls and children was perceived as another taboo.

Due to social changes worldwide, however, and the perennial struggle of numerous women's rights organizations, the topic of violence against women (including sexual violence) finally reached the UN when in 1992 the CEDAW Committee 'corrected' the above mentioned omission by drafting General Recommendation No. 19 on violence against women. In this Recommendation, the cited UN expert body clearly emphasized the perniciousness of gender-based violence because it '*...impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.*'<sup>21</sup> As a result, State parties to CEDAW are obliged to take positive measures to eliminate all forms of VAW, which

explicitly includes sexual violence. CEDAW is one of the most ratified UN treaties, bearing in mind that it has been ratified by 189 State parties. It should be emphasized that the United States and Palau have signed, but still not ratified this far-reaching treaty.<sup>22</sup>

This concrete obligation was developed more broadly in the Declaration on the Elimination of Violence against Women the following year<sup>23</sup> and also in comprehensive General Recommendation No. 35.<sup>24</sup> While the UN principally condemns rape in peacetime, it also condemns and recognises rape as a tool of war. Horrific experiences of war-time rape of women and girls in Croatia and Bosnia contributed to the increased visibility of this previously taboo topic at the highest international arena. Additionally, the International Criminal Tribunal for the former Yugoslavia, in its milestone ruling from 1993, held that rape during wartime amounts to a crime against humanity.<sup>25</sup> This momentous judicial dictum became codified in Article 7 of Rome Statute of the International Criminal Court.<sup>26</sup>

As mentioned in the introduction, since VAW is a widespread and deeply rooted issue, further regulation was needed at relevant regional levels. Finally, a comprehensive Convention on Preventing and Combating Violation

<sup>12</sup> Zacchia et al., *The #MeToo Social Media Effect and its Potentials for Social Change in Europe, The Complexity of #MeToo: the Evolution of the Twitter Campaign in Europe*, Foundation for European Progressive Studies, October 2019, 12, at 14.

<sup>13</sup> Thissen, *supra* note 5, at 5.

<sup>14</sup> Thissen, *supra* note 5, at 6.

<sup>15</sup> *Ibid.*

<sup>16</sup> Government of the Republic of Croatia, *Croatia to introduce stricter penalties for domestic violence and violence against women* (2019), available at: <https://vlada.gov.hr/news/croatia-to-introduce-stricter-penalties-for-domestic-violence-and-violence-against-women/2676>

<sup>17</sup> Amnesty International, *Croatia: Existing Laws are Failing Victims of Domestic Violence*, Amnesty International Submission for the UN Universal Periodic Review, 36th session of the UPR Working Group, 4-15 May, 2020., at 7.

<sup>18</sup> UN General Assembly, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>19</sup> Šimonović, *Development and Synergy of Global CEDAW and Regional European Istanbul Convention as Instruments for Combating Discrimination and VAW (Razvoj i sinergije globalne CEDAW Konvencije i regionalne europske Istanbulske konvencije kao instrumenata za uklanjanje diskriminacije i nasilja nad ženama)* in paper edition *Perspectives on Anti-Discrimination Law* (2014) (edited by Potočnjak; Grgurev and Grgić), p. 86

<sup>20</sup> Radačić, *Human Rights of Women and the Public/Private Divide in International Human Law*, CYELP vol. 3 (2007), at p. 452.

<sup>21</sup> CEDAW General Recommendation No. 19, 11th session, 1992

<sup>22</sup> The Holy See, Iran, Somalia, Sudan and Togo are not signatories to CEDAW. Full list of signatories available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en)

<sup>23</sup> A/RES/48/104, 20 December 1993

<sup>24</sup> CEDAW General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 14 July 2017

<sup>25</sup> ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T

<sup>26</sup> UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998

against Women and Domestic Violence (further: the Istanbul Convention) was adopted in 2011 which in its 81 articles provides the current legal path for a more efficient prevention of gender-based violence.<sup>27</sup> So far 34 Council of Europe's (further: CoE) ratified the Istanbul Convention, while several CoE's countries have signed it but not yet ratified (for instance, Bulgaria, Slovakia and the United Kingdom).<sup>28</sup> One of the recognized forms of VAW in the Istanbul Convention is sexual violence. In this specific field, Article 36 of the Istanbul Convention requires that signatory State Parties define rape based on a lack of consent rather than proof of the use of force. However, this year's International Day of Women, CoE's Secretary General, Marija Pejčinović-Burić, warned that many CoE countries, despite ratification of the Istanbul Convention, still lack consent-based rape legislation.<sup>29</sup>

Moreover, it is not a well-known fact that the European Parliament on 12<sup>th</sup> September 2017 signed the Istanbul Convention and that this institutional support can be understood as a strong political message to still reluctant EU Member States to speed up their own ratification process. In addition, the first

aim of the EU Commission's Gender Equality Strategy for the period 2020-2025 is ending violence against women in the EU; for the new Commission the EU's accession to the Istanbul Convention is its 'key priority' in this area.<sup>30</sup>

Relevant provisions in the Istanbul Convention, as well as other international and regional standards, are often cited by the European Court of Human Rights (further: ECtHR or the Court) in its rich case-law. The first rape decision of the ECtHR in which the perpetrator was a private individual,<sup>31</sup> *X. and Y. v. the Netherlands*, was decided as early as 1985. Due to ineffective and insufficient Dutch legislation when it came to the rape of a mentally disabled girl, the Court found a violation of Article 8 because 'fundamental values and essential aspects of private life were at stake'.<sup>32</sup> Since 2003 and the groundbreaking ruling *M.C. v. Bulgaria*,<sup>33</sup> rape is examined by the ECtHR as a possible violation of Article 3 (prohibition of torture, inhuman or degrading treatment) and/or Article 8 (the right to respect for private life in relation to applicant's personal autonomy) of the European Convention on Human Rights (further: the European Convention or the Convention).<sup>34</sup> It can

<sup>27</sup> Convention came into force on 1st August 2014 (after 10 Ratifications, including 8 EU Member States), so far 34 out of 47 CoE ratified the Istanbul Convention. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>

<sup>28</sup> Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>

<sup>29</sup> Available at: <https://www.coe.int/en/web/portal/-/sex-without-consent-is-rape-european-countries-must-change-their-laws-to-state-that-clearly>

<sup>30</sup> *A Union for Equality: Gender Equality Strategy 2020-2025*, COM/2020/152 final, at p. 3. The Commission explicitly calls the Council to conclude the EU's accession to the Istanbul Convention and ensure its swift ratification. *Ibid.*, at p. 8.

<sup>31</sup> As opposed to rape committed by a State official, e.g. in detention. Such grave violations of Article 3 are also part of the ECtHR's rape jurisprudence, for example case *Aydin v. Turkey*, Appl. no. 23178/94, 25 September 1998

<sup>32</sup> ECtHR, *X. and Y. v. the Netherlands*, Appl. no. 8978/80, 26 March 1985, at para. 27.

<sup>33</sup> ECtHR, *M.C. v. Bulgaria*, Appl. no. 39272/98, 4 December 2003

<sup>34</sup> Critical assessment of the judgments referenced above available in: Željko, *Gender Stereotyping in Cases of Sexual Violence: An Analysis of Regional Human Rights Courts and Croatia*, LL.M. Long Thesis, CEU, 2019

be concluded that ever since the latter judgment, the ECtHR is continuously striving to develop victim-centered jurisprudence when it comes to rape and other forms of sexual violence.<sup>35</sup> The ECtHR's decisions against Croatia regarding rape will be elaborated on later in the text.

As already stated, the EU is also an important actor in preventing and combating sexual violence. The EU's secondary legislation firmly promotes victim's access to justice and the realization of this noble aim reached its peak in the so-called Victim's Directive.<sup>36</sup>

### 3. THE CROATIAN SEXUAL VIOLENCE LEGAL FRAMEWORK

Croatia has been a State Party to CEDAW since 9 September 1992.<sup>37</sup> Interestingly, the current Special UN Rapporteur on the Elimination of Violence against Women, Dubravka Šimonović, comes from Croatia.

Unfortunately, Croatia is one of the CoE's countries showing a constant increase in the number of victims of sexual violence (and other forms of gender-based violence) and that clearly indicates that

respective national legislative, judicial, media and educational measures on prevention of VAW have not yet yielded the desired results. In order to decrease persistence of VAW, it was found that the logical step was ratification of the most comprehensive available regional document – the Istanbul Convention – which entered into force in October 2018.<sup>38</sup>

In January 2020, both the Croatian Penal Code and the Code on Criminal Procedure were amended and brought the current Croatian penal legislative in line with the highest international and regional standards when it comes to sexual violence. According to Croatian criminal law, criminal offences against sexual freedom include rape, serious offences against sexual freedom, indecency acts, sexual harassment and prostitution.<sup>39</sup> The Criminal Code, in a separate Chapter, criminalizes different sexual offences concerning children, thereby rightly recognizing their special vulnerability.<sup>40</sup> The biggest novelty is that 'sexual intercourse without consent' is now qualified as rape (and not as a separate offence as it was previously), as requested by the CEDAW Committee in 2015.<sup>41</sup> Moreover, it is commendable that punishments for all cited criminal offences have increased; higher penalties send important message of absolute

<sup>35</sup> More about the ECtHR rape jurisprudence available in: Radačić, *The European Court of Human Rights as a Mechanism of Justice for Rape Victims: Contributions and Limitations* in (edition) *Rape Justice: Beyond Criminal Law*, Palgrave, 2015, p. 127-143.

<sup>36</sup> *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime*, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14 November 2012

<sup>37</sup> Available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-8&chapter=4&lang=en)

<sup>38</sup> Istanbul Convention was signed on 22 January 2013 and ratified in April 2018 in Croatia.

<sup>39</sup> Articles 153-157, *Criminal Code (Kazneni zakon)*, Official Gazette 126/19

<sup>40</sup> *Ibid.*, Articles 158-166.

<sup>41</sup> CEDAW: *Concluding observations on the combined fourth and fifth periodic reports on Croatia*, at para. 18, C/HRV/CO/4-5, 2015.



social intolerance to such behavior and hopefully will have a deterrent effect on the perpetrators of (sexual) violence. *Exempli gratia*, the legal minimum sentence for qualified rape (rape by use of force or threat) increased from one to three years of imprisonment, while the maximum of 10 years remained the same.<sup>42</sup> According to Croatian legislation, the maximum sentence available for someone convicted of rape remains 10 years of imprisonment even if perpetrator has previous criminal history for similar offences. However, that fact is then rightly characterized as aggravating circumstance for the multiple offender.

The Croatian Code on Criminal Procedure has been changed multiple times in order to completely harmonize with the EU's Victim's Directive. Even before the ratification of the Istanbul Convention, victims of sexual violence were recognized as group that need special (*de iure* and *de facto*) protection due to their inherent high risk of secondary victimization. Their specifically vulnerable position is recognized in Article 44 (4) of the Code on Criminal Procedure, which corresponds to Article 23 of the Victim's Directive. The cited Article gives them and victims of human trafficking the following additional rights ('special protection') that include: the right to be advised by a counselor before being interviewed; right to a lawyer at the expense of State budget; right to being interrogated by the person of the same sex in front of police and public prosecutor – and if possible, being

interviewed again by the same person; right to refuse to answer questions which are not connected or relevant to the criminal offence, especially concerning the victim's private life; right to be examined through audio-video device; confidentiality of personal data and right to request the exclusion of the public at the hearing.<sup>43</sup>

Lastly, when compared to neighboring states, Croatia is seen to have a praiseworthy stance towards victims of wartime sexual violence. Namely, in 2015 Croatia enacted a special law which enables reparation for victims in the form of monetary compensation, psychological, legal, medical help and other interconnected rights.<sup>44</sup>

## 4. LESSONS LEARNED FOR CROATIA FROM THE ECtHR'S JURISPRUDENCE

In *D.J. v. Croatia*,<sup>45</sup> the applicant was allegedly raped by her acquaintance. She claimed that the relevant authorities failed to conduct a proper investigation into the facts of the case and that their (in)action towards her was based on deep-rooted and harmful gender-based stereotypes.<sup>46</sup>

The ECtHR examined whether the competent domestic authorities complied with relevant procedural

rules and if the available 'criminal-law mechanisms were implemented in the instant case.'<sup>47</sup> At the initial phase of proceedings, assigned police officers were worryingly passive and some of the most problematic deficiencies were the following: a police officer 'did not order an *in situ* inspection; nor did he take a statement from the injured party or conduct a detailed informative interview with her ... nor did he take the clothes that the injured party and the suspect were wearing in order to subject them for forensic examination...'<sup>48</sup> These failures to collect key evidence for the eventual prosecution did not satisfy the high standards of 'effective investigation required by the Convention.'<sup>49</sup> A further problem was how the police officers and investigating judge acted towards the alleged victim: with visible and harmful presumptions about her immoral and/or inappropriate behavior. Basically, they were suspicious because she did not correspond to the image of a 'real' rape victim and thus overtly questioned her credibility. The judge reflected in detail how she was drunk, loud, 'acted even more aggressively and shouting hysterically.'<sup>50</sup> Such derogatory language clearly lacks any gender-sensitivity and contributes to victim-blaming.

The ECtHR *expressis verbis* pronounced that an irrelevant and improper 'allegation that a rape victim was under the influence of alcohol or other circumstances concerning the victim's behaviour or personality cannot dispense

the authorities from the obligation to effectively investigate.'<sup>51</sup> The evident lack of professionalism, objectivity and impartiality of two police officers and the investigating judge had irreparable consequences for the victim since it eventually impeded her access to justice. Since 'objective flaws in the investigation show a passive attitude as to the efforts made to properly probe applicant's allegations of rape',<sup>52</sup> the ECtHR unsurprisingly found Croatia guilty of a violation of both Articles 3 and 8 of the European Convention of Human Rights in relation to the lack of an effective investigation.<sup>53</sup>

Contextually, it is important that in paragraph 106 of the judgment it is noted that at the relevant time there was no specific domestic protocol on the procedure to be followed in cases of sexual violence.<sup>54</sup> General measures of execution from the *D.J. v. Croatia* judgment clearly provided for necessary legislative and institutional changes regarding sexual violence. First, and most importantly, *pro futuro* victims; this judgment directly influenced the adoption of Croatia's first *Protocol of Procedure in Sexual Violence cases* which entered into force in 2012. The cited 'practical national policy tool' is mandatory for all relevant stakeholders when dealing with victims of sexual violence and requires cooperation and a multi-sectoral approach from police, medical and judicial authorities, welfare services and educational

<sup>47</sup> *Supra* note 45, at para. 89.

<sup>48</sup> *Ibid.*, at para. 90.

<sup>49</sup> *Ibid.*, at para. 96.

<sup>50</sup> *Ibid.*, at para. 11.

<sup>51</sup> *Ibid.*, at para. 101.

<sup>52</sup> *Ibid.*, at para. 103.

<sup>53</sup> *Ibid.*, at p. 27.

<sup>54</sup> *Ibid.*, at para. 106.

<sup>42</sup> *Supra* note 39., Article 153 (2)

<sup>43</sup> *Code on Criminal Procedure (Zakon o kaznenom postupku)*, Official Gazette 126/19

<sup>44</sup> *Law on the Rights of Victims of Sexual Violence during the Armed Aggression against the Republic of Croatia in the Homeland War*, Official Gazette 64/15, 98/19

<sup>45</sup> ECtHR, *D.J. v. Croatia*, Appl. no. 42418/10, 24 July 2012

<sup>46</sup> Examination of the cited judgement from the standpoint of gender stereotypes available in: *supra* note 34, at p. 30-31.



institutions.<sup>55</sup> Further practical measures of execution included an Instruction issued by the Ministry of the Interior 'as [to] how to conduct investigations actions in cases of sexual violence' and necessary 'training for judges, State attorneys and police officers.'<sup>56</sup> Besides the ECtHR, judges' inappropriate comments 'of a defendant's actions' were equally condemned by the Croatian Constitutional Court as an 'unacceptable derision of rape.'<sup>57</sup>

The recent case of *A. and B. v. Croatia* involved an investigation into allegations of child sexual abuse by her father.<sup>58</sup> Acknowledging its previous case-law the 'special vulnerability' of children as victims of sexual violence, the ECtHR confirmed that Croatia has an adequate regulatory and legal framework to deal with such sensitive cases.<sup>59</sup> More importantly, and unlike in *D.J. v. Croatia*, after detailed examination the Court concluded that the Croatian authorities took the appropriate steps to investigate these allegations of the girl's sexual abuse.<sup>60</sup> Consequently, the ECtHR did not find any violation of the Convention.

To conclude, innovative domestic instruments such as the cited Protocol are valuable and welcome assets in the protection and strengthening of the position of victims of sexual violence. However, since the objective of the European Convention is to '...*guarantee not rights that are theoretical or illusory but rights that are practical and effective*,<sup>61</sup> Croatia needs to continuously and uncompromisingly monitor and develop its institutional practice in accordance with the highest international and regional standards.

## 5. BALANCING THE CONFRONTATIONAL RIGHT AND VICTIMS' RIGHTS IN CRIMINAL PROCEEDINGS

The right to a fair trial is defined in Article 6 of the Convention as a central principle of criminal procedure, as amended by Protocols 11<sup>62</sup> and 14.<sup>63</sup> Article 6 § 3 of the Convention introduces the so-called

'minimum rights' of defense and one of these is the confrontational right defined in Article 6 § 3(d) of the Convention.<sup>64</sup> It states that: '*Everyone charged with a criminal offence has the following minimum rights:...(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*'<sup>65</sup> Besides this confrontational right, there are two further elements of the right to a fair trial; equality of arms, and the adversarial principle.<sup>66</sup> On the other hand, the victim should not be exposed to secondary victimization or discrimination because of their status. Additionally, their right to privacy and private life must be respected as well. In cases of vulnerable witnesses and victims of sexual offences, especially children, the need for protection is higher, but not at the expense of the defendant's rights.<sup>67</sup>

The defendant should have the opportunity to examine<sup>68</sup> these witnesses. The use of technology (audio/video recording) is recommended. The fact that convictions may be based merely on the testimony of particularly vulnerable witnesses does not lead to the conclusion that the defendant's right to a fair trial has been violated - what is important is that the defense had the opportunity

to question the witness(es).<sup>69</sup> The right to confront the victim is considered violated where a conviction is based only on uncontroverted (untested) evidence or if that evidence has significant influence in a way that conviction would not be possible without it (see *Al-Khawaja and Tahery v. United Kingdom*).<sup>70</sup>

The main question is how best to achieve a balance of these rights. Every case is specific and sensitive and, in addition to the committed crime, other circumstances should be taken in account such as the sex and age of the victim, their relationship with the perpetrator, the social status of victim, and so on.

Criminal proceedings concerning sexual offences usually conceive of agony for the victim, in particular, when he or she is unwillingly confronted by the defendant. These features are even more prominent in a case involving a minor. In assessing whether the accused received a fair trial, the right to respect for the private life of the alleged victim must not be violated.<sup>71</sup> Certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with the adequate and effective exercise of the rights of the defendant. In securing the rights of the defence,

<sup>64</sup> Mrčela, *Adversarial principle, the equality of arms and confrontational right - European Court of Human Rights - Recent jurisprudence, 1 EU and comparative law issues and challenges series (ECLIC): Procedural aspects of EU law* (2017) 15, at 15.

<sup>65</sup> Article 6(3)(d) ECHR

<sup>66</sup> Mrčela, *supra* note 64, at 16.

<sup>67</sup> *Ibid.*, at 21.

<sup>68</sup> Victim testimony should be tested by the defense at least once during procedure, ideally during the trial because it is best place for confrontation. Source: Mrčela, *Adversarial principle, the equality of arms and confrontational right - European Court of Human Rights - Recent jurisprudence, 1 EU and comparative law issues and challenges series (ECLIC): Procedural aspects of EU law* (2017) 15, at 18-19.

<sup>69</sup> Mrčela, *supra* note 64, at 21.

<sup>70</sup> *Ibid.*, at 20-21.

<sup>71</sup> ECtHR, *Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (criminal limb)*, updated on 30 April 2020, at para. 501.

<sup>55</sup> Second edition of Protocol entered into force in August 2018, which signals how Croatia continuously reflects on this important issue. - Official Gazette 70/2018

<sup>56</sup> *Action plan - Communication from Croatia concerning the case of D.J. against Croatia* (Appl. No. 42418/10), available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2013\)572E](http://hudoc.exec.coe.int/eng?i=DH-DD(2013)572E)

<sup>57</sup> Available at: <http://hudoc.exec.coe.int/eng?i=004-10139>

<sup>58</sup> ECtHR, *A. and B. v. Croatia*, Appl. no. 7144/15, 20 June 2019

<sup>59</sup> *Ibid.*, at para. 111.

<sup>60</sup> *Ibid.*, at para. 129.

<sup>61</sup> ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, 9 October 1979, at para. 24.

<sup>62</sup> Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby entered into force in 1998. It aims to rationalize the machinery for enforcement of rights and liberties guaranteed by the Convention. Source: Council of Europe, *Details of Treaty No.155*, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/155>

<sup>63</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention entered into force in 2010. Under the Protocol new admissibility criterion is introduced, as well as the treatment of repetitive cases or clearly inadmissible cases, for a more satisfactory operation of the European Court of Human Rights. Source: Council of Europe, *Details of Treaty No.194*, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/194>

judicial authorities may be required to take measures to counterbalance the handicap under which the defence operates.<sup>72</sup> The Court held that a direct confrontation between defendants charged with criminal offences of sexual violence and their alleged victims risks further traumatization of the victim. Therefore, personal cross-examination by defendants should be subject to the most careful assessment by national courts, and more so the more intimate the questions are.<sup>73</sup> Some protection measures, particularly the non-attendance of a witness to give evidence at the trial, cannot be applicable in all cases. Relevant reasons must be given by domestic authorities for applying such measures.<sup>74</sup> The viewing of a video recording of a witness account cannot alone be regarded as sufficient to safeguard the rights of the defence where no opportunity to question the person giving the account was given by the authorities.<sup>75</sup>

In proceedings against sexual offenders, some other aspects of the right to a fair trial can be violated. For example, the right to a public trial guaranteed in Article 6 § 1 of the Convention. In the case of *Mraović v. Croatia (2020)*,<sup>76</sup> the Court stressed that in criminal proceedings concerning such a serious and intimate crime as rape, the exclusion of the public from part of or the entire proceedings may be necessary for the protection of the private lives of rape victims,

in particular their identity, personal integrity and dignity. This might be necessary not only to protect the victims' privacy, but also to protect them from secondary and/or re-victimization.<sup>77</sup> The Court held that, in the case at hand, there had been no violation of Article 6 § 1 of the Convention.<sup>78</sup>

From the Croatian perspective, one of the most important cases is *Kovač v. Croatia* (no. 503/05). In 2002, an investigation was opened before the Virovitica County Court concerning an allegation of indecency against a 12-year old girl. In April 2002, the applicant (who was the defendant before the Croatian courts) was heard by an investigating judge. He was informed of his right to be legally represented, but chose to represent himself. In May 2002, the alleged victim gave evidence before an investigating judge in the presence of a psychologist. The applicant, who was not represented by a lawyer, was absent, which was confirmed by the transcript of the hearing, without comments on the reasons for his non-attendance.<sup>79</sup> In November 2002, the Bjelovar State Attorney's Office filed a bill of indictment against the applicant charging him with an act of indecency against a minor.<sup>80</sup> The trial court held a recorded hearing in April 2003 whereby the victim was summoned and the defendant appeared and denied the charges. It was then recorded, in the presence of the applicant, a psychologist and a deputy

state attorney, that the victim upheld the statement she had made prior. This statement was not read out and the deputy state attorney requested that the victim be questioned in the applicant's absence. The request was granted and the applicant was removed from the courtroom and had no opportunity to prepare any questions for the witness beforehand.<sup>81</sup> The victim's statement was then read to the applicant, with the psychologist noting that the victim's intellectual level corresponded to that of an average five years and four month old child.<sup>82</sup> The applicant was convicted of an act of indecency against a minor and sentenced to six months' imprisonment. The Virovitica Municipal Court based the applicant's conviction to a decisive degree on the statement made by the victim before the investigating judge.<sup>83</sup> After which, the Virovitica County Court dismissed the applicant's appeal who was at this stage represented by defence counsel. He denied the charges against him and also complained that he had not been given an opportunity to question the victim and that, due to his poor education, he had not been able to protect his own interests. Therefore, he claimed a lawyer should have been appointed to him from the very beginning of the proceedings.<sup>84</sup>

In the *Mild and Virtanen v. Finland (2004)* case, the ECtHR stated that reading the statements of the previous examination

of witnesses is not in itself a violation of the right to a fair trial. However, the national court must take reasonable measures to ensure the presence of witnesses. Any legal system which cannot secure the examination of witnesses which exclusively or predominantly form the ground for conviction cannot be a justification or excuse for violating the rights of the fairness of the proceedings.<sup>85</sup>

With regards to the circumstances of the case *Kovač v. Croatia*, the Court observed that the statement made by the minor victim was the only evidence on which the court's finding of guilt was based. The other witnesses heard by the trial court had not seen the alleged acts and gave evidence only as to subsequent events. The appellate court concentrated mainly on the reliability of the victim's testimony, considering it to be of decisive importance in determining the applicant's guilt.<sup>86</sup> Neither at the stage of the investigation nor during the trial was the applicant given the opportunity to examine the victim. The Court notes that this could have been arranged, for instance, by the applicant watching the victim giving her statement in another room via technical devices.<sup>87</sup> In these circumstances, the Court finds that the applicant cannot be regarded as having had a proper and adequate opportunity to challenge the witness statement which was of decisive importance for his conviction and, consequently, he did not receive a fair trial.<sup>88</sup>

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, at para. 502.

<sup>74</sup> *Ibid.*, at para. 503.

<sup>75</sup> *Ibid.*, at para. 505.

<sup>76</sup> ECtHR, *Mraović v. Croatia*, Appl. no. 30373/13, Judgment on 14 May 2020

<sup>77</sup> *Ibid.*, at para. 49.

<sup>78</sup> *Ibid.*, at para. 59.

<sup>79</sup> ECtHR, *Kovač v. Croatia*, Appl. no. 503/05, Judgment of 12 July 2007, at para. 5

<sup>80</sup> *Ibid.*, at para. 6.

<sup>81</sup> *Ibid.*, at para. 8.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, at para. 10.

<sup>84</sup> *Ibid.*, at para. 11-12.

<sup>85</sup> Mrčela, *supra* note 64, at 21-22.

<sup>86</sup> *Supra* note 79, at para. 24.

<sup>87</sup> *Ibid.*, at para. 30.

<sup>88</sup> *Ibid.*, at para. 32.

During the period when this trial was held, Croatia initiated a negotiation for accession to the European Union. Since then, especially after joining the EU in 2013, Croatian national law has been transformed in accordance with EU law, specifically criminal law and criminal procedural law. Furthermore, the Croatian legal framework, with all guarantees for both the accused and victims of sexual crimes, is theoretically sufficient to balance the rights of both sides. It is important to keep in mind that every norm has its own "life", with separate and particular challenges to which the legislature, judiciary and other practitioners should respond promptly and accordingly.

## 6. CONCLUSION

Sexual violence remains one of the most important social problems across the world. The violation of basic human rights has a significant impact on its victims. Consequences that victims experience continue throughout their life course. For centuries, there was a great deal of stigma around sexual violence, mostly because violence against women in general and sexual violence in particular was considered a private matter. That legacy of shame continues to make sexual violence against women, especially rape, one of the least reported crimes. This is also due to the fact that society still blames victims for crimes that happened to them. Only in the last century and due to social changes and persistence of various women's rights organizations did the international community start to address this problem on an international level. Women's rights campaigns and social media campaigns that followed

them had an extremely important role in raising public awareness on the issue of sexual violence. Their engagement forced governments to take this problem seriously. The Croatian government, among others, also toughened its penalties for crimes involving sexual violence. This proved, once again, just how important public engagement and social support for change really are.

Sexual violence is deeply connected to the inequality of the sexes and rooted deeply in the culture of discrimination. One cannot be resolved without addressing the other; they are interconnected. The constant increase in the number of victims of sexual violence in Croatia indicates the need for a thorough social change. Sexual violence against women can be reduced and even prevented in some cases with effective policies and programs. On the societal level, a climate of non-tolerance should be created and this can be effectively achieved through education. Changing the norms and beliefs about social and cultural inferiority of women that support sexual violence will initiate an important cultural shift that empowers women.

Victims of sexual violence often experience numerous barriers and difficulties in accessing justice. In these criminal proceedings it is important to balance the defendant's right to a fair trial, especially the right to confront the witness and victims' rights. *De iure* they are protected by law, but *de facto* many legal systems are gravely flawed when it comes to helping victims of sexual violence. This trend proves that formal legal reform should be just one aspect of a wider change in society and not the end goal. Further education of different

professionals and, especially, police officers who are often the first persons to hear the victim's statement, is very much needed. Additionally, there should be more centres for victims of sexual violence to receive basic information and assistance. Institutions on all levels should be more responsive to the rights and needs of every woman, especially of those women who experience sexual violence.

## BIBLIOGRAPHY

### ARTICLES

Mrčela, *Adversarial principle, the equality of arms and confrontational right - European Court of Human Rights - Recent jurisprudence' 1 EU and comparative law issues and challenges series (ECLIC): Procedural aspects of EU law* (2017) 15-31.

Radačić, *Human Rights of Women and the Public/Private Divide in International Human Law*, CYELP vol. 3 (2007), 452.

Radačić, *The European Court of Human Rights as a Mechanism of Justice for Rape Victims: Contributions and Limitations* in (edition) *Rape Justice: Beyond Criminal Law*, Palgrave (2015) 127-143.

Suarez and Gadalla, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 (11) *Journal of Interpersonal Violence* (2010), 2010-2035.

Šimonović, *Development and Sinergy of Global CEDAW and Regional European Istanbul Convention as Instruments for Combating Discrimination and VAW*, in paper edition *Perspectives on Anti-Discrimination Law* (2014) 86.

### INTERNATIONAL AND REGIONAL LAW

CEDAW, UN General Assembly, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

*CEDAW General Recommendation No. 19*, 11th session, 1992

*CEDAW General recommendation No. 35 on gender-based violence against women*, 14 July 2017

CEDAW, *Declaration on the Elimination of VAW*, A/RES/48/104, 20 December 1993

*Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime*, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14 November 2012

UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998

### CROATIAN LAW

*Law on the Rights of Victims of Sexual Violence during the Armed Aggression against the Republic of Croatia in the Homeland War*, Official Gazette 64/15, 98/19

*Code on Criminal Procedure (Zakon o kaznenom postupku)*, Official Gazette 126/19

*Criminal Code (Kazneni zakon)*, Official Gazette 126/19

*Protocol of Procedure in Sexual Violence cases*, Official Gazette 70/2018

## CASE LAW

ECtHR, *A. and B. v. Croatia*, Appl. no. 7144/15, 20 June 2019

ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, 9 October 1979

ECtHR, *Aydin v. Turkey*, Appl. no. 23178/94, 25 September 1998

ECtHR, *D. J. v. Croatia*, Appl. no. 42418/10, 24 July 2012

ECtHR, *Kovač v. Croatia*, Appl. no. 503/05, Judgment of 12 July 2007

ECtHR, *M. C. v. Bulgaria*, Appl. no. 39272/98, 4 December 2003

ECtHR, *Mraović v. Croatia*, Appl. no. 30373/13, Judgment on 14 May 2020

ECtHR, *X. and Y. v. the Netherlands*, Appl. no. 8978/80, 26 March 1985

ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T

## PUBLICATIONS

A Union for Equality: *Gender Equality Strategy 2020-2025*, COM/2020/152 final, 2020

ECtHR, *Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (criminal limb)*, updated on 30 April 2020

European Union Agency for Fundamental Rights, *Violence against women: an EU-wide survey*, 2014

Office for Gender Equality of the Government of the Republic of Croatia, *Rules of procedure in cases of sexual violence*, 2015

Thissen, *The #MeToo Social Media Effect and its Potentials for Social Change in Europe, Introduction*, Foundation for European Progressive Studies, October 2019

Zacchia et al., *The #MeToo Social Media Effect and its Potentials for Social Change in Europe, The Complexity of #MeToo: the Evolution of the Twitter Campaign in Europe*, Foundation for European Progressive Studies, October 2019

## REPORTS

Amnesty International, *Croatia: Existing Laws are Failing Victims of Domestic Violence*, Amnesty International Submission for the UN Universal Periodic Review, 36th session of the UPR Working Group, 4-15 May, 2020

CEDAW, *Concluding observations on the combined fourth and fifth periodic reports on Croatia*, C/HRV/CO/4-5, 2015

Women's Room, *Sexual Violence in Croatia 2000-2010*, 2011

World Health Organization, *World Report on Violence and Health*, October 3rd, 2002

## WEBSITES

Council of Europe, *Details of Treaty No.155*, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/155>

Council of Europe, *Details of Treaty No.194*, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/194>

European Convention on Human Rights, available at: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

Government of the Republic of Croatia, *Croatia to introduce stricter penalties for domestic violence and violence against women* (2019), available at: <https://vlada.gov.hr/news/croatia-to-introduce-stricter-penalties-for-domestic-violence-and-violence-against-women/26762>

HUDOC EXEC, *D.J. v. Croatia*, available at: <http://hudoc.exec.coe.int/eng?i=004-10139>

Council of Europe, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>

Council of Europe, *Sex Without Consent is Rape*, available at: <https://www.coe.int/en/web/portal/-/sex-without-consent-is-rape-european-countries-must-change-their-laws-to-state-that-clearly->

UN Treaties Signatories (CEDAW), available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en)

## OTHER

Action plan - Communication from Croatia concerning the case of D.J. against Croatia (Application No. 42418/10), available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2013\)572E](http://hudoc.exec.coe.int/eng?i=DH-DD(2013)572E)

Barr and Topping, *Police sending a third fewer rape cases to prosecutors, figures show*, The Guardian, 30.1.2020.

Wiesel, *Nobel Acceptance Speech*, Oslo, December 10, 1986.

Željko, *Gender Stereotyping in Cases of Sexual Violence: An Analysis of Regional Human Rights Courts and Croatia*, LL.M. Long Thesis, CEU, 2019

European Institute for Gender Equality, at: <https://eige.europa.eu/thesaurus/terms/1358>

KATARZYNA KANAFEK  
MARCIN WAŹTOR  
MATEUSZ WĘC



Team POLAND

# CRIME AND PREJUDICE: COMBATING HATE CRIMES IN THE EUROPEAN UNION

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The paper concerns the problem of hate crimes in the EU countries, especially from the perspective of criminal law and of the framework for the Police and Judicial Cooperation in Criminal Matters. It briefly defines the concept of the hate crimes and provides their legal definition, alongside with the justification for considering them as a separate phenomena, requiring specific legislative solutions. It presents an overview of the international legal systems aimed at combating hate crimes with special reference to the EU rules, including its historical significance and development, as well as the current status of EU anti-discriminatory regulations. The paper examines and outlines both merits and flaws of existing tools and actions introduced by the EU that concern hate crimes. It analyzes the scope of current legal acts, their reception in the Members States, as well as main difficulties that arise in the fight against hate crimes. It also proposes new legal and non-legal solutions that could be adopted by the Member States in order to counter hate crimes more effectively and to facilitate cooperation between the Member States in that field.

## KEY WORDS

Hate Crimes  
Human Rights  
EU, Criminal Law  
Discrimination  
FRA

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## 1. INSTEAD OF AN INTRODUCTION

“It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife”<sup>1</sup> – or at least it used to be acknowledged in the 19<sup>th</sup> century, when Jane Austen presented her well-renowned novel to the public. After 200 hundred years since its publication, however, one may be more cautious with expressing such a categorical statement. The world has become a bit more complex, with different people, cultures, values and lifestyles constantly colliding and influencing each other. Despite the numerous benefits that stem from such a situation, it often happens that prejudices and intolerance, present throughout our history in different forms, come to light. Our paper covers one of the most malicious aspects of these prejudices – hate crimes.

## 2. HATE CRIMES: GENERAL FEATURES

There is no common legal definition of a ‘hate crime’ but its understanding is rather similar among European countries. It consists of two elements: a criminal act (or so-called ‘base offence’<sup>2</sup>) and a biased motive.<sup>3</sup>

The first element means that a ‘hate crime’ must be treated as an offence by applicable rules of criminal law, regardless of whether features of a prohibited act contain any references to hatred as a motive of the crime. The type of offence is irrelevant – it may be an assault or battery, murder, arson, just a threat or any other act that is punishable by law.

In order to meet the second requirement, such offence must also be committed because of a biased motive towards a particular target. In other words, the target – be it a person or a group of people – must be chosen by a perpetrator because of their so-called ‘protected characteristic’.<sup>4</sup> There are many protected characteristics that can become an excuse to commit a hate crime but probably the most frequent are ethnicity, language, religion, gender identity, sexual orientation or political affiliation. Because of that, hate crimes affect not only the individual victims directly targeted by them but also the whole group characterized by that feature as a whole.

## 3. DIFFERENT WAYS OF LOOKING AT THE HATE CRIMES MODEL

**A. Introduction.** Examples of hate crimes are various. Criminal acts as different as physical attack on a LGBTQ person, slander of a religious community or sexual abuse of an ethnic minority member – committed only because of a ‘protected characteristic’ of their victims – will constitute a hate crime. In short, a ‘hate crime’ should be perceived more like an umbrella term for diverse criminal activities, rather than as a specific and strictly-defined type of offence.

**B. Organization for Security and Cooperation in Europe (OSCE).** OSCE considers<sup>5</sup> hate crimes to be ‘an extreme form of prejudice’ and a denial of the human dignity and individuality of the victim. According to the OSCE Office for Democratic Institutions and Human Rights (ODIHR), there are a couple of reasons why hate crimes should be dealt with separately and with great concern.

First, it considers hate crimes to be ‘message crimes’ – i.e. crimes communicating to the victims and to their communities that they – as a whole – are not accepted in society, which strengthens the social repercussions of said offences.

Second, hate crimes further divide communities, alienating minorities who have often already experienced some kind of prejudice and discrimination.

Lack of appropriate response to hate crimes deepens the sense of being an outcast, hampers the process of social integration and even – in some extreme cases – results in retaliation. It also undermines mutual trust in the justice system.<sup>6</sup> Because of these reasons, hate crimes should be recognized by public authorities as such. It is the only thing that enables them to effectively combat hatred, adequately engaging not only its consequences but also its origins.

**C. The Council of Europe (CoE).** One of the main international legal instruments used to combat criminal activity based on hatred is the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR). The action against hate crimes based on the ECHR goes two ways.

First, the ECHR provides that parties to the Convention have an obligation to actively combat crimes resulting from hatred, as a part of their obligation to protect specific rights guaranteed by the Convention (such as life, freedom from torture, privacy or freedom of thought, conscience and religion, guaranteed by Articles 2, 3, 8 and 9 respectively) and prohibit discrimination (Article 14 and Protocol No. 12).

Second, the European Court of Human Rights (ECtHR) has repeatedly stated that the obligation to counter hatred based on intolerance justifies limitations to other rights enshrined by the ECHR,

<sup>1</sup> J. Austen, *Pride and prejudice* (1844), at 5.

<sup>2</sup> OSCE/ODHIR, *Hate Crime Laws. A Practical Guide* (2009), at 16.

<sup>3</sup> OSCE/ODHIR, *Hate Crime Data-Collection and Monitoring Mechanism. A Practical Guide* (2014), at 12.

<sup>4</sup> OSCE/ODHIR, *Hate Crime Laws...*, *supra*, note 2, at 16.

<sup>5</sup> OSCE/ODHIR, *Prosecuting Hate Crimes. A Practical Guide* (2014), at. 15-16.

<sup>6</sup> *Ibid*, at 15-16.

referring particularly to the freedom of expression in a variety of cases concerning hate speech (regarding e.g. anti-Semitic<sup>7</sup> or hostile<sup>8</sup> activity).

In a handful of cases regarding attacks on LGBT demonstrations<sup>9</sup> the ECtHR stated that under Articles 1 and 3 of the ECHR, states have an obligation to ensure effective protection of individuals from the criminal acts of third parties, which also includes a duty to take reasonable steps to prevent ill-treatment of which the authorities knew or ought to have known<sup>10</sup> (e.g. when the victims had previously warned authorities about possible dangers). They are also bound to conduct an effective official investigation into the alleged ill-treatment. As the Court affirmed in the case of Identoba and others v. Georgia, states are also required “to take all reasonable steps to unmask possible discriminatory motive”. The court rightly spotted the distinction between hate crimes and other forms of criminal activity, underlining the peculiar character of the former. It explained very clearly that “treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.

A failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention”.<sup>11</sup>

The ECtHR has also confirmed that to constitute a hate crime an offence may involve mixed motives, based on a protected characteristic as well as on other factors. It also asserted that ECHR safeguards not only individuals actually or seemingly identified by a protected characteristic but also those who become a target of violence based on their links to such individuals.<sup>12</sup>

The ECHR provides for a solid legal framework allowing hate crimes to be effectively combated. However, it does not contain instruments of international cooperation that would facilitate this task. The burden of applying given rules rests entirely on the shoulders of parties to the ECHR. Although the CoE took further steps to ensure effective prevention and prosecution of hate crimes, such as establishing The Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI), it is still solely an obligation of states to cope with the problem.<sup>13</sup> The same goes for other international legal acts and organizations concerning this problematic.<sup>14</sup>

**D. The European Union** (EU). The experience of World War II, especially the lessons taken from fascism, racism and anti-Semitism, led the founding fathers of the EU to focus on combating discrimination within the EU.<sup>15</sup> The progressive strengthening of the Police and Judicial Cooperation in Criminal Matters (PJCCM) between the Member States (MS) allowed criminal measures to be introduced against this negative phenomenon. Due to the efforts of Spain, France and Germany, the EU established the Consultative Commission on Racism and Xenophobia.<sup>16</sup> The research conducted by the Commission revealed that, in spite of the efforts of the MS, the number of crimes related to racism and xenophobia in the EU was increasing.<sup>17</sup> The preparation of legislation unveiled several problems that would consistently return during the subsequent debates over combating racism and xenophobia.<sup>18</sup>

The first problem concerns the principle of subsidiarity, in particular, whether racism and xenophobia issues require cooperation between the MS in the field of the PJCCM.

The Maastricht Treaty established the competence of the EU to introduce anti-discrimination measures.<sup>19</sup> Subsequently, the Treaty of Amsterdam brought significant changes aimed at combating racism and xenophobia.<sup>20</sup> It clearly showed that these issues were considered to be a common problem of EU countries.<sup>21</sup>

The next problem refers to the application of the principle of proportionality; to what extent should the scope of EU law be in that matter. Finally, the Council decided that fighting racism and xenophobia shall cover its three principal manifestations: incitement to hatred, discrimination and racist violence.<sup>22</sup>

The Council also wondered how to prepare these rules in a way that would not infringe upon freedom of speech, expression and the press. It needed to weigh what is more important –freedom of speech, expression and the press or the protection of human dignity.

<sup>15</sup> See Article 7 of the Treaty establishing the EEC (1957); Council of the EU: Consultative Commission on racism and xenophobia, *Final Report* (1995), (The Kahn Report), at 4.

<sup>16</sup> Consultative Commission on Racism and Xenophobia was established during the summit of the European Council in Corfu on 24 and 25.6.1994; The Joint Action 96/443/JHA of 15.7.1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (The Joint Action 1996), OJ L 185 of 24.7.1996; J. Leman, Europe's Consultative Commission on Racism and Xenophobia and the Slow Progress towards a European Antiracism Observatory, *Loyola of Los Angeles International and Comparative Law Review* (1996) 18, at 604.

<sup>17</sup> The Kahn Report, at 6.

<sup>18</sup> Council Framework Decision 2008/913/JHA of 28.11.2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (The Framework Decision 2008).

<sup>19</sup> Treaty on European Union (1992), OJ C 191 of 29.7.1992.

<sup>20</sup> The Treaty of Amsterdam amending the Treaty on European Union (1997), OJ C 340 of 10.11.1997.

<sup>21</sup> Similar reasoning presented in: The Joint Action 1996, paragraph 10 and The Framework Decision 2008, paragraphs three, four and 12.

<sup>22</sup> Council of the EU: Consultative Commission on racism and xenophobia, Report of the Consultative Commission 'Racism and Xenophobia' (1997), at 57.

<sup>7</sup> ECtHR, *Ivanov vs Russia*, 35222/04, Decision as to the Admissibility of 20.2.2007.

<sup>8</sup> ECtHR, *Sürek vs Turkey*, 26682/95, Judgment of 8.7.1999.

<sup>9</sup> ECtHR, *Identoba and Others vs Georgia*, 73235/12, Judgment of 12.5.2015; ECtHR, *M.C. and A.C. vs Romania*, 12060/12, Judgment of 12.4.2016.

<sup>10</sup> The meaning of this obligation has been also extensively explained in ECtHR, *Dordević vs Croatia*, 41526/10, Judgment of 24.7.2012.

<sup>11</sup> ECtHR, *Identoba...*, *supra*, note 9.

<sup>12</sup> ECtHR, *Škrojanec vs Croatia*, 25536/14, Judgment of 28.3.2017.

<sup>13</sup> CoE, Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity (2009).

<sup>14</sup> OSCE, Decision No. 9/09 on Combating Hate Crimes (2009); CoE, International Covenant on Civil and Political Rights, which guarantees protection from hate crimes on a level comparable to the ECHR (1966).

The Council finally concluded that: '...the right to freedom of expression implies duties and responsibilities, including respect for the rights of others, as laid down in Article 19 of the United Nations International Covenant on Civil and Political Rights of 19 December 1966'.<sup>23</sup> This solution did not dispel all doubts, since the MS raised concerns that a harmonization of law in this respect could be used for political purposes.<sup>24</sup>

The first relevant legal act was the Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia. The version as adopted obligated MS to ensure effective judicial cooperation in respect of offences based on well-defined types of behaviour.<sup>25</sup> The Joint Action of 1996 was a very brief and general act, which made its implementation difficult. Furthermore, neither permanent control, nor the strict deadlines for the implementation were introduced, which was a significant drawback. For these reasons, the act turned out to be inefficient.

Changes initiated by the Charter of Fundamental Rights and the social changes in Europe which, at the beginning of the new millennium, became more multicultural and multi-ethnic, meant that the regulation on racism and xenophobia had to be

reconsidered.<sup>26</sup> Having regard to these remarks, MS decided to intensify their cooperation in terms of combating racism and xenophobia.<sup>27</sup> The objective was to be achieved by obliging the MS to introduce specified criminal provisions, as well as definitions, punishments, rules of jurisdiction and procedures for exchanging information.<sup>28</sup>

The Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law was prepared after seven years of intensive political negotiations and legal struggles. Finally, the Council introduced the new catalogue of prohibited acts (Article 1-2), which included forms of accessory liability and excluded crimes that are not considered as serious (paragraph 6).<sup>29</sup> Its work was based on an assumption that hate crimes violate the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law.<sup>30</sup>

The discussed legal act does not harmonize national legal orders in the maximum way. The first exception is included in the first article. Member States are authorized to prohibit conducts which are either carried out in a manner likely to disturb public order or which are

threatening, abusive or insulting (first derogation clause). Furthermore, in the same spirit, any Member State may make a statement that the criminalization of the prohibited act of denying or grossly trivializing the crimes listed in Article 1 of the Framework Decision 2008, may be dependent on the previous and valid court decision (domestic or international), which confirmed these crimes (second derogation clause). One of the most important provisions in the Framework Decision 2008 is Article 4, which in a soft way encourages MS to take racist and xenophobic motives into account while adjudicating. The Framework Decision 2008 provided that both natural and legal persons could bear criminal responsibility. In addition, the decision ensures that behaviours prohibited by Article 1 are prosecuted *ex officio*. This solution protects victims from secondary and repeat victimization, intimidation and retaliation.<sup>31</sup> It has also been noticed that many crimes of this type are committed using the Internet. Therefore, the EU has introduced the term 'information system' under jurisdiction rules.

The application of some of the mentioned regulations is demonstrated later in the paper in the form of mini cases.

The Member States were required to implement the Framework Decision by 28 November 2010. Only 19 countries have notified the implementation of the decision so far.

**E. Poland.** The Polish criminal law system does not penalize hate crimes as such (hate crimes are not distinguished from other types of crime, neither in the Polish Criminal Code (PCC), nor in any other regulations).<sup>32</sup> There is also no legal definition of hatred. Nevertheless, there are a few articles in the PCC which refer to offences relevant to hatred. Four main articles penalizing hate crimes defined can be identified.

Article 118 PCC criminalizes committing a homicide or causing grievous bodily harm to a person belonging to any ethnic, racial, political or religious group, or a group with a different perspective on life in order to partially or completely annihilate it; as well as creating living conditions threatening the biological annihilation of the members of such a group, or using means to prevent births within this group, or forcibly removing children from the people constituting it. Further, the two legal norms have the widest scope of application and similar hypotheses. They penalize acts that have been committed because of national, ethnic, political or religious grounds, or because of a lack of religious belief. Article 119 PCC refers to using violence or making an unlawful threat towards a person or a group of people on aforementioned grounds; Article 257 PCC – publicly insulting a population group or an individual. Then Article 256 PCC relates to acts of public promotion of a fascist or other totalitarian system of state, or incitement of hatred based on national, ethnic, race or religious differences or for not being religious, as

<sup>23</sup> The Joint Action 1996, paragraph 11.

<sup>24</sup> Declaration by the Greek Delegation (1996).

<sup>25</sup> These behaviours are listed in the title 1 of The Joint Action 1996.

<sup>26</sup> OJ C 364, 18.12.2000. See title III of the Charter. The acceleration of work was also induced by the terrorist attacks on the World Trade Center of September 11, 2001. Proposal for a Council Framework Decision on combating racism and xenophobia (2001), (The Proposal 2001).

<sup>27</sup> An important contribution to strengthening cooperation in the combat with racism and xenophobia was the establishment of the European Monitoring Centre on Racism and Xenophobia. See Council Regulation (EC) No 1035/97 of 2.6.1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10.6.1997. More: F. Jasiński, Europejskie Centrum Monitorowania Rasizmu i Ksenofobii, *Biuletyn Wspólnot Europejskich* (2000) 12.

<sup>28</sup> The Proposal 2001.

<sup>29</sup> These behaviours are listed in the article 1 and 2 of The Framework Decision 2008.

<sup>30</sup> The Framework Decision 2008, paragraph 1.

<sup>31</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25.10.2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, paragraph 9.

<sup>32</sup> The Act of 6.6.1997 Kodeks karny (Dz.U. of 1997 No. 88 Pos. 553 Amend.).

well as, inter alia, producing<sup>33</sup> a print, recording or another object with such content.

The above analysis shows that the distinguished offences cover only a part of hate crimes as they relate just to a few behaviours and areas of their manifestation. Offences motivated by hatred but reflected in other behaviour fall under offences against certain legally protected interests. Nonetheless, the Polish criminal law system enables, when passing sentence, various circumstances surrounding the offence committed (the motivation of the offender and the way they acted, the type and degree of any negative consequences of the offence, the degree of social consequences of the act; Article 53 (1,2) PCC) to be taken into consideration. Thus the burden of criminalizing hate crimes has been shifted to the general rules, which makes this solution applicable to all offences. As widely stated in the doctrine, the motivation of the offender may be important in determining both the degree of social consequences of the act and the degree of guilt.<sup>34</sup> It seems that when it comes to hate crimes, all these indicators are aggravating for the offender. In a democratic state ruled by law and implementing the principles of social justice, nothing deserves greater reprehension than a crime committed for failure to respect freedom and equality.

**F. Other Member States.** Presenting the state of affairs in the Polish legal system leads inevitably to an enquiring look at other EU members' legal systems. Are they relatively similar to each other or are they adopting completely different solutions?

The answer to this question may be useful when analysing the possibilities and methods of judicial cooperation at EU level. Obviously, there is no possibility to present – even in a nutshell – all the Member States' law systems. However, it is possible to introduce a short overview of the most important data on hate crimes in various MS. It should be made clear at the outset that the lion's share of the EU MS have criminal provisions on hate crimes. This remark is essential inasmuch as "if hate crimes are treated like other crimes and are not recognized as a special category they are often not dealt with properly" and that is because "hate crimes do not occur in a vacuum; they are a violent manifestation of prejudice, which can be pervasive in the wider community."<sup>35</sup>

On a theoretical basis, there are two principal possibilities for combating hate crimes. The first option is to establish substantive offences which are related to hatred and bias. Undoubtedly, such a solution creates a clear distinction between hate crimes and other criminal acts. On the other hand, if an act not covered by those offences is committed, this distinction is lost.

Therefore, the second option is to introduce a general provision which allows the possibility that each offence in certain circumstances can be perceived as committed out of hatred.

Plenty is no plague, at least so they say. That is why the most prevalent resolution among EU Member States' legal systems is a combination of a general penalty-enhancement provision and substantive offences. That system works in 15 countries.<sup>36</sup> The general penalty-enhancement provisions (despite the obvious differences) usually come down to aggravation of punishment for crimes committed on the basis of hatred or discrimination due to, inter alia, race, religion or similar circumstances. It occurs that the general provision addresses other factors, like disability (e.g. Finland, Greece), sexual orientation (e.g. Austria, Lithuania), language (Malta) or age, chronic non-contagious disease or HIV/AIDS infection (Romania). A specific variation of this combined solution was adopted in Belgium, Bulgaria and Luxembourg: in addition to substantive hatred-based offences they provide penalty-enhancement provisions for specific offences. Several states have decided to base their criminal laws on one of the solutions mentioned.

In Estonia, Hungary and The Netherlands the codes do not include any general or specific provisions related to hatred-based offences. Their regulations are based on substantive offences – in contrast to Denmark, in which hate crime regulations consist of general penalty-enhancement provision only. There is also a group of states where there are substantive offences and no general or specific hate crimes provision, but a similar effect can be achieved by referring to and taking into consideration motivation for the committed crime when imposing a sentence. As presented above, that system works in Poland, as well as in Portugal, Slovakia and Slovenia. In Ireland there are no hate crime provisions in the criminal code. Substantive regulations are provided by a special act.<sup>37</sup>

It is worth pointing out that the Croatian Criminal Code has incorporated a statutory definition of hate crime.<sup>38</sup> Due to Article 87 (21) 'a hate crime shall mean a criminal offence committed on account of race, colour, religion, national or ethnic origin, language, disability, gender, sexual orientation or gender identity of another person. Unless a more severe penalty is explicitly prescribed by this Act, such conduct shall be taken as an aggravating circumstance.' Definition of hate crime is also set in Article 81a of Greek Penal Code.<sup>39</sup>

<sup>36</sup> Austria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Malta, Romania, Spain and Sweden.

<sup>37</sup> Act to prohibit incitement to hatred on account of Race, Religion, Nationality or Sexual Orientation of 29.11.1989, ISB No 19 of 1989.

<sup>38</sup> Act of 26.11.2011 *Kazneni Zakon*, (NN 125/11 Amend.).

<sup>39</sup> Greek Penal Code, next to the introducing the definition of hate crime, which is still not a common solution, implements a provision which extends criminal protection in the field of voluntary humanitarian supply of goods and services – Article 361 B. To learn more about: P. Alikakos, 'Bias or hate incidents as criminal acts – The new provision of Art. 361 B of the Greek Penal Code', *1 Pro Justitia* (2018) 94, at 94-101.

<sup>33</sup> And: recording or importing, purchasing, storing or possessing, presenting, carrying or sending.

<sup>34</sup> W. Wróbel and A. Zoll, *Kodeks karny. Część ogólna* (2016).

<sup>35</sup> OSCE/ODHIR, *Hate Crime Laws, supra*, note 2, at 21.

This brief summary<sup>40</sup> allows the claim that, due to The Framework Decision 2008, the EU Members' law systems are relatively similar to each other; at least – acceptable as a starting point for discussion on improving it. The European Commission pointed out in 2014 that, although the majority of EU Members have provisions required under The Framework Decision 2008, they do not fully transpose the offences covered by it; there are some differences in the approach to certain offences, in particular trivialization, condoning and denial of the Holocaust.<sup>41</sup> However, this statement above enables cautious optimism about the potential opportunities for cooperation between states; *zgoda buduje, niezgoda rujnuje*, as we say in Poland (*united we stand, divided we fall*).

## 4. CURRENT TOOLS FOR FIGHTING HATE CRIMES IN THE EU

Combating hate crimes consists not only in adopting laws aimed at protecting individuals from hatred. In order to be effective, it also needs to involve a more practical approach that makes existing regulation operational. In that field, the EU takes actions that for the

purposes of this paper are divided into two categories: soft measures and procedural tools.

**A. Soft Measures.** There are various ways of fighting hate crimes without the use of criminal regulations. They may involve promoting certain values, influencing the public through social media campaigns, cooperating with NGOs, facilitating collaboration between states or public institutions, drawing up guidelines, exchanging good practices or conducting surveys. They can also contain many other different tools that are equally effective. The EU tends to use most of them, and some have even been enshrined into EU law. For example, Directive 2012/29/EU<sup>42</sup> stipulates in Article 26 that MS shall cooperate, *inter alia*, by the exchange of good practices, consultation in individual cases and assistance to European networks working on matters directly relevant to victims' rights. The EU has also developed special bodies that are entrusted with the job of administering an EU anti-hatred policy.

The first EU body designed to tackle hate crimes, among others, is the EU Agency for Fundamental Rights (FRA). As Article 2 of the regulation establishing it stipulates, the objective of the agency is to "provide the relevant institutions, bodies, offices and agencies of the Community and its

MS when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights".<sup>43</sup> The regulation also broadly describes ways by which the FRA is supposed to carry out its duties. In doing so, the FRA does not work alone. It cooperates with states, NGOs, other EU bodies or OSCE. It is also a part – *inter alia* – of an expert group of the European Commission – a High Level Group to combat racism, xenophobia and other forms of intolerance, charged with similar tasks but on a different level.

Those bodies are worth mentioning because they provide officials and individuals with knowledge, tools and expertise to effectively fight hate crimes, while facilitating their cooperation and fostering discussions on certain problems at the same time. For example, in recent years they have published an extensive report<sup>44</sup> and a set of guiding principles,<sup>45</sup> both concerning hate crime recording and data collection by the MS. The FRA also conducts its own surveys regarding hate crimes and discrimination based on certain protected characteristics. Just three years ago it published the results of an EU-wide survey on the problem of discrimination of ethnic minorities and immigrants. It found that as much as 24% of them experienced hate-motivated harassment and 3% experienced a hate-motivated physical attack in the

previous twelve months, with Roma and people with a North African background suffering the most. Most hate-motivated incidents remained obscured – only 10% of the total (and only 28% of the physical attacks) were reported either to the police or to other organizations.<sup>46</sup> Currently, a similar survey regarding LGBT persons is being conducted. Its results are going to be published this year.

The EU takes many more non-binding actions that are aimed at combating hate crimes specifically or hatred in general (such as #NoPlace4Hate action, taken by the European Commission in cooperation with main social media platforms). However, listing them exhaustively would be impossible and pointless. It is better to focus on the tools that are provided by the EU in the field of criminal law.

**B. Procedural Tools.** The EU has created a number of legal instruments that can be used to combat hate crimes. Their examples, assuming that the measures have been fully implemented, are given below in the form of mini cases. Due to space restrictions, the selection has been limited to the most important legal measures that may be helpful during any criminal proceedings. Our presentation aims at showing what can theoretically be achieved on the grounds of existing regulations but, due to the nature of this paper, it does not explore the way they are applied in real cases.

<sup>40</sup> The above summary is based on T. Đaković, C. Senta, *Against hate. Guidebook of good practices in combating hate crimes and hate speech* (2019), at 12-35; FRA, *Hate crime recording and data collection practice across the EU* (2018), at 28-88.

<sup>41</sup> Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (2014). EC lists as missing areas in particular motivation of crimes, the liability of legal persons and jurisdiction.

<sup>42</sup> *Supra*, note 31.

<sup>43</sup> Council Regulation (EC) No 168/2007 of 15.2.2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22.2.2007.

<sup>44</sup> EC, *Improving the Recording of Hate Crime by Law Enforcement Authorities. Key Guiding Principles* (2017).

<sup>45</sup> FRA, *Hate Crime Recording*, *supra*, note 39, 2018.

<sup>46</sup> FRA, *Second European Union Minorities and Discrimination Survey. Main Results* (2017), at 16-18.



**Case 1.**  
*Proceedings Ex Officio.*

Jerry professes Judaism. He went with his family to a Saturday service in a nearby synagogue. When Jerry's family crossed one of the streets, Arnold, sipping beer in the garden of one of the cafes together with his friends, got up and shouted: "We must end all of them" by pointing at the synagogue. Jerry was afraid to report the situation to the Police. The Police are considering whether to initiate proceedings against Arnold *ex officio*.

**Answer 1.** In accordance with Article 8 of the Framework Decision 2008, the authority of a Member State should be entitled to initiate criminal proceedings *ex officio*. In the above situation, Jerry should not have to personally initiate criminal proceedings.

**Case 2.**  
*Jurisdiction.*

A Portuguese publishing house (legal person) published a book by Johan Bencev from Bulgaria, in which the author indicated that a death camp should be opened for people with dark skin colour. Jerry reported the publication of this book to the Police in Portugal. Jerry said that the publishing house had received EUR 100,000 for the sale of book. The Portuguese prosecutor's office is considering whether to transfer the case to Bulgaria.

**Answer 2.** In the light of Article 9(1) (c) of the Framework Decision 2008, the criminal jurisdiction lies with that Member State in which the conduct has been committed for the benefit of

a legal person that has its head office in the territory of that Member State. In this case, the Portuguese authorities should be competent to conduct criminal proceedings.

**Case 3.**  
*Joint Investigation Teams.*

In Cieszyn, a beautiful town divided into two states (Poland and Czech Republic), a congress concerning persons with disabilities was held. A group of 200 Poles and Czechs from all over the states decided to stone the building (situated in Poland, about 10 m from the border) and persons with disabilities who were leaving it. Twenty of them were seriously injured (among other: Helga, Jerry's daughter), one person died. Some perpetrators, during the act, were on the Polish side of the border, while others were on the Czech side. Nobody knows how such a large group agreed to act. They had balaclavas and quickly dispersed, disappearing without a trace.

**Answer 3.** The competent authorities of Poland and Czech Republic may set up a joint investigation team for limited period in order to resolve the case, because this investigation will require difficult and demanding investigations having links with two Member States.<sup>47</sup>

**Case 4.**  
*European Protection Order (EPO).*

In the course of the proceedings, the Court of Graz adopted a precautionary measure against Arnold, who hated not only Jews but also people of Austrian nationality, which consisted in prohibiting contact with Jerry who moved with his family to Zagreb after the incidents described in the case 1.

Arnold also moved to Zagreb, claiming he won't let Jerry go. The Court of Graz requested the Court of Zagreb to execute the EPO.

**Answer 4.** In the face of the need to protect Jerry against a criminal act by Arnold which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity, the Court of Graz issues an EPO, executed by the Court of Zagreb. It enables him to keep his protection in Croatia. Jerry can feel safe in Zagreb.<sup>48</sup>

**Case 5.**  
*European Investigation Order (EIO).*

The Milan Public Prosecutor's Office requested that the Zagreb Public Prosecutor's Office execute the EIO by questioning Jerry about the murder of his Nigerian friend committed by Johan Bencev (the book author described in the case 2), which he witnessed in Milan.

**Answer 5.** It is possible to carry out Jerry's interrogation in Croatia to obtain evidence in accordance with EU law, pursuant to a judicial decision issued by the Italian authorities. The EIO covers any investigative measure with only a few exceptions (e.g. setting up of a joint investigation team, gathering of evidence within such a team as provided in separate regulation). There is no need for Jerry to be questioned in Milan.<sup>49</sup>

**Case 6.**  
*Determination of Punishment.*

Jerry is a person in a homelessness crisis and stays in Turku (Finland). Mark wounded Jerry with a knife, shouting that there should be no such persons in Turku. Mark was arrested and brought to justice. During the deliberation, the court wondered if Mark's motivation should affect the punishment.

**Answer 6.** The Framework Decision 2008 (Article 4) provides that MS should ensure that motivation may be taken into consideration by the courts in the determination of the penalty. Therefore, the Finnish court should consider Mark's motivation as an aggravating circumstance.

**Case 7.**  
*Criminalization of Aiding.*

Jerry's homelessness crisis is over and he owns some audio equipment. His friend Frank asked to borrow the equipment from him so that he could announce to the public his plan to exterminate a local LGBT community. Jerry lent him the equipment, claiming that he is happy to be able to help in such an important matter. The court wonders whether Jerry's behaviour is a criminal offense.

**Answer 7.** Article 2 of the Framework Decision 2008 provides that MS should ensure that aiding and abetting are punishable. With this in mind, the court should consider Jerry's act as a criminal offence.

<sup>47</sup> Article 1(1) of the Council Framework Decision of 13.6.2002 on joint investigation teams, OJ L 162 of 20.6.2002.

<sup>48</sup> Article 1 of Directive 2011/99/EU of the European Parliament and of the Council of 13.12.2011 on the European protection order, OJ L 338 of 21.12.2011.

<sup>49</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3.4.2014 regarding the European Investigation Order in criminal matters, OJ L 130 of 1.5.2014.

### Case 8.

#### *Mutual recognition of judgments.*

Having realized how much evil he has suffered because of divisions and differences between human beings, Jerry decided to symbolically fight them. He came to Cieszyn, where Helga had been injured, and damaged all the boundary marks by writing insulting slogans against Poles and Czechs on them, stating the fact that they should not exist as people and nations. He was sentenced to two years of imprisonment. Before the sentence was passed, Jerry decided to go back to his family in Graz; he stayed there. The Court of Cieszyn asked the Court of Graz to enforce the sentence.

**Answer 8.** Poland and Austria may cooperate when it comes to executing a custodial sentence. It requires filing a motion to recognize the judgment and enforce the sentence to a competent court or other authority of a EU Member State.<sup>50</sup> This solution serves the purpose of facilitating the social rehabilitation of Jerry as far as he has certain links, family and social bonds in Graz.

## 5. SOLUTIONS FOR EXISTING PROBLEMS

We believe that although some significant steps have been taken in combating hate crimes in recent years, there is still a lot to be done – both in the field of legal framework and on-the-ground operations. Keeping in mind the circumstances described in our paper above, we would like to offer a couple of improvements that could facilitate achieving our common goal. We are aware that the relatively modest Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia took seven years<sup>51</sup> of negotiation, and that adopting any of the ideas set out below could be at least equally challenging or perhaps even more arduous – not only from a legal perspective, but especially from the political one. However, we are resolved to present them as our part in the ongoing discussion regarding hate crimes. We realize that ideas to improve the current system are numerous.<sup>52</sup> Although we were inspired by some, we do not seek to present all of them or even to summarize the ongoing discussion but rather we wish to discuss those which we consider to be the most important.

### Solution 1.

#### *Strengthening Criminal Collaboration by a New Legal Act.*

First, we strongly believe that in the light of contemporary challenges, the EU should adopt a more comprehensive approach, encompassing all kinds of crimes based on hatred. For that purpose, the EU should adopt a new legal act that would not differentiate between crimes driven by racist and xenophobic motivation and crimes based on different kinds of hatred. Racist and xenophobic crimes still pose a significant challenge in all EU jurisdictions. However, in recent years Europe has seen a rise in hate crimes prompted by – for example – homophobic prejudices and false religious preconceptions. The former have been particularly visible in Central and Eastern Europe, where LGBT members became, among others, the victims of malicious attacks, whereas the surge in hatred towards religious minorities was targeted mainly at Muslim communities after the spark of the so-called refugee crisis. We reckon that anti-discriminatory actions taken by the EU, including by means of criminal law, should take into account these facts, providing protection for a wider range of vulnerable groups. For the sake of maximum flexibility, full scope of protection and avoidance of doubt, the new legislative act should provide mechanisms to counter all kinds of hate crimes.

Introduction of a new legal act raises questions as to its form. Ideally, it would be the best to adopt a new regulation that would include the proposed solutions. The regulation would be directly applied by Member States and would provide among them a unanimous understanding of core anti-discriminatory rules. However, the legal basis for such regulation is controversial. Theoretically Article 352(1) of TFEU could be considered as a sufficient legal ground, but its scope of application may prove controversial. We also acknowledge problems that could arise with regard to the substantive rules included in the regulation. Another solution is to adopt the new legal act in a form of a directive.<sup>53</sup> Although the directive would bring about much more modest changes to the status quo, we think that it would still constitute a more effective and practical tool than a framework decision. Albeit framework decisions are of a binding character and a failure to implement them now can result in an action before the CJEU under Article 258 of TFEU, they still do not entail a direct effect, unlike directives.<sup>54</sup> Given the troubles with the implementation of the Framework Decision 2008, a direct effect could prove to be a welcome tool. However, even adopting the directive would bring its own challenges - it would still require unanimous decision of the Council, which could turn out to be politically impossible. Also, the direct effect of such directive would be somehow limited.<sup>55</sup>

<sup>50</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union OJ L 327/27.

<sup>51</sup> EU, Report From... *Supra*, note 40, at 2.

<sup>52</sup> FRA, *Fundamental Rights Conference 2013. Combating Hate Crime in the EU. Giving Victims a Face and a Voice. 12-13.11.2013, Vilnius, Lithuania, Conference Conclusions* (2013).

<sup>53</sup> It is possible on the basis of Article 83 of the Treaty on the Functioning of the EU by an unanimous decision of the Council after obtaining the consent of the European Parliament.

<sup>54</sup> A. Giannakoula, *Framework Decisions under the Lisbon Treaty: Current Status and Open Issues*, *European Criminal Law Review* (2017) 7, at 275-288; Court of Justice of the EU (CJEU) Judgment of 5.7.2016, *Atanas Ognyanov v. Sofijska gradska prokuratura*, C-554/14, at para. 58.

<sup>55</sup> See: CJEU Judgment of 3.5.2005, *Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others*, joined cases C-387/02, C-391/02 and C-403/02 at para. 73-75.

Properly addressing the above-mentioned issues would require further analysis, which was not included in this paper, given its limited scope.

We reckon that the new legal act should generally adopt a similar way of regulating the said matter but some adjustments ought to be made. First, it should specifically enlist a number of criminal acts that are to be punishable under Member States' laws. It should encompass crimes listed so far in Article 1 of the Framework Decision 2008 but extended in a matter that would take into account all manifestations of prejudices. Second, the new legal act should provide that hate-oriented motivation is considered an aggravating circumstance and is taken into consideration in the determination of penalties with regard to all criminal acts. We believe that MS should be bound to implement this as a separate legal premise, incorporated into their criminal acts, as opposed to a situation in which motivation of that kind is taken into account under general provisions concerning the degree of penalty. Otherwise the goal of the act could be easily frustrated as its effectiveness would depend mostly on the individual approaches of judges.

### **Solution 2.** *Strengthening of Victims' Rights.*

Contemporary criminal law focuses on a spectrum of victims' rights. The EU legal system shares this approach. The EU instruments (including Directive 2012/29/EU<sup>56</sup> and the measures of the Framework Decision 2008) allow the implementation of the preventive function of criminal law; however, due to their generality, they leave some space where victims of the racist or xenophobic crimes remain alone.<sup>57</sup> Thus, our proposal consists in the harmonization of punitive measures or the establishment of new ones (like prohibition of use specific social media), which would allow victims to avoid the perpetrator, even on social media. We also propose different means, including long-term and short-term psychological and legal aid. The solutions adopted should also focus on wider cooperation with NGOs that provide assistance to crime victims. These solutions would be beneficial for legal protection from secondary and repeat victimization, intimidation and retaliation.

### **Solution 3.** *Strengthening Collaboration Against Internet Hate Crimes.*

Nowadays, it is impossible not to notice the challenge that the Internet has become.<sup>58</sup> We realize that this problem was noticed during the preparation of The Framework Decision 2008 (see jurisdiction solutions). However, technical progress requires further intervention. Since 2008, the world of social media has developed significantly. Therefore, we propose that the above-mentioned punitive measures should affect the Internet. The new legal act should also ensure that MS are bound to take necessary measures to ensure the prompt removal of web pages (containing or disseminating hate crimes) hosted in their territory, also on the request of other MS. It could also be provided that MS have to take measures to block access to web pages or to the certain part of the web page (e.g. commentary sections) containing or disseminating hate crimes towards Internet users. These measures should be executed in transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction.

### **Solution 4.** *Strengthening Collaboration in Detection of Hate Crimes.*

One of the biggest problems in fighting hate crimes is their detection. Although the Framework Decision 2008 orders prosecution of such offenses *ex officio*, their detectability is not high. Therefore, we propose to set minimum standards that would encourage reporting of such phenomena, for example by guaranteeing anonymity to the reporting person. We also propose obliging service providers to inform National Liaison Officers about cases of hate crimes detected in course of their regular business. This would be beneficial in combating the shadow area of hate crimes.

### **Solution 5.** *Strengthening Collaboration Against Recidivism.*

Another very important aspect of crime fighting, often overlooked, is rehabilitation. Nowadays, there is no cooperation aimed at rehabilitation of the convicted. The harmonization should cover educational programmes that would help them reintegrate into society.

<sup>56</sup> Supra, note 31.

<sup>57</sup> J.C. Healy, 'It spreads like a creeping disease': experiences of victims of disability hate crimes in austerity Britain, *Disability&Society* (2020) 35, at. 180.

<sup>58</sup> J. Jurczak, Police Competences in Preventing Investigating and Combating Hate Crimes in Poland – Part I, *Internal Security* (2018) 10, at 278.

## 6. CONCLUSIONS

The measures presented above, without any doubt, are the next step in homogenization and refining of policies to combat hate crimes. However, in our opinion, even in the absence of a change in legal regulations, it is possible to conduct activities that will contribute to the fight against hate crimes.

First, the relatively simple and seemingly insignificant problem concerning data collection occurs. However, this is not just a barren desideratum, the meaning of which would come down to accounting purposes. Obviously, this is not an innovative idea. Currently such efforts are being taken at EU level, primarily by the FRA. Taking into consideration that a proper understanding of reality is a prerequisite for changing it, we postulate focusing more attention on these activities. As it is stated, there are significant differences in data recorded among EU states. This results in gaps, meaning that “official data collection mechanisms pertaining to hate crime often fail to capture the reality on the ground.”<sup>59</sup> The situation is deepened by disparate approaches of what hate crime is in fact. It overlaps with the issues of the different authorities responsible for collecting information and the heterogeneous system of publishing it among EU Members. As a result, different data pertaining to different types of hate crimes are published – supposing they really are. Reports by the FRA show that there is a significant number of states which do not publish

their disaggregated hate crime data (it is not collected)<sup>60</sup> or they do not practice flagging of hate or bias motivation in the general crime recording system.<sup>61</sup>

All these circumstances render the number of hate crimes underestimated and lead to two negative consequences. First of all, they prevent efficient operations in the areas where it is most required. Second, they may discourage victims from reporting such crimes, because their own histories often indicate completely different experiences; this may result in reduced trust in public authorities. Meanwhile, receiving signals from victims is extremely important not only to counteract their sense of fear and create good practices in the functioning of institutions based on cooperation and trust, but also to make the crimes widely visible in the reports.

It is therefore crucial to improve data collection primarily at state level, having regard to unification of its criteria. The EU should define a number of hate crimes for reporting purposes. The definitions should include different ranges of bias motivations which could enable MS to classify committed crimes into appropriate, harmonized and more specific categories (for example, instead of ‘racist crime’ – ‘anti-African crime’, ‘anti-Asian crime’). They should be related to a standardized database. On the other hand, EU Members have to put more emphasis on counteracting underestimation of crimes. A good solution is to cooperate with civil society organizations, which do a great

job in the fight against hate crimes by supporting victims; not only through simple data exchange and dialogue, but also through systemic solutions such as financial support. The efficient functioning of such entities enhances the effectiveness of the activities of public authorities within the scope of their joint action. It is also important to notice that the understanding of hate crimes by police and prosecuting officers contributes to efficient reporting and proper categorization of a crime, including its hate/bias motives.

Within the scope of combating hate crimes the role of criminal law is prominent. The existence of regulations on hate crimes is a clear signal of disapproval of behaviours that violate the freedom, diversity and dignity of other human beings. The criminalization of such behaviours is crucial as it runs counter to the fundamental values of the EU, which is guided primarily by inviolable and inalienable human rights, and reinforces a uniform approach across the States. Nevertheless there are other fields that could be used in the fight against hate crimes. It would be misleading a little to say that *he who lives by the sword shall die by the sword* – but it is hard to deny that it embraces a grain of truth.

In our opinion it is no less important to develop soft measures including mostly various forms of prevention and understanding of hate crimes on the ground, following the simple truth: *prevention is better than cure*. This comes from the fact that, regardless of the importance of criminal hate regulations, it is indeed true that, as Alexis de Tocqueville said, one man’s freedom ends where the other man’s begins. In

the seeking of effective solutions under criminal law, we must not succumb to the temptation to overly radicalize methods of combating hate crimes. At such a time, a conflict may arise between the protection of victims’ rights and the exercise of others’ rights. Perhaps the most resonant example in this area could be a clash between hate speech and freedom of speech. Obviously, there is significant number of apparent cases, where the border between them can be clearly delineated. However, the more we move the border, the more dubious cases arise.

That is why the non-legal ways of combating hate crimes should first and foremost focus on developing proper social behaviour. It is a well-known truth in political philosophy that the development of a society with a sense of respect for human rights is achieved primarily through education. It is not only about educating the youngest citizens (although this aspect is extremely important, as confirmed by actions taken in Poland), but also about conducting good community policies. Building a sense of community at a national and local level through actions for equality and tolerance (even those as simple as local picnics or cultural events to learn about the history and customs of other nations and social groups) contributes significantly to reducing hate crimes. The more we know about those who seem different from ourselves, the more we are *united in diversity*.

A specific form of education should involve programmes of training for prosecutors and police officers. Their sensitivity to the symptoms of hate crimes is an extremely important factor, as they are the first of the public

<sup>59</sup> FRA, *Making hate crime visible in the European Union: acknowledging victims' rights* (2012), at 31.

<sup>60</sup> Bulgaria, Latvia, Malta, Romania, Slovenia - in 2018; FRA, *Hate Crime Recording...*, *supra*, note 39, at 24. In 2012 there were also: Hungary, Portugal; FRA, *Making...*, *supra*, note 56, at 32-34.

<sup>61</sup> Belgium, Bulgaria, Czech Republic, Hungary, Italy, Luxembourg, Malta, Portugal, Romania, Slovenia – FRA, *Hate Crime Recording...*, *supra*, note 39, at 22.

authorities who face hate crimes and their victims. This is something that has already been introduced in 22 of EU MS. However, the need for more training should be postulated, as long as it is often organized *ad hoc*, not on a regular basis.<sup>62</sup> Those actions in plain view may contribute to public authorities *taking hate crimes seriously*.

We believe that small things create big ones. That is why the best thing each of us can do to combat hate crimes is self-call: *do not stay indifferent*. Act. When seeing harm and evil – act to repulse it. Every hate-action should cause a reaction.

“Do not stay indifferent when you see historical lies, do not stay indifferent when you see that the past is adapted to current political needs. Do not stay indifferent when any minority is discriminated against, as democracy assumes that the rights of minorities need to be protected at the same time. Obey the commandment. The 11th commandment: do not stay indifferent. Unless you do so, in the blinking of an eye, an Auschwitz will suddenly fall from the sky.”<sup>63</sup>

## 7. BIBLIOGRAPHY

### BOOKS

Austen J., *Pride and prejudice* (1844)

Wróbel W., Zoll A., *Kodeks karny. Część ogólna* (2016)

### GUIDEBOOKS

Đaković T., Senta C., *Against hate*.

*Guidebook of good practices in combating hate crimes and hate speech* (2019)

FRA, *Making hate crime visible in the European Union: acknowledging victims' rights* (2012)

FRA, *Ensuring justice for hate crime victims: professional perspectives* (2016)

FRA, *Second European Union Minorities and Discrimination Survey. Main Results* (2017)

FRA, *Improving the Recording of Hate Crime by Law Enforcement Authorities. Key Guiding Principles* (2017)

FRA, *Hate crime recording and data collection practice across the EU* (2018)

OSCE/ODHIR, *Hate Crime Laws. A Practical Guide* (2009)

OSCE/ODHIR, *Hate Crime Data-Collection and Monitoring Mechanism. A Practical Guide* (2014)

OSCE/ODHIR, *Prosecuting Hate Crimes. A Practical Guide* (2014)

### ARTICLES

Alikakos P., 'Bias or hate incidents as criminal acts – The new provision of Art. 361 B of the Greek Penal Code', *1 Pro Justitia* (2018)

Giannakoula A., Framework Decisions under the Lisbon Treaty: Current Status and Open Issues, *7 European Criminal Law Review* (2017)

Healy J.C., 'It spreads like a creeping disease': experiences of victims of disability hate crimes in austerity Britain, *Disability&Society* (2020) 35

Jasiński F., Europejskie Centrum Monitorowania Rasizmu i Ksenofobii, *Biuletyn Wspólnot Europejskich* (2000) 12

Jurczak J., Police Competences' in Preventing Investigating and Combating Hate Crimes in Poland – Part I, *Internal Security* (2018) 10

Leman J., Europe's Consultative Commission on Racism and Xenophobia and the Slow Progress towards a European Antiracism Observatory, *Loyola of Los Angeles International and Comparative Law Review* (1996) 18

### REPORTS

Council of the EU: Consultative Commission on racism and xenophobia, *Final Report* (1995)

Council of the EU: Consultative Commission on racism and xenophobia, *Report of the Consultative Commission* (1997)

Report from the Commission of the EU to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/

JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (2014)

### JUDGMENTS

CJEU Judgment of 3.5.2005, *Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others*, joined cases C-387/02, C-391/02 and C-403/02

CJEU Judgment of 5.7.2016, *Atanas Ognyanov v. Sofijska gradska prokuratura*, C-554/14

ECtHR Judgment of 8.7.1999, *Sürek vs Turkey*, 26682/95

ECtHR Decision as to the Admissibility of 20.2.2007, *Ivanov vs Russia*, 35222/04

ECtHR Judgment of 24.7.2012, *Dordević vs Croatia*, 41526/10

ECtHR Judgment of 12.5.2015, *Identoba and Others vs Georgia*, 73235/12

ECtHR Judgment of 12.4.2016, *M.C. and A.C. vs Romania*, 12060/12

ECtHR Judgment of 28.3.2017, *Škrojanec vs Croatia*, 25536/14

### SPEECHES AND CONFERENCES

FRA, *Fundamental Rights Conference 2013. Combating Hate Crime in the EU. Giving Victims a Face and a Voice. 12-13 November 2013, Vilnius, Lithuania, Conference Conclusions* (2013)

Turski M., Speech at a ceremony to mark the 75th anniversary of the liberation of Auschwitz-Birkenau Nazi death camp (2020)

<sup>62</sup> FRA, *Ensuring justice for hate crime victims: professional perspectives* (2016), at 49.

<sup>63</sup> M. Turski, excerpt from a speech at a ceremony to mark the 75th anniversary of liberation Auschwitz-Birkenau Nazi death camp, 27.1.2020.



AGNÈS LENGAGNE  
ISABELLE SEYS-DELIÈRE  
MÉLISSA VINÇON



TUTOR: MARTIN VIVER-DARVIOT

Team FRANCE

# THE EUROPEAN UNION – FUTURE WARDEN OF EUROPE’S DETENTION CONDITIONS?

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This paper discusses various possibilities of improving detention conditions in the Member States through existing procedural tools developed by the European Union. These tools exist at all stages of criminal trials and include the European Arrest Warrant, the European Supervision Order and framework decisions on transfer of prisoners, probation measures and alternatives sanctions. After a general introduction on European-level measures taken so far in the field of prisoners’ rights, all instruments will be briefly presented, as well as their potential impact on detention conditions, and their current shortcomings in that regard. It will be argued that further reforms should be carried on, in order to guarantee a more effective enforcement of detainees’ fundamental rights, to reduce overcrowding and to improve rehabilitation. Beyond case-law evolution and technical modifications of the texts, harmonisation measures might prove efficient to bring effective changes. A short examination of potential obstacles for such reforms, but also of current opportunities, will conclude the paper.

## KEY WORDS

Prison conditions  
Mutual trust  
European Arrest Warrant  
Transfer of prisoners  
Pre-trial detention  
Alternative measures

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## 1. INTRODUCTION

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>2</sup> Indeed, various international agreements show the importance attached by their Contracting Parties to prisoners’ rights. However, it is behind prison walls that these international commitments made by Governments to respect, protect and fulfil human rights are perhaps most regularly put to the test.<sup>3</sup> As an illustration, detention conditions in Europe have become a recurrent subject of concern.<sup>4</sup> Hence the importance of questioning these conditions and thinking of ways to improve them, in order to ensure effective respect for the rights and dignity of prisoners.

### DEFINITION OF DETENTION CONDITIONS

The term “detention” can be defined as the deprivation of liberty prescribed by law. In this essay, we will not address all forms of detention, but will rather focus on remand and custody after sentencing. Therefore, administrative detention such as for undocumented migrants, involuntary hospitalisation and police custody will not be tackled

in the following developments. As for the conditions of detention, they cover material conditions such as cell space, or access to food and healthcare; procedural rights such as the right to a fair trial; opportunities for rehabilitation such as contacts with the outside world, and the right to education and work. Adequate detention conditions should entail the possibility for prisoners to have their rights respected despite the restriction on their right to liberty.

### FIRST EUROPEAN MEASURES TO IMPROVE DETENTION CONDITIONS AND THEIR LIMITS

Apart from the European Union (EU), some other European entities have had a decisive role to play in fostering the improvement of prison conditions in Europe. Even if they fall beyond the scope of this essay, they are worth mentioning to give a brief, non-exhaustive overview of what has been done so far and what the limits of these legal tools are. This will enable us to highlight what the added value of the Union could be.

Some mechanisms have been created to monitor detention conditions. For instance, the 1987 Council of Europe’s Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment created a European Committee which goes under the same name, CPT. The CPT has the power to visit any place where persons are deprived of their liberty. It checks not only

active behaviour of law enforcement authorities, thus collecting allegations of violence and abuse, but also actual conditions in prisons in order to verify whether the latter are complying with the standards developed by the CPT.<sup>5</sup>

The CPT is not the only body to have developed European standards regarding the treatment of persons deprived of their liberty. In this respect, it is worth mentioning the European Prison Rules,<sup>6</sup> first adopted in 1987 and then amended in 2006 and 2018, which are a set of recommendations passed by the Committee of Ministers of the Council of Europe. They are non-binding.

The European Court of Human Rights (ECtHR) has also had a major role to play in the improvement of prison conditions in Europe. Indeed, it has developed its case law mostly on the basis of Article 3 of the Convention prohibiting inhuman and degrading treatment. Violations of this article may arise from positive acts of abuse by law enforcement authorities over prisoners, but also through “negative violations”, in cases where, due to the lack of action by a State, poor detention conditions are imposed upon prisoners. In fact, convictions for failure to take positive action are the most frequent in the Court’s case law.<sup>7</sup>

Moreover, the ECtHR has also used the procedure of “pilot judgment”<sup>8</sup> for cases dealing with detention conditions. In some cases, the Court found the existence of structural and systematic problems, for instance overcrowding of prisons leading to lack of personal space or privacy, and reduced access to outdoor space. It therefore ruled that the resolution of these problems required general action on the part of State authorities.<sup>9</sup> Indeed, the overcrowding of detention facilities has undeniable consequences on general prison conditions, which explains why these rulings have been crucial in promoting the improvement of prison conditions.

Despite the changes they fostered, these actions have had limited effects for various reasons. The main one is that the instruments created do not, in most cases, have a binding effect and are therefore not necessarily followed by the States. It eventually lies with their political willingness to improve detention conditions. And even if they are mandatory, such as in the case law of the ECtHR, this does not mean that authorities are more prone to comply with the rulings of the Court. Thus, because of its specific status, the EU might be able to do more and to overcome these hurdles.

<sup>1</sup> This quote meaning “the words of criminal law are the keys to prison” is taken from M. Papa, *Fantastic voyage attraverso la specialità del diritto penale*, Ampliata (2nd ed., 2019), at 2.

<sup>2</sup> Article 10, International Covenant on Civil and Political Rights 1966, 999 UNTS 171

<sup>3</sup> Penal Reform International, *Global Prison Trends* (2016), available at [https://cdn.penalreform.org/wp-content/uploads/2016/05/Global\\_prison\\_trends\\_report\\_2016.pdf](https://cdn.penalreform.org/wp-content/uploads/2016/05/Global_prison_trends_report_2016.pdf), at 4.

<sup>4</sup> This topic is frequently covered by general newspapers. For instance, an article on the World Health Organisation’s alert about access to healthcare in European prisons: *L’OMS s’alarme de la santé des détenus dans les prisons européennes*, 21 November 2019, available at [https://www.lexpress.fr/actualite/monde/europe/l-oms-s-alarme-de-la-sante-des-detenus-dans-les-prisons-europeennes\\_2108404.html](https://www.lexpress.fr/actualite/monde/europe/l-oms-s-alarme-de-la-sante-des-detenus-dans-les-prisons-europeennes_2108404.html)

<sup>5</sup> EP Briefing, *Prison conditions in the Member States: selected European standards and best practices* (2017), available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583113/IPOL\\_BRI\(2017\)583113\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583113/IPOL_BRI(2017)583113_EN.pdf), at 2.

<sup>6</sup> European Prison Rules, updated version 2019

<sup>7</sup> D. Anagnostou and D. Skleparis, ‘Human Rights in European Prisons: Can the Implementation of Strasbourg Court Judgments Influence Penitentiary Reform Domestically?’, in T. Daems and Robert L. (eds), *Europe in Prisons* (2017), at 46.

<sup>8</sup> ECtHR, Rules of the Court, Rule 61

<sup>9</sup> See for example, ECtHR, *Torreggiani and Others v. Italy*, Appl. no. 43517/09, Judgment of 8 January 2013 ; All ECtHR decisions are available at <http://hudoc.echr.coe.int/>

## GENERAL BARRIERS TO FURTHER IMPROVEMENT OF PRISON CONDITIONS WITHIN THE EUROPEAN UNION

The EU started addressing the issue of detention conditions more recently, mostly by creating diverse instruments (which will be detailed later on). While the current state of prisons in Europe is still unsatisfactory, the EU might take a step further towards the improvement of prison conditions, using its supranational position to impose more progressive norms upon the Member States (MS). However, several obstacles still stand in the way of the Union.

The first hurdle might lie in the very nature of criminal matters. Indeed, because it is so close to the core of the exercise of State sovereignty, criminal law is among the fields in which the Union took the longest time to intervene.<sup>10</sup> The reluctance of MS for the EU to intervene is still particularly strong when it comes to procedural law, which might be explained by the fact that States are not particularly prepared to give up their sovereign prerogative of organising their internal proceedings.<sup>11</sup> Besides, detention conditions and the improvement thereof are not always a central issue for the public, and many governments do not actively push for them. In fact, with repressive calls for harsher treatment of offenders spreading throughout Europe, there is often little space left for advocating the right of detainees to live in tolerable conditions, without even mentioning calls to reduce the number of inmates. Although repeatedly proven to be an ineffective long-term strategy, proposals to build more and more prisons are met

with more support than programmes focusing on keeping as few persons in custody as possible.

Secondly, any considerations of the present and future state of EU criminal law would be incomplete without mentioning the persistent implementation issues pervading it, and raising serious concerns as to its effectiveness. Should the core objective of a reform be to promote fundamental rights – and better detention on which its implementation relies will view it as another cumbersome addition to the normative framework, and are less likely to ensure swift and full implementation. Beyond questions of resources and training, emphasis should therefore also be put on the short and long-term benefits of new tools for those in charge of implementing them. This is of course especially the case where detainees' rights are concerned; national authorities may need additional incentives to go through the changes required to implement new norms. It should be emphasised, for instance, that reforms will improve the working conditions of prison and probation staff, and save substantial amounts of resources in the long term.

## THE CRUCIAL ROLE OF THE EUROPEAN UNION IN IMPROVING DETENTION CONDITIONS

The current state of prison conditions in Europe demonstrates that most MS have not yet reached their stated objectives. Nonetheless, improving these conditions is in every State's interest, as adequate detention conditions are necessary to ensure the role of rehabilitation in

detention and are, therefore, a precious tool against recidivism. Thus, it is paramount to keep working towards the achievement of decent detention conditions for all prisoners. In this respect, we believe that the EU has a crucial role to play, mainly because of the following developments.

At first sight, one could argue that detention problems are the responsibility of MS and not the EU. However, there are reasons for the Union to address these issues. Indeed, some European legal instruments rely on mutual trust and mutual recognition. To give these principles their full meaning, the EU should make sure that fundamental rights are safeguarded and that the same standards apply in all MS. Indeed, a lack of confidence in the effectiveness of these rights when the States implement Union law would hinder the cooperation these instruments are meant to promote.<sup>12</sup>

Initially, the promotion of fundamental rights was not a major concern for the EU. Generally, safety concerns have been the key incentive for MS to move forward with EU criminal law; improving cross-border cooperation to deter transnational crime or to ensure offenders are caught, convicted and carry out their full sentence. However, in the past two decades, the EU has demonstrated its will to take a more active part in the promotion and implementation of fundamental rights. The long awaited adoption of the Charter and its integration within primary law has perhaps been the most remarkable sign of this shift.

All instruments now mention the respect of fundamental rights, as stated in EU law or even as demanded by international norms or interpreted by the ECtHR. Framework decisions, and now directives, contain more and more references to those rights, and create exceptions in the execution of cross-border requests where they would be at risk. For a long time, these provisions remained for the most part theoretical. However, there is an increasing tendency to give such exceptions their full meaning, even if it means suspending the application of EU norms, when there is a real risk that individual rights would be violated. This strict interpretation of fundamental rights' safeguards should and could be encouraged by the EU even more, as we will see hereafter.

The EU has the possibility to do more than other international organisations. Indeed, harmonisation allows the Union to make direct changes in national law. But it is perceived as particularly intrusive, and requires a strong justification with regard to the principle of subsidiarity. In substantive criminal law, the EU is now releasing the full potential of approximation measures – adopting directives which give common elements for the definition and criminalisation of a wide array of serious offences.<sup>13</sup> In procedural law, directives have been adopted regarding suspects' or victims' rights in criminal proceedings, but they remain rather broad,<sup>14</sup> and do not touch upon specific topics – in our case, mandatory limitation of resorting to prison sentences and their length, and material conditions of detention.

<sup>10</sup> M. Blanquet, *Droit général de l'Union européenne* (11th ed., 2018), at para 1529.

<sup>11</sup> W. Wagner, 'Negative and positive integration in EU criminal law co-operation', *15 European Integration Online Papers* (2011), Article 3.

<sup>12</sup> Commission Green paper of 14 June 2011, COM(2011) 327 final, at 4.

<sup>13</sup> B. Hecker, *Europäisches Strafrecht* (4th ed., 2012), at 358.

<sup>14</sup> M. Blanquet, *supra* note 10, at para 1548.

However, as stated in the Strategic Agenda 2019-2024: “The EU must give itself the means to match its ambitions, attain its objectives and carry through its policies.”<sup>15</sup> If the improvement of detention conditions is as important an objective as put forward by the institutions, it could be relevant to consider the adoption of approximation norms, which only the EU can do.

It has now become clear that the EU can and should act towards further improvement of detention conditions in Europe. The question still pending is therefore “How can the European Union use existing procedural tools to foster further improvement of detention conditions in Europe?”

To answer this question, it will be argued that reforming some existing EU procedural tools to give priority to prisoners’ rights over mutual trust would bring about some necessary changes in detention conditions in general (I). Furthermore, the EU should also pay particular attention to the issue of overcrowding, which has a direct, negative effect on prison conditions, and therefore try to reduce it through procedural reforms (II).

## 2. PRISONERS’ RIGHTS BEFORE MUTUAL TRUST: A KEY TO IMPROVING DETENTION CONDITIONS

We will argue in this part that some changes in the European Arrest Warrant (EAW) (A) and the Transfer of Prisoners (ToP) (B) could help improve detention conditions in Europe by integrating more clearly human - and prisoners’ - rights concerns.

### A. PURSUING THE ECJ’S TIMID PROGRESS: ENSHRINING HUMAN RIGHTS IN THE EAW PROCESS

#### 1. PRESENTATION OF THE EAW

The EAW Framework Decision<sup>16</sup> was adopted in a special context where the focus was put on security concerns rather than prison conditions. Indeed, after the 9/11 attacks, ‘the war against terrorism’ was identified as a top priority. The European Commission announced that “Europe must have common instruments to tackle terrorism”.<sup>17</sup> Therefore, the EAW was created shortly after this period to improve the efficiency of the fight against terrorism and reduce the possibility of impunity for terrorists in cross-border cases.

This tool was defined as a “judicial decision issued by a MS with a view to the arrest and surrender by another MS of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”.<sup>18</sup> This is a legal procedure accelerating the extradition of suspects or convicted criminals from one EU MS to another. The judicial authorities of the issuing state can request the surrender of a person located on the territory of the executing state to their judicial authorities so that this person can either face trial or serve a prison sentence in the country where they committed a crime.<sup>19</sup> If the individual has already been sentenced to at least four months of imprisonment or risks at least 12 months of detention for the offence s/he is suspected of having committed, the EAW must as a principle be executed.<sup>20</sup> Some grounds were enacted as mandatory or optional to refuse the execution of an EAW. However, none of them expressly mentions the violation of human rights in the issuing state, such as poor prison conditions, as a ground for refusal.

#### 2. MUTUAL TRUST PREVAILS OVER THE RESPECT OF PRISONERS’ RIGHTS

To support this omission, it was argued that all MS are members of the Council of Europe. Furthermore, according to Article 2 of the Treaty on European Union “the Union is founded on the values of

respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the MS in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Therefore, EU law is based on the fundamental premise that all MS share a set of common values on which the European Union is founded, including the respect of human rights.<sup>21</sup> This explains the existence of the principle of mutual trust on which the EAW is based and the fact that national authorities are bound by a presumption of compliance with EU fundamental rights.<sup>22</sup> However, it has become clear in practice that this was not a sufficient safeguard against the violation of prisoners’ rights.

In this respect, the ECtHR has made clear a MS will violate its obligations under the ECHR if it chooses to extradite an individual to a foreign state where the person, if extradited, would likely suffer inhuman or degrading treatment or torture contrary to Article 3 ECHR.<sup>23</sup> This means that a judicial authority executing an EAW is “responsible for ensuring fairness of EAW proceedings and, moreover, national courts in the executing state can, and if called upon to do so must make rulings in connection with an alleged potential violation of

<sup>15</sup> European Council, *A New Strategic Agenda 2019-2024* (2019), available at <https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf>

<sup>16</sup> Council Framework Decision 2002/584/JHA, OJ 2002 L190/1

<sup>17</sup> Commission Press Release of 19 September 2001, IP/01/1284

<sup>18</sup> Council Framework Decision, *supra* note 15, Article 1.

<sup>19</sup> European Commission, *European Arrest Warrant* (2019), available at [https://ec.europa.eu/info/sites/info/files/european\\_arrest\\_warrant\\_makes\\_europe\\_a\\_safer\\_place\\_factsheet\\_for\\_citizens.pdf](https://ec.europa.eu/info/sites/info/files/european_arrest_warrant_makes_europe_a_safer_place_factsheet_for_citizens.pdf), at 1-2.

<sup>20</sup> Council Framework Decision, *supra* note 16, Article 2.

<sup>21</sup> C-220/18 PPU, *Generalstaatsanwaltschaft* (EU:C:2018:589), at para 48.

<sup>22</sup> TP Marguery, ‘Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions’, 25(6) *Maastricht Journal of European and Comparative Law* (2018) 704, at 706.

<sup>23</sup> ECtHR, *Soering v. United Kingdom*, Appl. No. 14038/88, Judgment of 7 July 1989

the ECHR in the issuing state.”<sup>24</sup> Because of this and the number of convictions of EU MS under Article 3 of the ECHR due to prison conditions,<sup>25</sup> it became obvious that changes in the EAW process were necessary.

### 3. THE EVOLUTION OF THE ECJ’S CASE LAW REGARDING THE EAW

It was only a decade after the entry into force of the EAW that the ECJ’s case law evolved and strengthened the protection of human rights, and more particularly prisoners’ rights. At first, the court held that the execution of an EAW could only be refused on grounds mentioned in the Framework Decision. Indeed, in *Radu*, the ECJ ruled that even if there is a breach of a fundamental right, in this case the right to be heard, that is recognised by EU law but not enshrined as a ground for refusing the execution of the EAW, this violation cannot justify the non-execution of the EAW.<sup>26</sup> The same solution applies for a right guaranteed by national constitutional law but not stipulated in the text of the Framework Decision.<sup>27</sup>

A development in the ECJ’s ruling in this matter can be identified in *Aranyosi and Caldararu*.<sup>28</sup> The first case concerned an EAW issued in Hungary seeking the surrender of a Romanian national who was accused of forced entry into a dwelling and of stealing various objects of value. In the second, a Romanian court issued an EAW for a Romanian national who had been convicted of driving without a driving licence. In both cases, the German executing judicial authority had doubts as to whether the EAWs should be executed due to the conditions in Hungarian and Romanian prisons. Indeed, the ECtHR had established that prison conditions in these two countries were contrary to human rights and particularly to the right not to be subjected to inhuman and degrading treatment.<sup>29</sup> The German court asked the ECJ’s opinion on how to proceed. Firstly, the Court reaffirmed that executing judicial authorities must execute EAWs, except in situations of grounds of non-execution exhaustively listed in the Framework Decision. But then, the ECJ recognises that “limitations of the principles of mutual recognition and mutual trust between MS can be made ‘in exceptional circumstances.’”<sup>30</sup>

Thus, “where the judicial authority of the executing MS is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing MS, ... that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing MS of the individual sought by a European arrest warrant.”<sup>31</sup>

In order to assess that risk, the Court developed a two-step analysis. Firstly, the executing judicial authority must assess the prison conditions of the issuing MS in general. To do so, it must “rely on information that is objective, reliable, specific and properly updated” and that may be obtained from judgments of the ECtHR for instance.<sup>32</sup> If the executing judicial authority concludes that there are general or systemic deficiencies, there comes the second step, which entails an assessment of the risk in the particular case of the requested person.<sup>33</sup> To complete this step, the issuing national authority must be asked to provide as “a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that MS.”<sup>34</sup>

If the information received shows that there is a risk that the requested person may indeed face inhuman or degrading treatment, the executing judicial authority must postpone the execution of the EAW until it obtains new information discounting the existence of such a risk.<sup>35</sup> It is only if this risk cannot be discounted in a reasonable time that the executing MS can consider bringing the procedure to an end.<sup>36</sup>

In this case, the ECJ finally recognises that “mutual trust does not imply blind trust,”<sup>37</sup> which was confirmed and clarified in recent cases. In the *Celmer* ruling, the Court extended the possibility of refusal of execution of EAW to the violation of non-absolute rights. More precisely, the Court held that a potential infringement on the right to a fair trial – the essence of which includes the requirement that tribunals are independent and impartial – can trigger the *Aranyosi* test.<sup>38</sup> In the *Dorobantu* case, the ECJ gave further guidance to MS on how to assess conditions of detention as regards the personal space available to each detainee. To do so, the Court referred to the ECtHR case law, and more specifically to the case *Muršić v. Croatia*.<sup>39</sup> It stated especially that for the calculation of the available space, areas occupied by sanitary facilities should not be taken into account, but should include spaces occupied by furniture.<sup>40</sup>

<sup>24</sup> P. Garlick, ‘The European Arrest Warrant and the ECHR’, in Rob Blekxtoon et al. (eds), *Handbook on the European Arrest Warrant* (2005), 175.

<sup>25</sup> See for example, ECtHR, *Payet v. France*, Appl. No. 19606/08, Judgment 20 January 2011, in which the Court found a violation of Article 3 of the Convention with regard to the poor conditions of detention in the disciplinary wing where the applicant was placed (dirty and dilapidated premises, flooding, lack of sufficient light for reading and writing).

<sup>26</sup> Case C-396/11, *Ciprian Vasile Radu* (EU:C:2013:39), at para. 36-42.

<sup>27</sup> Case C-399/11, *Stefano Melloni v. Ministero Fiscal* (EU:C:2013:107), at para. 61-64.

<sup>28</sup> Joined Cases C-404/15 and C-659/15 PPU, *Pal Aranyosi and Robert Caldararu* (EU: C:2016:198), at para. 75-81.

<sup>29</sup> For Hungary, see for example, ECtHR, *Varga and Others v. Hungary*, Appl. No. 14097/12, Judgment of 10 March 2015. For Romania, see for example, ECtHR, *Vociu v. Romania*, Appl. No. 22015/10, Judgment of 10 June 2014.

<sup>30</sup> *Aranyosi and Caldararu*, *supra* note 28, at para. 82.

<sup>31</sup> *Ibid* 28, at para. 88.

<sup>32</sup> *Ibid* 28, at para. 89.

<sup>33</sup> *Ibid* 28, at para. 94.

<sup>34</sup> *Ibid* 28, at para. 95.

<sup>35</sup> *Ibid* 28, at para. 98-103.

<sup>36</sup> *Ibid* 28, at para. 104.

<sup>37</sup> Anne Pieter van der Mei, ‘The European Arrest Warrant system: Recent developments in the case law of the Court of Justice’, 24(6) *Maastricht Journal of European and Comparative Law* (2017) 882, at 899.

<sup>38</sup> Case C-216/18PPU, *Minister for Justice and Equality* (EU:C:2018:586)

<sup>39</sup> ECtHR, *Muršić v. Croatia*, Appl. no. 7334/13, Judgment of 20 October 2016

<sup>40</sup> Case C-128/18, *Dorobantu* (EU:C:2019:857), at para. 75.



It also mentioned the strong presumption of violation that arises when the personal space available to a detainee is below 3 m<sup>2</sup> in a multi-occupancy accommodation.<sup>41</sup> This strong presumption of violation of Article 3 of the ECHR can be overruled only if (a) the reductions in the required minimum personal space of 3 m<sup>2</sup> are short, occasional and minor, (b) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, and (c) the general conditions of detention at the facility are appropriate and there are no aggravating aspects of the conditions of detention.<sup>42</sup>

The strengthening of the *Aranyosi* evolution is obviously very welcome for prisoners' rights. However, this innovative case law cannot be considered as having introduced a general ground prohibiting the execution of an EAW every time a human rights' violation is established. That is why we believe that the EU should go even further.

#### 4. THE NEED FOR FURTHER IMPROVEMENT OF THE EAW SYSTEM

Even if the process of improvement of prison conditions has begun, it should be intensified. To do so, some questions, that are still pending, should be addressed. For instance, the Court opened the door to the refusal of execution of an EAW based on a derogable right in the *Celmer* case. However, would the same reasoning apply to the right to family life or healthcare?

Besides, even if the Court specified in this same case that completing the first step of the analysis is not sufficient to refuse the execution of an EAW, it is not clear whether this first step must always be followed. Can a MS refuse the execution of an EAW if there is no general risk of breach of fundamental rights but one established in the particular case of the requested individual?

In order to clarify these uncertainties and to foster the improvement of prison conditions through the EAW, some solutions may be proposed. For example, so far, once the first step of the test is satisfied, the burden of proof remains on the individual or the executing MS. It should shift to the stronger party – i.e. the issuing state accused of rule of law violations – because it is in better position to demonstrate the existence or absence of this risk. In addition, national independent institutions could be in charge of implementing and updating a database with the relevant information needed to assess the risks of violation of human rights in their prisons. In this way, the procedure of EAW could be executed or brought to an end more rapidly. Besides, even if the ECJ has clarified what situation could amount to a breach of the right not to be subjected to inhuman or degrading treatment in terms of cell space, it did not give an exhaustive list of inadequate detention conditions that could lead to this violation. To illustrate this point, the question of solitary confinement, the access to sanitary facilities, the possibility to go outdoors every day etc... have not been tackled by the Court yet.

Moreover, because this new ground for refusal is built case by case, the ECJ cannot specify the rules that would apply to every fundamental rights. Therefore, we believe that the Framework Decision should be updated to include this new exception to the execution of an EAW. This would be a perfect opportunity to clarify its scope and expressly extend it to all the rights of prisoners. The adoption of EU minimum rules concerning detention conditions would also be welcome and could be used as a framework to decide whether or not the EAW procedure should be brought to an end on the basis of the violation of a prisoner's rights.<sup>43</sup> Considering the growing number of EAWs issued every year,<sup>44</sup> this would provide a strong incentive for MS to improve their prison conditions if they ever want these EAWs to be executed.

## B. RECONSIDERING FUNDAMENTAL RIGHTS IN TRANSFER OF PRISONER PROCEDURES

### 1. THE TOP FRAMEWORK DECISION'S PURPOSE AND WORKING PRINCIPLES

Six years after the EAW, the 2008/909/JHA Framework Decision on ToP was conceived as its counterpart – where States can require a transfer to their territory, they may also choose to transfer from it. The decision sought

to improve on the existing Council of Europe Convention<sup>45</sup> by using the mutual recognition tool to impose a duty on a MS to accept transfers of convicted prisoners from another MS. Unlike the Convention, it removes the need to seek the concerned person's consent to the measure in many cases.<sup>46</sup> Transfers are also no longer limited to the State of nationality, but rather extended to any MS of long-term residence and even to any consenting MS. The Decision stresses that "enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person".<sup>47</sup> Its stated purpose is "to establish the rules under which a MS, with a view to facilitating the social rehabilitation of the person, is to recognise a judgment and enforce the sentence" (Article 3).

Such transfers could indeed have a positive impact on detention conditions in several regards. First, foreign prisoners have been shown to be particularly vulnerable to degraded detention conditions. When a convicted person is sent to a country they have close ties with, they are no longer part of the "foreigners"; interaction with the authorities and other detainees is facilitated, and contacts with family and friends – a key component of successful rehabilitation – can be far better ensured. Additionally, national authorities – specifically judges and probation services overseeing

<sup>43</sup> It should however be noted that some non-binding documents exist already. For example, EU Agency for Fundamental Rights, *Criminal detention conditions in the European Union: rules and reality* (2019), available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2019-criminal-detention-conditions-in-the-eu\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-criminal-detention-conditions-in-the-eu_en.pdf)

<sup>44</sup> Europa.eu, *European Arrest Warrant* (2019), available at [https://e-justice.europa.eu/content\\_european\\_arrest\\_warrant-90-en.do](https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do)

<sup>45</sup> Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983

<sup>46</sup> Council Framework Decision 2008/909/JHA, OJ 2008 L327/27, Art.6: consent is not required for transfers to the MS of nationality and residence, to the MS where the person would be deported once released, to the MS where the person has fled or returned.

<sup>47</sup> Ibid 46, at para 9.

<sup>41</sup> Ibid 40, at para. 72.

<sup>42</sup> Ibid 40, at para. 74.

the execution of the sentence – will be more inclined to transform part of the sentence into a non-custodial measure and/or grant an early release to detainees when they already have a connection with the outside world and are more likely to find employment, as well as return to a stable and supportive social environment. But transfers might also work against individual rights, if the detention conditions in the executing States do not meet European standards. Thus, although this instrument is much more effective than the previous one (namely, the Council of Europe Convention), there is still much room for improvement, be it with respect to fundamental rights guarantees, or to practical implementation.

## 2. IMPLEMENTATION AND FUNDAMENTAL RIGHTS ISSUES

The Framework Decision might underline the importance of respecting fundamental rights,<sup>48</sup> but it also mentions public safety. Under closer scrutiny, one may wonder whether the second concern does not take precedence in the execution of transfers. It should be noted that the text was adopted only four years after a major expansion of the Union to the East. MS could seize upon this interesting opportunity to transfer a certain number of detainees back to other countries and reduce their own prison population.

Transfers executed with more regard to a State's interests than individual well-being and rehabilitation are especially easy to set up since the person's consent is irrelevant in most cases.

Despite the general provision creating an exception to execution if fundamental rights are threatened – for instance if the individual were to be transferred to a prison with substandard detention conditions – the texts are largely reliant on MS willingness to actively assess potential risks to individual rights and to really take into account the opinion of the concerned person. While detention conditions and rehabilitation prospects might be improved through transfer to a familiar environment, all benefits would be lost without a case-by-case analysis of the pros and cons of executing the decision. On the contrary, a 2016 study showed that in many cases, due to numerous factors – discrepancies between national systems, faults in communication between authorities, translation issues, strict time limits for execution, etc. – such individual assessments were often insufficient.<sup>49</sup>

Several ways to improve the situation could be considered – to begin with, by taking care of the still unsatisfactory implementation of the Framework Decision. After a lengthy transposition period into national legislations, use of the Decision has started to increase, but practitioners are still far from using it to its full potential.<sup>50</sup>

Differences in structure between the emitting and receiving authorities, lack of information on the specifics of each case and on the procedural particularities of each State, translation issues, tight deadlines for the execution... such are the obstacles, not uncommon in the implementation of EU criminal law, that still have to be overcome. They raise the question of the relevance of some harmonisation measures on procedure, which would ensure that norms promoting individual rights and rehabilitation could really meet their purpose.

As regards the “negative” view of the transfer of prisoners, and the potential risks for fundamental rights, the same 2016 study pushes for more systematic application by MS of suspension grounds (as has recently been the case with the EAW). This, of course, is not without danger for mutual trust and recognition. On the other hand, if States feared actual condemnation by the ECJ, it might be an incentive to properly assess the situation in the country of execution before a transfer. Another path could be taken, by strengthening the obligation to take into account the situation in the State of execution,<sup>51</sup> or in the case of transfers by making the consent of the person a condition of execution in all cases – and ensuring it is truly an informed decision.<sup>52</sup> Such changes, however, can only take place if the numerous implementation issues are addressed.

Through a more rigorous application of fundamental rights reservations when executing an EAW or requiring transfers of prisoners, the MS could take an active part in mutual supervision of each other's prisons. To go further, the texts themselves could be modified to better take into account the issues related to degraded detention conditions. In the same spirit, other EU procedural instruments could contribute to specifically tackling one main cause of such issues – namely, overcrowding.

## 3. REFORMING CRIMINAL PROCEDURE INSTRUMENTS: A NEW WAY TO REDUCE OVERCROWDING

The European Parliament resolution of 5 October 2017 on prison systems and conditions states that “prison overcrowding is seriously detrimental to the quality of detention conditions, may contribute to radicalisation, has adverse effects on the health and wellbeing of prisoners, is an obstacle to social rehabilitation, and contributes to an unsafe, complicated and unhealthy working environment for prison staff”.<sup>53</sup> However, overpopulation in Europe persists, exacerbating the poor material conditions, enhancing the risk of violence between inmates and generating new problems such as vectoring disease.

<sup>48</sup> Ibid 46, at para 13.

<sup>49</sup> EU Agency for Fundamental Rights, *Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers*, (2016), available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-criminal-detention-and-alternatives\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-criminal-detention-and-alternatives_en.pdf), at 83.

<sup>50</sup> EuroPris, *Working Group Report – Framework Decision FD 909 Expert Group (2017)*, available at <https://www.europris.org/file/working-group-report-2017/>

<sup>51</sup> As proposed in W. Van Ballegoij, *Procedural Rights and Detention Conditions - The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions* (2017), available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS\\_STU\(2017\)611008\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf), at 9.

<sup>52</sup> Ibid 51, at 98.

<sup>53</sup> EP Resolution of 5 October 2017, OJ 2018 C 346/14, at para.F.

Obviously, the density rate varies from prison to prison within each European country, and also across the EU MS. Based on reported figures from 2018, the highest density rates on a national scale can be observed in Romania (prison density per 100 places: 120.5), France (116.3) and Italy (115).<sup>54</sup>

As mentioned in the introduction, the ECtHR considers overcrowding to be a violation of Article 3 of the ECHR. In some very recent decisions condemning France on grounds of overcrowding and lack of effective remedy, the Court reiterated that “a high crime rate, a lack of financial resources, or other structural problems were not circumstances that attenuated the State’s liability and justified a failure to take measures to improve the situation in prisons. The State had a duty to organise its prison system in such a way that prisoners’ dignity was respected.” It also urged France to adopt general measures.<sup>55</sup> Besides, in its Resolution of 5 October 2017, the European Parliament “insists that an efficient long-term management of penitentiary systems should be implemented, reducing the number of prisoners through more frequent use of non-custodial punishments – such as community service orders or electronic tagging – and minimising recourse to pre-trial detention.”<sup>56</sup> Therefore, it appears non-controversial to state that in order to improve detention conditions one must reduce overcrowding in prisons.

This is why in the next part, we will see what the EU can do in order to tackle overcrowding, both before (A) and after (B) the trial takes place.

## A. LIMITING PRE-TRIAL DETENTION: THE INESCAPABLE REFORM

### 1. DEFINITION OF PRE-TRIAL DETENTION AND IMPACT ON DETENTION CONDITIONS

The term pre-trial detention refers to the detention of a suspected person before coming to trial. Detention on remand is a particularly sensitive subject, because it affects fundamental principles such as the right to liberty, the right to humane treatment and the prohibition of torture and ill-treatment, but also the presumption of innocence. As P. H. Van Kempen noted, there is a paradox between the fundamental rights of the person presumed innocent (which entails that they should be more protected than an already convicted person) and the requirements of criminal investigation (that frequently requires limiting their rights considerably, for example the possibility to communicate with friends or family).<sup>57</sup>

A report written as the result of a research project co-funded by the EU and the Council of Europe showed that “despite various instruments with regard to pre-trial and remand custody prepared within the Council of Europe and, the

extensive case law of the European Court of Human Rights (ECtHR), human rights violations in this sphere persist in many MS. The lengthy periods of remand detention, insufficient and irrelevant reasons given for extending periods of detention, and its use as a disguised form of punishment are the most pressing issues in the practice of pre-trial detention.”<sup>58</sup> The overcrowding problem in prisons is often linked to massive (and sometimes excessive) use of pending trial detention, and it is also often more noticeable in pre-trial detention facilities.<sup>59</sup> Analysis of the most recent data pertaining to the rate of pre-trial detainees in each MS shows that there is a huge difference between MS, the lowest rate of pre-trial detainees over global prison population being below 10% in the Czech Republic and Romania and the highest being over 40% in Luxembourg.<sup>60</sup>

The human toll is colossal and the impact on individuals and their families is even higher for suspected people detained without trial and for an indefinite period. Another downside of pre-trial detention is its high economic cost for States: indeed, it was assessed that the average cost for a pre-trial detainee in Europe is close to 3000 Euros per month.<sup>61</sup>

Thus, not only the individuals but also the States would benefit from a reduction of this peculiar type of detention. This is why possible solutions to limit overcrowding should be explored. On a European level, two main measures seem possible to limit preventive detention, namely in order to guarantee the suspect’s rights and to avoid overcrowding: the implementation of alternative measures to detention on remand, and the harmonisation of pre-trial detention rules.

### 2. THE EFFECTIVE IMPLEMENTATION OF ALTERNATIVE MEASURES TO PRE-TRIAL DETENTION

According to the subsidiarity and proportionality principles, pre-trial detention can be ordered only if alternative measures are not sufficient.<sup>62</sup> Thus, effective alternative measures may help to enhance the right to freedom and to diminish the detention rate.

An alternative measure to pre-trial detention was promoted at European Union level with the Council Framework Decision of 23 October 2009 on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.<sup>63</sup>

<sup>58</sup> The EU and the Council of Europe, *Pre-trial detention assessment tool* (2017), available at <https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06>

<sup>59</sup> D. Anagnostou and D. Skleparis, *supra* note 7, at 41.

<sup>60</sup> International Center for Prison Studies, available at <https://www.prisonstudies.org/map/europe>. Numbers were given by the national authorities, and most of them were updated in 2020. Here are the rates of pre-trial detainees over global prison population in the MS, ranked from the lowest to the highest rate: Czech Republic 8.7 % Romania 9.9% Poland 11.4% Lithuania 11.8% Slovakia 14.5% Spain 16% Hungary 16.6% Portugal 18% Ireland (Republic of) 18.9% Estonia 19.7% Germany 20.4% Austria 21% Bulgaria 21.1% Finland 23.6% Slovenia 26% Greece 26.6% Sweden 27.2% Latvia 27.8% Croatia 28.3% Netherlands 28.9% France 29.8% Cyprus (Republic of) 30.4% Malta 31% Italy 31% Belgium 35.6% Denmark 38.2% Luxembourg 41%.

<sup>61</sup> J. Hartshorn, *The case for reform and action at European level: the use of pre-trial detention and its impact on individuals within the context of the ECHR* (2017), available at [http://www.era-comm.eu/detention\\_3/kiosk/audiopodcasts/seminar\\_1/03\\_Hartshorn\\_316DT67.html](http://www.era-comm.eu/detention_3/kiosk/audiopodcasts/seminar_1/03_Hartshorn_316DT67.html), at 16’58.

<sup>62</sup> Commission Green Paper of 14 June 2011, *supra* note 12, para 4.

<sup>63</sup> Council Framework Decision 2009/829/JHA, OJ 2009 L 294/20

<sup>54</sup> Council of Europe Annual Penal Statistics, *SPACE* (2018), available at [http://wp.unil.ch/space/files/2019/06/FinalReportSPACEI2018\\_190611-1.pdf](http://wp.unil.ch/space/files/2019/06/FinalReportSPACEI2018_190611-1.pdf), at 65.

<sup>55</sup> ECtHR, *J.M.B. and others v. France*, Appl. no. 9671/15, 9674/15, 9679/15, Judgment of 30 January 2020, at 316: France was asked to put an end to overcrowding and to improve the compliance with maximum occupancy standards, and also to put in place an effective preventive remedy.

<sup>56</sup> EP Resolution of 5 October 2017, *supra* note 50, at para 15.

<sup>57</sup> P.H. van Kempen, *Pre-trial Detention in National and International Law and Practice: A Comparative Synthesis and Analyses* (2012), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2181903](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181903), at 16.

This Decision creating the ESO (European Supervision Order) was to be implemented by each MS by 1 December 2012. This measure allows, under certain conditions, an alternative measure (for example the prohibition of practicing certain activities related to the alleged offence) or provisional release (for example house arrest with electronic monitoring) ordered in one MS to be executed in another MS where the suspect is normally resident.<sup>64</sup> It should be very efficient, as it reduces the risk of failure to appear at trial on the part of the non-resident suspect while enhancing the right to freely circulate within the EU. Thus, it also reduces the risk for suspected persons to be placed in detention only because of their non-resident status, and reduces the risk of discrimination. Regrettably, oversight of the ESO in 2017 was particularly unsatisfactory and the Portuguese team taking part in the Themis competition that year stressed the "practical failure" of the ESO, noting that, while some difficulties come from the fact that the types of alternative measures may differ somewhat from one MS to another, the main hurdle to its effective implementation was that most judges and prosecutors from various MS were not even aware of its existence.<sup>65</sup>

Therefore, it appears that the EU should make an effort in communication to fight the lack of awareness of European standards and tools amongst justice professionals, and increase the training

of European judges and prosecutors in this topic. Only in this way could the ESO, an already effective tool, become efficient.

### 3. HARMONISATION OF PRE-TRIAL DETENTION RULES

Currently, the individual domestic systems of various MS still differ considerably (both concerning legal frameworks and practices), even if the European Courts and Convention have worked on creating common minimum standards. The European Bar Association, calling for a new 2020 roadmap on criminal law, underlined that "effective legislative measures at the EU level are lacking in the entire area of pre-trial detention (cf. Measure F of the 2009 Roadmap) where the EU competence according Art 82 TFEU is not in doubt".<sup>66</sup>

The pre-trial detention rules could be harmonised in various respects:

- Procedural requirements for ordering pre-trial detention: it would be useful to set a common level of suspicion, to harmonise the type of offences that allow the order of preventive detention, and to limit the grounds for detention - for example prohibiting the seriousness of the offence from being an autonomous ground. It would also be very useful, as suggested by Mr Van Ballegooij, to impose appropriate reasons not only for imposing pre-trial detention but also for not resorting to alternative measures.<sup>67</sup>

<sup>64</sup> Ibid 63, Article 8. It distinguishes standards and opt-in measures.

<sup>65</sup> C. M. Lopes Serras de Carvalho, R. E. Martins Costa Machado and S. I. da Silva Maia, *The European Supervision Order, from discrimination to equality* (2017), available at <http://www.ejtn.eu/Documents/Team%20Portugal%20Semi-Final%20%20A.pdf>, at 19.

<sup>66</sup> ECBA, *A new Roadmap on minimum standards of certain procedural safeguards* (2018), available at [http://www.ecba.org/extdocserv/20180424\\_ECBA\\_Agenda2020\\_NewRoadMap.pdf](http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf), at 3.

<sup>67</sup> W. Van Ballegooij, *supra* note 51, at 42.

- Procedural settings (i.e. necessity of an oral hearing/need for concrete reasoning behind the decision/length of detention/possibility to ask for release in case of unlawful detention). In this part we will focus more specifically on the aspect that has the most impact on prison density: the length of pre-trial detention, that differs greatly from one MS to another.<sup>68</sup>

Regarding the length of pre-trial detention, the ECtHR checks this on a case-by case basis and it seems to be quite difficult to set a maximum without any exception. However, according to the case law of the ECtHR, pre-trial detention requires periodic review by a Court "at short intervals" under Article 5 § 4 ECHR,<sup>69</sup> without mention of the maximum interval. Already in 2006, a Recommendation by the Committee of Ministers to MS of the Council of Europe stated that the interval should not be longer than a month.<sup>70</sup> But as we know, these recommendations are not binding. It is interesting (and quite worrying) to note that the European Parliament explicitly called "on the Commission to come up with a legislative proposal on minimum standards in this field" in its 2011 resolution, whereas it no longer does this in its 2017 resolution.<sup>71</sup>

<sup>68</sup> P.H. van Kempen, *supra* note 57, at 24.

<sup>69</sup> ECtHR, *Assenov and others v. Bulgaria*, Appl. No 24760/94, Judgment of 25 September 1998, para 162-165.

<sup>70</sup> Committee of Ministers Recommendation of 27 September 2006, Rec(2006)13, at para. 17.2.

<sup>71</sup> EP Resolution of 15 December 2011, 2011/2897(RSP), at para.10 ; EP Resolution of 5 October 2017, *supra* note 50 at para. 13 and 15.

<sup>72</sup> This was also an option proposed by W. Van Ballegooij: "Taking further action at EU level, including enacting new EU legislation. As regards pre-trial detention, there is sufficient evidence for the added value of EU action, even if there is no political will to proceed at present", *supra* note 51, at 8 and 28.

<sup>73</sup> Council Framework Decision 2008/947/JHA, OJ 2008 L337/102

Yet, it is clear that such global harmonisation of pre-trial detention rules would limit the number of pre-trial detainees and also the length of their detention, and as a consequence would reduce overcrowding and help to improve detention conditions at the same time. It is now time that the EU took a firm step and issued a Directive on the harmonisation of pre-trial detention rules.<sup>72</sup>

### B. PROBATION MEASURES AND ALTERNATIVE SANCTIONS, A STILL UNEXPLOITED POTENTIAL

While the limitation of pre-trial detention will mostly impact overcrowding, probation measures and alternative sanctions will reduce prison population as well as considerably improve chances of social reintegration. The EU has for some time now stated its intention to promote a drastic increase in such measures, and regularly calls upon MS to actively follow this policy. The 2008 Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions<sup>73</sup> is a landmark in this area, but it is not without flaws, and this first step should be followed by many others.

## 1. PURPOSE AND WORKING PRINCIPLES OF THE FRAMEWORK DECISION

This Framework Decision comes into play when non-custodial measures are adopted, and also seeks to overcome the numerous shortcomings of the Council of Europe Convention in this field.<sup>74</sup> It lays out a framework for cross-border execution of these measures, where the MS in which the judgment was passed hands over supervision of the sentence to the State in which it will be executed.<sup>75</sup>

The main difficulty for the drafting and implementation of the Decision was and remains that, while traditional prison sentences exist in all States, probation measures and alternative sanctions vary widely across the Union – and may not exist at all. Building on the basis of measures “which are common among the MS and which all MS are in principle willing to supervise”<sup>76</sup> the Decision essentially gives an obligation to supervise a core number of measures adopted in another State.<sup>77</sup> On a voluntary basis, MS can additionally notify the Council that they will supervise other, less commonly shared types of decisions.<sup>78</sup>

The primary goal of this Decision is to facilitate “the social rehabilitation of sentenced persons” (followed by the protection of the public and the improved implementation of probation measures and alternative sanctions – art.1). Within its limited scope of action – cross-border execution of sentences – the Council takes part in a more global effort to promote non-custodial sentences, especially in cases where, the convicted person being a non-national, courts may fear that anything less constraining than a prison sentence would be inefficient or remain unexecuted.

Just as in the case of prisoner transfer, the measures may be executed in the country of origin or of residence, as well as in any State consenting to forward the judgment “with a view to social rehabilitation”.<sup>79</sup> The person's consent, however, is always required under this Framework Decision; by ascertaining their consent, the Decision seeks to guarantee that they will properly follow their obligations rather than disappear in the supervising State.

If they are to fulfil their stated purpose properly – that is to say, not resort to detention and ensure better social reintegration – the EU should take proactive steps, and even consider going further than mutual recognition.

## 2. PERSISTENT IMPLEMENTATION ISSUES

After slow integration into national law, the Framework Decision on probation measures and alternative sanctions has not yet found its public, and remains largely underused to this day – although it is most interesting for detention conditions.<sup>80</sup> Many causes can be identified, many of which point either to a lack of information and political will, or to persistent differences in national systems.

The proposed solutions remain the same; the Council, in its 2019 recommendations, was still encouraging States to take into account practical implementation issues met by their national authorities. States are called upon to pay attention to the training of professionals – both from public and private spheres, to ensure that sufficient information is available to them. A number of European initiatives, many of which are funded by the Union, are trying to promote the use of the decisions and to make their practice easier – among which EuroPris, the Confederation of European Probation, the Criminal Justice Platform Europe, etc. Databases have been created to allow national authorities to compare equivalences between their national provisions – incidentally providing an overview of the complexity of transposition.<sup>81</sup>

Since the conditions to use even traditional measures (conditional release, suspended sentences, etc) vary widely (depending on the nature of offences, the maximum applicable penalties, or the individual's situation), applying mutual recognition to less well-spread measures can quickly become a procedural nightmare.

The issue remains that the EU depends on its MS' willingness to effectively apply its decisions, taking into consideration the implications for prison overcrowding and social rehabilitation. As the Union constantly pushes for the increased use of non-custodial sanctions, more radical solutions should perhaps become relevant.

## 3. BEYOND MUTUAL RECOGNITION, TOWARDS HARMONISATION

Several more or less ambitious approaches could be considered; they all require strong political support from the institutions, as they definitely clash with the States' general wish to retain control over the determination of procedure and sentences. However, since the treaties have opened up the possibility for harmonisation, or even approximation measures when deemed necessary (e.g. when the desired outcome could not be reached through action on national level), these options must at least be taken into account. They include:

<sup>74</sup> Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 30 November 1964 – ratified by 12 States only by 2008, with numerous reservations

<sup>75</sup> Council Framework Decision, *supra* note 73, Article 1.

<sup>76</sup> *Ibid* 73, at para 9.

<sup>77</sup> *Ibid* 73, Article 4§1 listing all common measures: obligations to report to the authorities, obligations to avoid contact, community service, financial compensation, obligation of therapeutic treatment...

<sup>78</sup> *Ibid* 73, Article 4§2.

<sup>79</sup> *Ibid* 73, at para 14. In particular in any State where the person may have an employment contract, family members, or follow a study or training programme.

<sup>80</sup> Council conclusions of 16 December 2019, OJ 2019 C 422/06, at para 20.

<sup>81</sup> See for example, the EU Probation Project website, available at <https://www.euprobationproject.eu/>



- making a larger number of probation measures and alternative sanctions available in all MS, additionally providing common definitions and execution procedures for each of them

- making recourse to alternative sanctions mandatory in some cases, depending either on the nature of the offence or on the length of the maximum applicable penalty

- or, in the same fashion, making the use of alternative sanctions mandatory in some cases, foregoing any custodial measure.

Furthermore, in the case of this Framework Decision, as in other procedural instruments, harmonisation would ensure a more equal and effective implementation of fundamental rights guarantees. It would spare individuals the necessity of a lengthy judicial process and provide for global, immediately applicable rules rather than piecemeal progression depending on case-by-case convictions. Reducing the possibility for States to have recourse to custodial sentences could have the effect of finally making detention the measure of very last resort that the EU and the Council of Europe have been wishing for decades.<sup>82</sup>

Such changes would pose a double challenge to the EU and MS. It would mean a radical departure from the current approach of European criminal law, moving from a system mostly based on mutual recognition and resorting to harmonisation as a last resort, to an increased role of the EU in criminal law, beyond cross-border cases.

## 4. CONCLUSION

For two decades now, the EU has started to play an active part in policies and norm-making governing prison-related issues. At first motivated by safety concerns, this evolution seems to have found new justification in the issue of fundamental rights and prison conditions. However, as illustrated by the practice of the different instruments presented above, the Union is still acting on the sidelines, held back by proportionality, subsidiarity and perhaps other concerns.

And yet, despite numerous condemnations by the ECtHR, and now the ECJ, most MS have still insufficiently adapted their national policies to put a stop to sometimes outright appalling prison situations. The EU can – and should – go much further than the ECtHR. Mutual recognition should not be a blank cheque allowing MS to do away with proper assessments of potential risks for fundamental rights in individual situations.

It is a tool that must be used with hindsight, and replaced by other, more adapted ones (such as harmonisation or approximation) when it repeatedly fails to meet its purpose.

As we have seen, in this rather stagnating field, the Union has unprecedented technical means to promote substantial changes on national level, but theoretical possibilities do not equal practical changes. A double shift in attitude will be required from the EU and the MS: in the perception of the EU's role in matters as domestic as prison management, and in the perception of the role of prisons themselves.<sup>83</sup> Deprivation of liberty should be the only punishment following a prison sentence – not the obligation to live in substandard conditions and the extreme difficulty to reintegrate society afterwards. Not only NGOs, but also practitioners would welcome a change of paradigm, where costly and in many cases meaningless prison sentences become a marginal option in sentencing.<sup>84</sup>

This might need a lot of convincing, as the Union's policies are still in large part determined by the MS' general orientations, but the game is (literally) worth the money. The change has already been initiated in some States; the EU could now accelerate it in all of them.

<sup>82</sup> And are still calling for it, see for example, EP resolution of 5 October 2017, *supra* note 53, at M; Council conclusions of 16 December 2019, *supra* note 80, at para 4.

<sup>83</sup> European Prison Observatory, *Manifesto for a new penal culture* (2016), available at <http://www.prisonobservatory.org/upload/Manifesto%20English%20variation%202.pdf>

<sup>84</sup> S. Snacken, *Prisons en Europe - pour une pénologie critique et humaniste* (2011), at 228.

SEMI-FINAL B

# EU AND EUROPEAN FAMILY LAW

## PARTICIPATING TEAMS

CROATIA , FRANCE, HUNGARY, ITALY, PORTUGAL, ROMANIA

1<sup>st</sup> place: Team Portugal

2<sup>nd</sup> place: Team France

3<sup>rd</sup> place: Team Hungary

Selected papers for TAJ:

Team Hungary

Team Portugal

Team Romania



30 JUNE - 1 JULY 2020, ONLINE

# JURY MEMBERS

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## MAARJA TORGA (EE)

JUDICIAL ADVISOR AT THE ESTONIAN SUPREME COURT,  
PROFESSOR AT UNIVERSITY OF TARTU, FACULTY OF LAW

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Being a Jury member in the Themis Annual Moot competition is an absolute joy for every practicing lawyer. The enthusiasm that the teams from all over Europe bring with them when presenting their legal problems is contagious and the whole competition is organized in a way which offers everyone, be it a Jury member or a participant, the experience that is not easily forgotten.

What I personally found the most impressive when listening to the teams from various countries was the exchange of novel ideas that took place between the different teams. Although the Moot is, due to the pandemic, temporarily being held in an electronic format the dialogue that the teams were having enabled the participants to critically think of and exchange the novel ideas that they had raised in their papers. In here lies perhaps the biggest benefit of this competition – it allows everybody involved to look at the often too familiar legal rules with new eyes and critically question what they know or think they know based on what they have learned during the years of their formal education. I cannot stress enough how impressed I was by the novel viewpoints that the teams presented in their papers. It takes creativity and a lot of research to find a unique and novel way of looking at the existing legal rules and the teams definitely delivered in making the jury members enjoy reading about the area of law where they had been practicing for years.

Themis competition is a wonderful opportunity for any future judge to test his or her analytical skills and to practice something that a judge is often required to do – think quickly and tackle legal problems on her feet while everybody's eyes are on her. Themis competition definitely offers that opportunity for the participants and although the Moot did not bring the participants physically together this year due to the pandemic, the electronic form is just as good if not even better for the competitive part of the Moot. I was very impressed by the professionalism and creativity that the teams put into their oral presentations and discussions and I am sure that everybody involved in the Moot during these difficult times will look back to this competition as challenging but a very enjoyable and useful experience.

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## ALEŠ GALIČ (SI)

PROFESSOR OF INTERNATIONAL PRIVATE LAW,  
UNIVERSITY OF LJUBLJANA

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I have been delighted to accept the EJTN's call to act as a juror in this year's Themis European Family Law semi-finals. Surely, it is regrettable that it was not possible to meet my fellow jurors, the members of the teams along with their tutors and EJTN's Arno in person, in beautiful Budapest, Hungary. The pan-European lockdown caused by the Covid-19 pandemics took its toll. Nevertheless, this downside and challenge also proved to be an opportunity. First, the EJTN as well as participating teams must be lauded to have organised and participated in the event in this difficult time. In this manner, they have all shown that the Judicial training and the judicial cooperation in the EU and the will to keep it going cannot easily be shaken. Second, the new format of the Competition, which included a video presentation enabled the teams to demonstrate their digital skills and to avail themselves to the use of numerous opportunities offered by modern technologies.

I have participated in numerous moot courts and similar competitions, in different capacities: as a law student, as a tutor and as a juror. Comparing all these events, I can, without a shred of exaggeration, say that – for a juror at least – the THEMIS format is by far the most interesting and rewarding. The reason is this: In other competitions all teams deal with the same topic and the same legal problems, based on the same underlying facts, and thus, from the viewpoint of a juror, after reading all the papers there is quite some amount of repetition. In THEMIS format however, each team does a research on a topic of its own choice. This guarantees, already in and of itself that a juror will have a great opportunity to learn a lot and to broaden significantly his or her horizons. The diversity and the originality of chosen topics demonstrates the tremendous amount of scholarly knowledge, accumulated in the teams' papers and presentations. This year, for example, the teams participating in the THEMIS EU Family law semi-final covered the following areas of law: (1) the cross-border child abduction (with special focus on challenges faced by European judges in return proceedings); (2) surrogacy from the child's legal perspective, (3) recognition of the family status of children under the institution of kafala (two papers, though dealing with different angles of this legal institution), (4) the freedom of movement of persons and circulation of status familiae within the European Union and (5) reception, identification and age assessment procedures of unaccompanied migrant children in first reception centres.

I had a pleasure to be assigned as a reviewer of the latter (for the publication in this Volume), a most inspiring paper written and presented by the Portuguese team. It is well written, credible and an easy to read paper, based on a thorough scholarly research, dealing with an original topic.

The topic is - though not perhaps on the face of it – very relevant and, unfortunately, its practical significance is growing. The team deals with different aspects of age-determination procedure as one of the first steps after the (allegedly) minor refugee/immigrant's arrival to the destination country, with empathy and focused on the protection of human rights and dignity. I hardly had any comments for improvement. Understandably, in different situations, e.g. for a purpose of complying with rules of international sports federations, the issues of age-determination (just like gender determination) might be far more complex and different opposing underlying values might come into play. But here, the paper was restricted to the procedures in »first reception centres«.

While the diversity of the topics covered by the teams is what makes the THEMIS most interesting for a juror, it is also its biggest disadvantage when it comes to the unavoidable task to do the final ranking. It is much easier objectively to compare – and rank – papers and presentations which all examine the same case. It is however extremely difficult to compare and rank excellent papers, dealing with different topics – of which some are novel, some are »evergreen« (but thus probably also highly important in practice), some written in an area of law where there is already a huge body of case law and scholarly research, and some where the team is almost pioneering a research, some are dealing with the topics which fall within the main academic/professional interest and expertise of a juror and some with topics, which are novel for the jurors as well ... It is unavoidable that there might be some disappointment among some teams after the results are proclaimed. Yet I can assure that the jurors do this final part of our work with much diligence, in good faith and striving for fair results. In my perspective anyway, all participating teams along with their tutors are the winners in the THEMIS competition. They should all be proud of their outstanding and inspiring performance and the displayed intellectual fervour and in-depth knowledge of EU law, international law and (comparative) national laws during the competition and the weeks or months of research, writing and preparing a video-presentation leading up to it.

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## BORIANA MUSSEVA (BG)

HEAD OF DEPARTMENT AT SOFIA UNIVERSITY, ATTORNEY  
AND LECTURER AT NATIONAL INSTITUTE FOR JUSTICE

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Being part of the jury of the eThemis competition 2020 EU and European Family Law has been an extremely valuable life and professional experience. I really feel privileged participating at this EJTN event.

At the time of Covid-19 filled with fear, uncertainty and serious social upheavals we were gathered by the pursuit for knowledge and excellence. The online format was a decisive evidence that with an important aim, there are thousands ways to go home again (as per Rumi, cited as a motto in the paper of the Romanian team). The e-way proved to be challenging, but possible.

We did not witness the heartbeat of the teams before their presentations, but we saw the beauty of the acting, the script, the music, the light, and even of the drawings in the videos. We were not together in Budapest as scheduled, but we were together in the home of each of us. We did not manage to socialize, but we succeeded to focus on the hard work and most importantly on the love and passion of what the teams were doing.

All young professionals who reached the semifinals are winners. They did not get lost in the labyrinth of EU law, CJEU and ECtHR case-law and the complicated interplay with the domestic substantive and procedural law. The suggested exits were clearly indicated and justified in an argumentative and convincing manner.

We established and enjoyed the common way of European thinking and reasoning of all participants proving that all these young national judges are competent and reliable European judges. The dream of Europe being an area of freedom, security and justice with smooth judicial cooperation in civil matters having cross-border implications seems to have come true at least during the eThemis competition 2020 EU and European Family Law.

The Jury members decided to support the publication of the paper of the Romanian team "I Can't Go Home, Could You Bring Home Back To Me?" Family Reunification - A Kafala Experience" due to the original question, which touched upon various different fields of law, including predominantly immigration and private international law. The paper uses both theoretical and practical approach emphasizing on the child's vulnerability and on the absurdity of the many unanswered questions influencing her or his best interests. The conclusions are under the motto that the sun could start to peek more through the cloud providing the analyzed topic with the charming sent of hope. Maybe the positive attitude is always the right way to go and to stay at our home – EU!

MARIANNA JANKA DARABÁN  
MARTIN KISGYÖRGY  
DANIELA KAROLA AMON



Team HUNGARY

# SWEET SURROGATE CHILD O' MINE

## SURROGACY FROM THE CHILD'S LEGAL PERSPECTIVE

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This paper offers an analysis of fundamental rights issues arising from the surrogate born child's perspective in particular. With surrogacy, the parent-child relationship is replaced by the parent-child-legal parent triangular relationship. This study does not intend to discuss the relationship between children and their legal parents, that is parental custody, and shall not go into the criminal aspects or contractual issues between parents either. Our hypothesis is that some of the fundamental rights assumed by children need to be given new meaning. Our aim is to discuss the best interest of the child and their subjective rights in relation to surrogacy and the approach of the European Court of Justice and the European Court of Human Rights. Among the rights of a surrogate-born child we aim to examine the child's right to foetal life, furthermore, the issue of the child's right to identity, the right to know their origin, as well as the extent of the right of private and family life.

### KEY WORDS

Family law  
Multi-parenthood  
Surrogacy  
Children's rights  
Legal parentage  
Identity

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# 1. INTRODUCTION

What do Cristiano Ronaldo<sup>1</sup> and Abraham,<sup>2</sup> the biblical patriarch, have in common? We do not know much about that, but one thing is for sure: they both turned to a surrogate mother to have a child. It seems that surrogacy is not an invention of recent times, in fact, it might be as old as mankind itself. From occurrences in the Bible and Hammurabi's Code, to 18<sup>th</sup> century research in artificial insemination, surrogacy has been around for thousands of years.<sup>3</sup> For several centuries it has been 'a process where a woman agrees to carry a child on behalf of another person or couple.'<sup>4</sup> Irrespective of the fact whether this process is prohibited, tolerated or supported by national legislation, surrogate-born children's fundamental rights need to be safeguarded.

## 1.A. ABOUT THE DEFINITION OF SURROGACY AND ITS LEGAL CHARACTERIZATION

Medically speaking, two types of surrogacies, gestational and traditional, can be distinguished. In the former scenario, the surrogate mother is not genetically related to the child, since she is inseminated with *a*) an embryo created with in-vitro fertilization (IVF) using the egg and sperm of the commissioning parent. Here, the child is genetically

related to both commissioning parents; *b*) an embryo created with IVF using either a donor egg or donor sperm, as a result of which the child will be genetically related to one of the commissioning parents, or *c*) a donor embryo, where none of the commissioning parents will be genetically related to the child. On the other hand, in traditional surrogacy there is a genetic link between the child and the surrogate mother. In this process, the surrogate mother is inseminated with either the commissioning father's sperm, or donor sperm. In the former case, a genetic link between the commissioning father and the child will be established, in the latter there is no genetic link to any of the commissioning parents whatsoever.<sup>5</sup>

States' approaches to surrogacy vary greatly. Some states expressly prohibit all kinds of surrogacy arrangements,<sup>6</sup> while others expressly permit certain forms of surrogacy, and regulate it by law. There are states which may not have a specific regulation in place but have no legal prohibition either, nevertheless, surrogacy arrangements are void and unenforceable. Lastly, some states show a permissive approach not only to altruistic, but also to commercial surrogacy, and there are procedures available that grant legal parentage to one or both commissioning parents.<sup>7</sup>

Clearly, these new constellations of an age-old phenomenon give rise to a flood of legal and ethical questions. One such question is the construction of the identity of a child born out of surrogacy.

## 1.B. FROM HUMAN DIGNITY TO THE RIGHT TO IDENTITY IN GENERAL

When discussing the issue of surrogacy, one needs to address two rights in particular: the child's right to life,<sup>8</sup> and their right to human dignity – including rights forming the basis of the latter. These two rights have two fundamental features in common: these are both absolute and non-negotiable. To fully explore all these issues in detail would far exceed the limits of this paper, however, a brief outline is necessary. In legal literature, there seems to be a consensus over the scope of the right to human dignity, which encompasses integrity, moral and ethical identity, equal rights, and the right to minimum living conditions. This paper argues that the issue of surrogacy has the largest number of questions requiring legal interpretation in the prenatal stage of the child, most specifically evolving around the foetus' right to life, while following the birth of the child, it is the right to human dignity that needs detailed scrutiny.

Except for the right to life, the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) determined the essence of the above rights based on human dignity. The dignity of the person is not only a fundamental right in itself, but it also establishes the real basis of other fundamental rights. Although there is no unambiguous definition of right to dignity, which leaves the concept of dignity open to interpretation, the ECJ has confirmed that a fundamental right to human dignity is part of community law.<sup>9</sup> However, the right to dignity also includes how people feel and how they think of themselves, how their personality develops. In essence, all of these other rights contribute to a child's self-worth, these rights constitute the principle of the right to dignity.<sup>10</sup>

The *right to identity* is an independent and fundamental human right. It can also be deduced from the right to human dignity. It is a very important part of a child's healthy and adequate development. The ECtHR derives the origin of this right from Article 8 of the European Convention on Human Rights (ECHR). In a variety of cases the ECtHR concluded that a person's right to private life was infringed because their right to identity was violated.<sup>11</sup>

<sup>1</sup> Roberts, S.: 2020. *Here's Everything You Need to Know About Surrogate Parenting*. (online) The Sun. Available at: <https://www.thesun.co.uk/fabulous/3409134/surrogacy-cristiano-ronaldo-ivf-baby-celebrities/>.

<sup>2</sup> Genesis 16. Holy Bible: King James Version.

<sup>3</sup> *Surrogacy in Russia and Abroad*. 2020. History (online) Available at: [https://surrogacy.ru/en/surrogacy/surrogacy\\_history/](https://surrogacy.ru/en/surrogacy/surrogacy_history/).

<sup>4</sup> Bracken, 'Assessing the best interests of the child in cases of cross-border surrogacy: inconsistency in the Strasbourg approach?' *Journal of Social Welfare and Family Law* (2017.), 39(3), at 369.

<sup>5</sup> Pascoe, 'Sleepwalking through the minefield: Legal and ethical issues in surrogacy' 30 *Singapore Academy of Law Journal*, (2018) 455, at 456-457.

<sup>6</sup> For example, in Hungary, Section 167 of Act CLIV. of 1997 only allows any and all procedure targeted at human reproduction on married couples or partners of different sex.

<sup>7</sup> *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*. HCCH. Available at: <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>

<sup>8</sup> This right is enshrined in article 2 of the Charter of Fundamental Rights of the European Union.

<sup>9</sup> Judgment of 9 October 2001, *Netherlands v Parliament and Council*, C-377/98, EU:C:2001:523

<sup>10</sup> McGuirk, Madison, Mills, Brianna, *Climate Change and the Dignity Rights of the Child*, at 3. Available at: [https://www.ohchr.org/Documents/Issues/ClimateChange/RightsChild/Dignity\\_Rights\\_Proj-ect.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/RightsChild/Dignity_Rights_Proj-ect.pdf).

<sup>11</sup> Al Tamimi, 'Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law', 27(3) *Social and Legal Studies* (2018) 283, at 288-289.

Thus, according to the Court, rights such as the right to nationality and the right to know one's origins – to name but two of the rights discussed in this paper – are parts of a person's identity. Also in conjunction with Article 8 of the ECHR gender identity was deemed 'one of the most intimate areas of a person's private life.'<sup>12</sup> Furthermore, in the case of *Putistin v. Ukraine* the ECtHR accepted that the reputation of an ancestor could in some circumstances affect a person's private life and identity, and is thus related to Article 8.<sup>13</sup> Analysing the notion of identity, in *Odièvre v. France*, the ECtHR pointed out that Article 8 guarantees the right to obtain information necessary to discover the 'truth' concerning important aspects of one's personal identity.<sup>14</sup> It can be established from these cases that discovering information about one's origin is a part of one's identity, thereby establishing a person's basic identity is an integral part not only of their private life, but also of their family life, with whom they hope to establish emotional ties. However, in almost every case, the ECtHR emphasized that identity may be restricted to a necessary and proportionate extent.

Besides the ECHR, Article 8 of the United Nations Convention on the Rights of the Child (UNCRC) also confirms the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.<sup>15</sup>

It is important to understand that human rights, far from being an abstract concept, have a real and tangible impact on the lives of everyone. From birth, each individual has the right to have an identity. The right to identity is associated with several other rights, such as the rights to a name, nationality, personality, family, and culture, but does not precisely equal any one of these rights. It is not disputed that the question of origin is an important element of identity, thus it is a specific component of the right to identity.<sup>16</sup> It can be clearly deduced that the right to origin can also be deduced from the right to human dignity, which is closely linked to the right to life. This lack of information and access affects the child's ability to develop a full sense of identity. This understandable desire to know one's origins has been balanced by the courts and State statutes with the right of parents giving their children up for adoption and maintaining anonymity if they wish.<sup>17</sup>

<sup>12</sup> ECtHR, *Van Kück v. Germany*, Appl. no. 35968/97, Judgement of 12 June 2003, at para. 56; see also ECtHR, *YY. v. Turkey*, Appl. no. 14793/08, Judgement of 10 March 2015, at para. 66.

<sup>13</sup> ECtHR, *Putistin v. Ukraine*, Appl. no. 16882/03, Judgement of 21 November 2013, at para. 33, 36–41.

<sup>14</sup> ECtHR, *Odièvre v. France*, Appl. no. 42326/98, Judgement of 13 February 2003, at para. 29.

<sup>15</sup> Article 8, United Nations Convention on the Rights of the Child. Available at: <https://tinyurl.hu/mHvE/>

<sup>16</sup> Besson, 'Enforcing the Child's Right to Know his Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights', 21(2) *International Journal of Law Policy and the Family*. (2007), at 137–141.

<sup>17</sup> Amorós, 'Donor anonymity, or the right to know one's origins?' 5 *Catalan Social Sciences Review* (2015)

There are many other fundamental rights that may conflict with the right to know one's origin,<sup>18</sup> but once a person is born, the issue of identity always takes precedence. Further components of identity are the right to private life and the right to family life.

According to the ECtHR, physical, psychological or moral integrity, privacy, identity and autonomy fall under the notion of private life.<sup>19</sup> The right to family life entails 'the right to live together so that family relationships may develop normally ... and members of the family may enjoy each other's company...'<sup>20</sup> However, it does not mean the right to found a family or the right to adopt, but assumes the existence of a family, or at least de facto family ties.

## 2. DO RIGHTS EXIST PRIOR TO BIRTH? EMBRYONIC AND FOETAL RIGHTS WITH RESPECT TO SURROGACY

As it has been previously laid down, the right to life and the right to dignity (including the right to identity) are closely linked. One obvious relationship between the two terms is their inherent feature of being absolute and non-negotiable, another being the subject safeguarded via these rights: the human

being. The final link between the two rights is that one precedes the other, as we cannot talk about identity, without life. The state's obligation to enforce the right to life has been laid down in Article 2 of the ECHR, but it is a question of interpretation whether this serves as a basis for the prenatal child to have a right to life, or not. Another question that needs to be addressed is whether we can even talk about identity, when it comes to the foetus. The following chapter will focus on these dilemmas and will attempt to find some answers to the questions posed above.

### 2.A. RIGHT TO LIFE OF THE UNBORN CHILD

The ECtHR has delivered judgements with reference to both stages of development of the unborn child: *Evans v. the United Kingdom*<sup>21</sup> concerned the embryo, while *Vo v. France*<sup>22</sup> concerned the foetus.<sup>23</sup>

The applicant in *Vo v. France* was an expectant French citizen, whose pregnancy was terminated due to an injury suffered during a medical examination. The doctor, who faced prosecution of unintentional homicide, was acquitted by the Court of Cassation, on the grounds that French law did not recognize the foetus as a person; thus, it could not be a victim of a homicide.

In its judgement delivered on 8 July 2004, the ECtHR decided that there was no clear definition on when the right to

<sup>18</sup> See for example right to anonymity and privacy.

<sup>19</sup> Guide on Article 8 of the European Convention on Human Rights, p. 20–53. Available at: [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf)

<sup>20</sup> *Ibid.* at 54.

<sup>21</sup> ECtHR, *Evans v. the United Kingdom*, Appl. no. 6339/05, Judgement of 10 April 2007.

<sup>22</sup> ECtHR, *Vo v. France*, Appl. no. 53924/00, Judgement of 8 July 2004.

<sup>23</sup> For the sake of differentiation, we use the term 'embryo', when referring to it in vitro, and use the term 'foetus' when referring to it in vivo.

life begins, and it is up to each Member State to make this definition within a margin of appreciation.<sup>24</sup> It also stated that 'it follows from this recapitulation of the case law that ... the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests.<sup>25</sup> Thus the Court concluded that there was no violation of the Convention in the case.

In *Evans v. the United Kingdom*, the applicant was a woman, who wanted to have a child with her partner by means of IVF, however, their relationship broke down before the created embryos were implanted in her uterus. Her partner withdrew his consent to the use of the embryos, and the clinic was obligated by law to destroy them. The applicant argued before the ECtHR that said law violated Article 2 of the Convention.

In its judgement delivered on 10 April 2007, the Court upheld the principles laid down in *Vo v. France*, reaffirming the States' authority in defining whether Article 2 of the Convention extends to embryos or not.

Although the Court in the above-mentioned cases did not recognize that Article 2 extends to the child before birth, it did not dismiss the interpretation, that it does extend either, effectively circumventing the question.<sup>26</sup> We may ask the question what the real objective of the Court might be. If the Court were

to rule that Article 2 does or does not extend to the unborn child, it would not change the current practice as most national regulations already protect the foetus on various grounds including ethical, religious, and cultural ones. The most logical answer to the indecisiveness of the ECtHR is that it wants to retain the competence to determine the exact scope of the right to life provided by Article 2 for any new challenges which may arise in the future. This theory is further supported by the notion that in its case-law, the Court considers the Convention a 'living-instrument which must be interpreted in the light of present-day conditions.'<sup>27</sup> Although the Court still has not given a response to the Convention's applicability to the prenatal child, the voices urging a definite standpoint on the matter are growing stronger.

In *Parrillo v. Italy*,<sup>28</sup> the applicant wanted to donate embryos created through IVF to scientific research. Her request was refused, as such research was banned under Italian law. The applicant thus turned to the ECtHR, claiming that the relevant law is incompatible with the Convention. The Court, reinforced its case law, effectively repeating its judgement of *Vo v. France*, deciding that the use of embryos for specific purposes is a 'delicate moral and ethical question' on which there is no wide consensus, and thus Member States should be afforded a wide margin of appreciation.<sup>29</sup> It runs contrary to the majority opinion, that 11 out of the 17 Judges had given their

own reasoning in the forms of either concurring or dissenting opinions, some of them expressly urging the Court to finally take a firm stance in the question, and asking whether the Convention's fuzzy wording (namely, the wording of 'everyone' in Article 2, and the wording of 'others' in Article 8) extends the unborn child or not.<sup>30</sup>

In spite of the reluctance of the ECtHR to expressly recognize any right of the unborn child, we can make one tentative conclusion: in the interpretation of the Court, the right to life of the unborn child is always at odds with the mother's rights and interest (especially her right to private life guaranteed by Article 8).<sup>31</sup> Furthermore it can be argued that the pregnant woman's rights and interest are the most significant,<sup>32</sup> at least during pregnancy. This is also reflected in the case-law of the Court in cases of abortion: the father's interests and rights are not taken into consideration to the same extent as those of the mother, as she is the one who is most closely involved in the pregnancy.<sup>33</sup> As a matter of fact, in practice the mother's interests are clearly promoted over even the right of the child, reflected by the permissive abortion laws in North-America, the majority of Europe, and parts of Asia, as in numerous countries abortion is legal on request (with domestic restrictions of course).<sup>34</sup> Based on the above we can

conclude that pregnant women's rights are the most prevalent in cases disputing the fate of the unborn child.

## 2.B. THE UNBORN CHILD'S RIGHT TO LIFE IN CASE OF SURROGACY

In the followings, the above conclusion will be applied to answer the underlying question of this chapter: what rights does the prenatal child conceived in surrogacy have? When the child conceived in surrogacy is not yet born, the key legal issue is abortion. Surrogacy contracts tend to include an 'abortion clause' which tries to cover every possible scenario that may occur during the pregnancy such as foetal abnormalities, or multiple pregnancies. These clauses often give the right of choice to the intended parents.<sup>35</sup> However, from the perspective of fundamental rights, the intended parents have the same status as the father in the case of a regular pregnancy, and as highlighted above, the interest of the father in case of abortion are insignificant. Therefore, if we apply the principle established above – that during pregnancy the pregnant woman's rights take precedence over any other interests –, we can conclude, that such agreements violate the surrogate mother's rights. This contractual and fundamental rights issue can give rise to legal disputes between the intended parents and the surrogate. But in this

<sup>24</sup> *Ibid.* at para 82.

<sup>25</sup> *Ibid.* at para 80.

<sup>26</sup> Plomer, 'A Foetal Right to Life? The Case of *Vo v. France*', 5 *Human Rights Law Review* (2005) 311, at 331.

<sup>27</sup> *Supra* note at para 82.

<sup>28</sup> ECtHR, *Parrillo v. Italy*, Appl. no. 46470/11, Judgement of 27 August 2015.

<sup>29</sup> *Ibid.* para 175-176

<sup>30</sup> Giles and Lee, 'Parrillo v Italy: Is There Life in the European Court of Human Rights?', 5 *Oxford Journal of Law and Religion* (2016) 162, at 164-166.

<sup>31</sup> Plomer, *supra* note 27 at 332.

<sup>32</sup> *Ibid.* at 335.

<sup>33</sup> Supported by the European Commission of Human Rights *Paton v. the United Kingdom*, Appl. no. 8416/78., or *H v. Norway*, Appl. no. 17004/90., which although were not adjudicated by the ECtHR, the Court still frequently references them; and ECtHR, *Boso v. Italy*, Appl. no. 50490/99.

<sup>34</sup> *World Abortion Policies 2013*. - United Nations Department of Economic and Social Affairs, Population Division – Available at: <https://tinyurl.hu/n15u/>

<sup>35</sup> Forman, 'Abortion Clauses in Surrogacy Contracts: Insights from a Case Study', 49 *Family Law Quarterly* (2015) 29, at 33-34.

uncertainty and ensuing legal warfare, the best interest of the child<sup>36</sup> – which should be always considered first and foremost as noted in Article 3 of the UNCRC – is lost along the way as, in essence, whether the child will be born or not, is up to the whims of people depending on personal interests.<sup>37</sup>

The solution would be a transparent and unified practice and legal environment of surrogacy contracts across countries, as surrogacy agreements tend to involve more jurisdictions.<sup>38</sup> Of course, this is easier said than done, as the different cultural viewpoints are the reason that some states permit surrogacy and abortion, and some do not, and reaching common ground in these issue, which would be the first step towards a unified regulation seems impossible to reach. It is not impossible, however.

An unexpected step in that direction came from the ECJ in the case of *Brüstle v Greenpeace*.<sup>39</sup> In the case concerning the patentability of research on stem cells acquired from human embryos – which, as of today necessitates the destruction of the embryo itself – the ECJ implied that the destruction of embryos is contrary to the European concept of morality,<sup>40</sup> and thus the judicial body of the Union did

something that the ECtHR seems to have so far avoided: it adopted a community opinion in a moral question.

#### **Genetic Identity**

Moving from the issue of the right to life to the right to identity, the main question concerning identity at the prenatal state of the child is whether there is a right referred to as genetic identity. The term is not yet defined, and can mean various things, such as parentage (or ancestry), ethnicity, individuality etc.<sup>41</sup> This paper will focus on one specific meaning, the *freedom from genetic intervention*.

Currently the main international instrument of genetic research is the Oviedo Convention on Human Rights and Biomedicine.<sup>42</sup> Article 13 of the Convention states that intervention into the human genome ‘may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants’. Article 18, which concerns research on embryos in vitro, states that ‘Where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo.’ From the above it is obvious that the Convention attempts to minimize the permissibility of genetic research on

embryos. Nowadays, however, science is pushing<sup>43</sup> the boundaries<sup>44</sup> as there have been attempts in some countries to ‘genetically modify’ embryos.<sup>45</sup>

Although advances in the field of genetic research, up to this point, have been met with harsh criticism, the promise of improving the human race (i.e. gaining longer life span, or resistance to deadly diseases) is mighty tempting.<sup>46</sup> We should remember, however, that such research might be interfering with the life of the ‘created’ child, as their personality will be most likely affected by the traits genetically engineered.<sup>47</sup>

As IVF treatment is a necessary part of surrogacy, it is very likely that children born via this method will be among the first ones to be affected by such ethically questionable scientific advances. Therefore, the question may arise: is the protection of these children properly provided for by domestic regulations;<sup>48</sup> or perhaps, could this controversial issue be settled by the reconsideration of the laconic Oviedo Convention?

### **3. THE RIGHT TO IDENTITY AND THE PROBLEM OF LEGAL PARENTAGE. THE CHILD’S RIGHT TO PRIVATE AND FAMILY LIFE**

The difficulty of analysing surrogacy and fundamental rights lies in the fact that the child’s rights must not only be examined in terms of the parent-child relationship, but also in terms of the aforementioned parent-child-legal parent triangle. In the following, we look at the questions regarding the right to identity that arise from the relationship between the child and the legal parents.

International surrogacy raises various legal issues after birth, many of which concern the relationship between the child and the commissioning parents, such as the question of legal parentage and the registration of the child in the receiving state,<sup>49</sup> respectively.

<sup>36</sup> As explained in the preamble of the UNCRC, the best interest of the child is the cardinal principle by which every other right or obligation concerning children should be interpreted.

<sup>37</sup> *Ibid.* at 29-30. - For example, in the Crystal Kelley case, where the surrogate mother refused to abort a foetus with multiple birth defects

<sup>38</sup> Navratyil, ‘Bérmányaság határok nélkül – Különös tekintettel az Emberi Jogok Európai Bíróságának döntéseire’ (in English: *Surrogacy without borders – With emphasis on the decisions of the European Court of Human Rights*), 13(3) *Iustum Aequum Salutare* (2017) 101, at 102.

<sup>39</sup> Judgement of 18 October 2011, *Brüstle*, C-34/10, EU:C:2011:669

<sup>40</sup> Staunton, ‘Commentary: *Brüstle v Greenpeace*, embryonic stem cell research and the European Court of Justice’s new found morality’, 21 *Medical Law Review Spring* (2013) 310, at 314.

<sup>41</sup> Goekoop et al., ‘Systematic scoping review of the concept of ‘genetic identity’ and its relevance for germline modification’, 15(1) *PLoS ONE*, at 7. doi: [10.1371/journal.pone.0228263](https://doi.org/10.1371/journal.pone.0228263)

<sup>42</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biomedicine and Biotechnology: Convention on Human Rights and Biomedicine – Oviedo, 4 April 1997.

<sup>43</sup> Cyranoski and Readon, *Chinese scientists genetically modify human embryos*. Available at: <https://tinyurl.com/ya4n874j>

<sup>44</sup> Ledford, ‘CRISPR fixes disease gene in viable human embryos’, 548 *Nature* (2017), at 13-14. doi: [10.1038/nature.2017.22382](https://doi.org/10.1038/nature.2017.22382)

<sup>45</sup> Regalado, *Chinese scientists are creating CRISPR babies*, Available at: <https://tinyurl.hu/C0Qt/>

<sup>46</sup> Regalado, *Engineering the Perfect Baby*, Available at: <https://tinyurl.hu/7bld/>

<sup>47</sup> Klitzman, ‘“Am I my genes?”: Questions of identity among individuals confronting genetic disease’, 11(12) *Genetics in Medicine* (2009) 880, at 880–889. doi: [10.1097/GIM.0b013e3181bfd212](https://doi.org/10.1097/GIM.0b013e3181bfd212)

<sup>48</sup> For example, Section 168 of Act C of 2012 on the Criminal Code of Hungary prohibits any procedure on the human genome.

<sup>49</sup> The term is used by the HCCH and refers to ‘the state in which the intending parents are resident and to which they wish to return with the child, following the birth’.



The problem appears when the commissioning parents, who are nationals of a country prohibiting surrogacy, seek out a surrogacy arrangement in a state that has a permissive approach towards it, especially if commercial surrogacy is concerned. In such an occurrence, the authorities of the state of the child's birth might register the intended parents as the legal parents, however, the authorities of the receiving state consider the registration as void and might even prosecute the intending parents, depending on the legislation. What are the effects on the child? The issues range from inconveniences like more paperwork, to serious consequences like not being able to obtain a passport for the child.<sup>50</sup> The most severe issue that may arise is statelessness, which occurs 'if the state of the surrogate mother's nationality does not attribute that nationality to the child, and the state of the commissioning mother does not attribute its nationality because the commissioning mother did not give birth to the child'; and the child cannot acquire the nationality of the commissioning mother's husband or partner.<sup>51</sup> Nationality ensures basic human rights such as political rights, the right to freedom of movement and the freedom to choose a residence, the right to family life, the right to work, the right to social security, the right to health and education, and so on – all of which a stateless child might be deprived of.<sup>52</sup>

This is something the ECtHR is aware of, as can be seen from its case-law regarding the registration of children born out of surrogacy abroad.

### 3.A. LEGAL PARENTAGE AND REGISTRATION OF BIRTH IN ECtHR CASE-LAW

There are two key cases before the European Court of Human Rights concerning surrogacy and the recognition of commissioning parents as legal parents of children born out of surrogacy: *Menesson v. France*<sup>53</sup> which was heard simultaneously with *Labassee v. France*.<sup>54</sup> The Court adopted the same approach in both cases, ruling that there had been no violation of Article 8 concerning the applicants' right to respect for family life, but there had been a violation of the article concerning the children's right to private life. Here we only analyze the *Menesson*-case.

In *Menesson*, an infertile French couple had travelled to California, where surrogacy agreements are permitted. The Californian court recognized them as the legal parents of the twins born there. Together they returned to France, where the French authorities entered the foreign judgement and the births of the children into the register for births, marriages and deaths. However, the public prosecutor instituted proceedings to have the entries annulled, arguing that 'an agreement whereby a woman undertook to conceive and bear a child

and relinquish it at birth was null and void in accordance with the public-policy principle that the human body and civil status are inalienable'.<sup>55</sup> The Court of Cassation agreed, whereupon the couple turned to the ECtHR. They complained that 'to the detriment of the children's best interests, they were unable to obtain recognition in France of the legal parent-child relationship lawfully established abroad between the first two applicants and the third and fourth applicants born abroad as the result of a surrogacy agreement. They complained of a violation of the right to respect for their private and family life guaranteed by Article 8 of the Convention'.<sup>56</sup> Regarding the right to family life of the first and second applicant – the intended parents –, the Court held that there was a fair balance struck between the interest of the applicants and the interests of the state, since despite having to overcome practical obstacles, the applicants had been able to settle in France together with the children, similarly to other families, and there was no risk of authorities separating them on account of their situation under French law.<sup>57</sup> However, the Court also examined the third and fourth applicants' – the children's – right to private life, where it held that as long as the French courts refuse to grant effect to the Californian judgement and record the details of the birth certificate accordingly, and therefore the legal parent-child

relationship is not recognized under French law, the children remain in a state of legal uncertainty, undermining the children's identity within French society.<sup>58</sup>

The Court recognized that although Article 8 does not guarantee the right to acquire a nationality, nationality is nonetheless an element of one's identity. The uncertainty whether the children can acquire French nationality (despite the French nationality of their biological father) 'is liable to have negative repercussions on the definition of their personal identity'.<sup>59</sup> It also jeopardizes their inheritance rights, which are an important part of identity as well.<sup>60</sup> The Court considered the importance of biological parentage as a component of identity and found that 'it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof'.<sup>61</sup> The Court concluded that the state overstepped the permissible limits of its margin of appreciation by preventing both the recognition and establishment of the children's legal relationship with their biological father. Hence, the right of the third and fourth applicants to respect for their private life was infringed.<sup>62</sup>

<sup>50</sup> Pyrcce, 'Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem', 23(2) *Indiana Journal of Global Legal Studies* (2016) 925, at 933.

<sup>51</sup> *No Child Should Be Stateless*, European Network on Statelessness, at 22. Available at: <https://www.statelessness.eu/resources/no-child-should-be-stateless>

<sup>52</sup> *Human rights and arbitrary deprivation of nationality*, Report of the Secretary General, United Nations General Assembly. A/HRC/19/43. at 4-14., Available at: <https://tinyurl.hu/rLSz/>

<sup>53</sup> ECtHR, *Menesson v. France*, Appl. no. 65192/11, Judgement of 26 June 2014

<sup>54</sup> ECtHR, *Labassee v. France* Appl. no. 65941/11, Judgement of 26 June 2014

<sup>55</sup> *Supra* note 53 at para 18.

<sup>56</sup> *Ibid.* at para. 43.

<sup>57</sup> *Ibid.* at para 92.

<sup>58</sup> *Ibid.* at para 96.

<sup>59</sup> *Ibid.* at para 97.

<sup>60</sup> *Ibid.* at para 98.

<sup>61</sup> *Ibid.* at para 100.

<sup>62</sup> *Ibid.* at paras 100-101.



In the centre of the above case lies the best interest of the child, which is, according to the Court, ‘paramount’ whenever the situation of a child is in issue.<sup>63</sup> This is in accordance with the previously mentioned Article 3 of the UNCRC which states that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.<sup>64</sup> Consequently, this principle must be applied in legislative and judicial decisions concerning the regulation and recognition of children’s family relationships.<sup>65</sup> As mentioned before, the Court acknowledges that the states enjoy a wide margin of appreciation in deciding what is in harmony with its public policy and what is not. Nevertheless, where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the state will normally be restricted.<sup>66</sup> Even narrower is that margin if the individual in question is a child.

However, it must not remain unmentioned, that in both *Mennesson* and *Labassee*, a genetic relationship between the children and one of the commissioning parents existed, and the ECtHR put great emphasis on legally recognizing the biological ties. Contrary to these cases, in the quite similar case of *Paradiso and Campanelli v. Italy*, where such a genetic link did not exist,

the Grand Chamber did not find that a violation of Article 8 had happened.

### 3.B. STEPS TOWARDS A CONSISTENT APPROACH

In order to receive a guideline for similar situations, on 12 October 2018 the French Court of Cassation requested the ECtHR to give an advisory opinion on two questions. The first question was whether a state party is overstepping its margin of appreciation under Article 8 of the ECHR by refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the ‘intended mother’ as the ‘legal mother’, while accepting registration in so far as the certificate designates the ‘intended father’, who is the child’s biological father? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the ‘intended mother’? The second question was if in the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?<sup>67</sup>

<sup>63</sup> *Ibid.* at para 81.

<sup>64</sup> Article 3. UNCRC

<sup>65</sup> Bracken, ‘Assessing the best interests of the child in cases of cross-border surrogacy: inconsistency in the Strasbourg approach?’, 39(3) *Journal of Social Welfare and Family Law* (2017) 368, at 370.

<sup>66</sup> *Mennesson v France*, at para 77.

<sup>67</sup> Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019.

In its answer, the Court referred to *Mennesson*, *Labassee*, and other cases, pointing out that according to the Court’s case-law, Article 8 of the Convention requires that domestic law provide a possibility of recognition of the legal relationship between a child born through surrogacy abroad and the intended father where he is the biological father.<sup>68</sup> The Court also highlights the essential principle of the best interest of the child, with which the general and absolute impossibility of obtaining recognition of the relationship between the child and the intended mother is incompatible. The principle requires at a minimum the examination of each situation in the light of the particular circumstances of the case.<sup>69</sup> In sum, provided there is a biological tie to the intended father, the Court’s opinion is that the right to respect for private life of a child born abroad through a gestational surrogacy agreement requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the ‘legal mother’.<sup>70</sup>

<sup>68</sup> *Ibid.* at para 35.

<sup>69</sup> *Ibid.* at para 43.

<sup>70</sup> *Ibid.* at para 46.

<sup>71</sup> *Ibid.* at para 51.

<sup>72</sup> *Ibid.* at para 54.

Regarding the question whether the recognition has to take the form of entry in the register of births, marriages and deaths, or might happen through other means, such as adoption, the Court’s opinion is that the choice of means by which to permit recognition of the legal relationship falls within the states’ margin of appreciation.<sup>71</sup>

Again, the best interest of the child must be examined individually in each case. The Court emphasizes the importance of an effective mechanism to exist, enabling the legal relationship to be recognized. In this regard, other means, such as adoption may satisfy this requirement, ‘provided that the conditions which govern it are appropriate and the procedure enables a decision to be taken rapidly, so that the child is not kept for a lengthy period in a position of legal uncertainty’.<sup>72</sup>

This chapter examined one side of the surrogacy-triangle: the relationship between child and commissioning parents. But what about the other side? The next chapter looks at the curious relation between the child and the surrogate mother.

## 4. FURTHER ISSUES OF FUNDAMENTAL RIGHTS IN RELATION TO SURROGATE-BORN CHILDREN, THE RELATIONSHIP BETWEEN SURROGATE CHILDREN AND BIOLOGICAL PARENTS

Interpreting the right to identity becomes even more problematic if we discuss the relationship of the surrogate-born child and the biological parent. Several legal principles, adopted by the ECJ, will need to be revisited and reinterpreted related to children's identity that will impact their rights to legal proceedings.

### 4.A. EMOTIONAL BONDS BETWEEN SURROGATE MOTHERS AND THEIR CHILDREN AND RELEVANT LEGAL INTERPRETATIONS

The ECtHR acknowledges children's interest to know their origin, to get to know their parents, especially their mother. The ECtHR views this right as part of children's right to know their identity and underlines the significance of emotional bonds forged between mother and child.

Children's rights must also be addressed at all stages of their childhood.

Circumstances that could lead to distress for children in early childhood through disputes or separation from carers must also be taken into consideration during the development of the child. The growth from childhood to adolescence has been described as a critical time for the development of personal autonomy and identity formation. This is also a time of increased understanding of genetic relatedness and biology. Adolescence represents a unique developmental stage that may present specific challenges for those who are from a surrogate family.<sup>73</sup>

National laws, however, may see it fit to limit children's interests to access information about their origins on various grounds including private and public ones. The limitations of this right need to be both obligatory and proportionate. In the *Godelli v. Italy* case<sup>74</sup> the ECtHR found Italy guilty of violating Article 8 because it failed to establish a balance between the conflicting interests of the child and that of the mother. Concerning this balance, the ECtHR determined two principles of proportionality.

One of the principles stipulates that the anonymous births may be permissible under Article 8 of the ECHR (right to respect for private and family life) provided that the child can at least obtain non-identifying information about the mother and that there is a possibility of seeking a confidentiality waiver by the mother.

The other principle establishes that an adopted child has the right to access information concerning his or her origins. Biological parents may be granted a legal right not to disclose their identity, but this does not amount to an absolute veto.

How can children, born to a surrogate mother, assert their rights in practical terms? This paper argues that one's right to access information about one's ancestry cannot be restricted to the extent that it excludes individuals born via surrogacy. This issue is even more complex by the fact that such individuals may be subject to provisions that they may not be aware of. We therefore hold the view that the right to fair trial under Article 6 is infringed by national legislation as it precludes the possibility of action.

It is clear that the infant cannot be blamed for being born out of a surrogacy arrangement. While the state may place some responsibility on parents, such as raising and educating their children, parents still have reasonable versatility in fulfilling even those basic requirements.<sup>75</sup> Surrogate pregnancies also deliberately break the natural maternal bond which occurs beneath pregnancy.<sup>76</sup>

When discussing the issue of emotional bond between mother and child, psychologists highlight that 'surrogacy children showed higher levels of adjustment difficulties at age 7' and 'the absence of a gestational connection to the mother may be more problematic'.<sup>77</sup> The issue of emotional bond was debated by the ECtHR in *Paradiso and Campanelli v Italy*.<sup>78</sup> In this case, the child stayed in Russia for three months with the surrogate mother and then was taken to Italy where he started living with the Italian couple.

The obtained child receives the least attention in debates around fundamental rights, assuming that the desire for a child is the whole point of any type of surrogacy arrangement.<sup>79</sup> It is very important to recognize that the coveted and ultimately received 'prize' does eventually grow up. Therefore, it is relevant to consider the effects of surrogacy on children. Early adoption research as well as policies tend to fall into this ambush: 'freezing adoptees in time as vulnerable children without adequate acknowledgement of the adults they eventually became'.<sup>80</sup>

<sup>73</sup> Purvis, 'Intended Parents and the Problem of Perspective', 24 *Yale Journal of Law and Feminism* (2012) 210, at 210.

<sup>74</sup> As indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

<sup>75</sup> E. Ilioi et al., 'The role of age of disclosure of biological origins in the psychological wellbeing of adolescents conceived by reproductive donation: a longitudinal study from age 1 to age 14', 58(3) *Journal of Child Psychology and Psychiatry* (2017) 315, at 315–324.

<sup>76</sup> ECtHR, *Paradiso and Campanelli v. Italy*, Appl. no. 25358/12, Judgement of 24 Jan. 2017

<sup>77</sup> Beeson, Darnovsky and Lippman, 'What's in a name? Variations in terminology of third-party reproduction', 31 *Reproductive BioMedicine Online* (2015) 805, at 805–814. Available at: [https://www.rbmojournal.com/article/S1472-6483\(15\)00434-4/abstract](https://www.rbmojournal.com/article/S1472-6483(15)00434-4/abstract)

<sup>78</sup> Dempsey D., Kelly F., 'Transnational third-party assisted conception: pursuing the desire for 'origins' information in the internet era' in Davies M. (ed), *Babies for sale: transnational surrogacy, human rights and the politics of reproduction*. (2017) 204, at 204–214.

<sup>73</sup> S. Zadeh et al., 'The perspectives of adolescents conceived using surrogacy, egg or sperm donation', 33(6) *Human Reproduction Oxford University Press* (2018) 1099, at 1099–1106.

<sup>74</sup> ECtHR, *Godelli v. Italy*, Appl. no. 33783/09., Judgement of 25 September 2012

#### 4.B. THE IDENTITY OF SURROGATE-BORN CHILDREN AND THE LEGAL CONTENT OF PATERNAL RELATIONSHIP

The ECtHR held that the determination of the legal relationship between a child and the alleged natural father was part of the scope of private life under Article 8 of the ECHR. The Court said in *Mennesson v. France* that affiliation is a fundamental part of identity.<sup>81</sup> However, the ECtHR also highlights that a child's interest in establishing paternity, however, must be balanced against the interests of the presumed father as well as the general interest. Indeed, a child's interest in having legal certainty about his or her paternal affiliation does not trump a father's interest in rebutting the legal presumption of paternity. In the *Mikulić v. Croatia*<sup>82</sup> case the ECtHR ruled that children's rights to fair trial are violated because under Croatian law fathers cannot be forced to undergo a DNA test in paternity suits. A child's identity therefore entails the right to bring an action against their biological father and obtain evidence about paternity; it may not, however, restrict the father's right to reject the presumption of paternity.

With regard to the specific case of recognition of affiliation between intended parents and children born out of surrogacy, the ECtHR accepted in principle that states have a wide margin of appreciation, since there is no European consensus on allowing or recognising affiliation in surrogacy arrangements. The fact, however, that affiliation is a fundamental aspect of a child's identity reduces that margin of appreciation.<sup>83</sup>

It needs to be underlined, however, that in surrogacy cases identity issues related to paternal relationships are predominantly theoretical since the father is known.

In an American case, an interesting aspect of the identity of surrogate-born children in view of paternal relationships was explored. In the *Astrue v. Capato*<sup>84</sup> case, the Supreme Court held that children conceived through IVF after the death of their biological father do not qualify for social security survivor benefits, which proves that current regulations such as the one discussed above do not think about modern dilemmas arising from assisted reproductive technology (ART). We argue that such a position could never be adopted by either EU law or by the ECtHR as the principles of non-discrimination (Article 14) and fair trial (Article 6) precludes this a priori.

The authors of this paper support the viewpoint which claims that 'the child is forced to rebuild his roots to escape disembodiment, disidentification. These manipulations are like "black holes" in the child's history, and should get us thinking: are we not lacking in humanity? Separations all have a reason in life, but should all come in their due time.'<sup>85</sup>

Therefore we argue that those born from surrogacy, from external donors, tend to experience a tragic homelessness in their own identity including their parental filiation. There is some evidence that difficulties may arise when individuals discover their donor conception in adulthood.<sup>86</sup> In the significant case,<sup>87</sup> the ECtHR spelled out that it is necessary that a child should not be disadvantaged by the fact that he was born by a surrogate mother.<sup>88</sup>

#### 4.C. IDENTITY AND LIMITED RIGHT OF ACTION

The right of surrogate-born children to know their origins is hindered not only by fundamental rights, but also by procedural obstacles. The child's right of action is limited by their age, as well as by the permission of the parent having custody or a state authority.

Examining the EU member states, as the main rule children cannot bring a case to court on their own before they acquire full procedural capacity. In the vast majority of EU member states, the minimum age for this is at 18 years.<sup>89</sup>

By way of exception, in some member states, children can bring a case to court on their own under certain conditions, for example those who are married or become parents may acquire procedural capacity.<sup>90</sup> Their capacity is closely linked to how they can exercise their own rights.<sup>91</sup> This issue is not precisely regulated at the international or EU level, but it relies on the right of children to be heard in all proceedings affecting their lives.<sup>92</sup>

<sup>85</sup> A. Schaub-Thomas, *Un cri secret d'enfant. Attachement mère-enfant, mémoires précoces, séparation-abandon*, (2017) at 5-80.

<sup>86</sup> McWhinnie, 'Gamete donation and anonymity. Should offspring from donated gametes continue to be denied knowledge of their origins and antecedents?', 16(5) *Human Reproduction* (2001) 807, at 807-817.

<sup>87</sup> *Paradiso and Campanelli v. Italy supra* note 77 - In this case there was no genetic link between the intending parents and the child.

<sup>88</sup> Turner and Coyle, 'What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counselling and therapy', 15 *Human Reproduction* (2000) 2041, at 2041-2051.

<sup>89</sup> European Union Agency for Fundamental Rights website. Mapping minimum age requirements: *Children's rights and justice*. FRA, 2018. Available at: <https://fra.europa.eu/en/publications-and-re-sources/data-and-maps/minag>

<sup>90</sup> This applies mostly to family, property and employment, but also rarely to paternity.

<sup>91</sup> In Hungary, children can bring cases to court from the age of 14. These cases are linked to their capacity to freely dispose of certain subjects, such as salaries earned with their work, or cases affecting their personal legal status, for example filiation or termination of custody.

<sup>92</sup> EU acquis and policy documents on the rights of the child. European Commission no. JUST.C2/MTF-NCP. March 2019. Available at: <https://tinyurl.hu/foom/>

<sup>81</sup> *Handbook on European law relating to the rights of the child*. Publications Office of the European Union, Luxembourg 2017., at 66. available at: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf)

<sup>82</sup> ECtHR, *Mikulić v. Croatia*, Appl. no. 53176/99, Judgement of 7 February 2002

<sup>83</sup> *Handbook on European law relating to the rights of the child, supra* note 80 at 67-80.

<sup>84</sup> Argued 19 March 2012 in the Supreme Court of the United States. No. 11-159. (Decided 21 May 2012.)

Moreover, it constitutes an integral part of children's right to access justice.<sup>93</sup> However, according to Article 12 (2) of the UNCRC, in judicial proceedings this right may be exercised 'either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law',<sup>94</sup> so for example with an authorization/permission of their parents. Furthermore, adults and children are not aware of what children's participation means and how to implement this right, not to mention that we can come across so many different regulations.

#### 4.D. INTERPRETATIONS OF THE ESSENCE OF IDENTITY

In our opinion, the development of a uniform application of law is made difficult by the fact that the ECJ and the ECtHR give quite divergent interpretations of the law in terms of identity. They interpreted the question of identity and the right to know one's origins generally within adoption cases.

The Hague Convention on Inter-Country Adoption provides for an adopted child to access information about the identity of their parents under certain conditions, but it is up to each state party to authorize such access, or not.<sup>95</sup> Two core components of a child's right to respect for family life are the right to know the identity<sup>96</sup> of their parents and the right to be cared for by them.<sup>97</sup> However, in view of surrogacy these rights are more closely associated with the child's right to identity, as expressed by knowing their biological parents. The ECJ has managed severe adherence to the problem and the European legal instruments are often interpreted literally, while the Strasbourg Court has relied on an interpretation of the ECHR in the view of the *best interests of the child* principle. So it is clear that the two Courts have different approaches.<sup>98</sup> The practice of surrogacy clearly breaches a series of the child's legal rights as guaranteed by the UNCRC, such as the right to be born into and grow up with one's biological family, the right to registration of one's birth and to know one's parents,<sup>99</sup> the right to family reunification,<sup>100</sup> the right to maintain a relationship with both parents and the right to be protected from sale or human trafficking,<sup>101</sup> and above all, the right to dignity.

In March 2018, the UN Special Rapporteur presented a specific report on surrogacy and the sale of children.<sup>102</sup> The report emphasizes that recognizing that the child, for the complete and harmonious development of its personality, should grow up in a healthy environment, in understanding, love, care, and happiness, furthermore in the spirit of peace, dignity, tolerance, freedom, equality and solidarity. The UN Special Rapporteur on the sale and sexual exploitation of children has underlined that states are also obliged to 'protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law'.<sup>103</sup> The Rapporteur highlighted that some cases under Article 8 of the ECHR<sup>104</sup> on the right to respect for private and family life look at the issue from the aspect of parents' rights rather than from that of children's rights, while cases under other substantive provisions do not necessarily involve parents and have a clearer focus on the rights of the children of interest, such as the right to protection from inhuman and degrading treatment<sup>105</sup> or the right to a fair trial.<sup>106</sup>

## 5. CONCLUSION

The major conclusion of this paper is that surrogacy is not a national phenomenon. It is our standpoint that both international and community legislations are required to protect the rights of surrogate children.

### I. INTERNATIONAL LEGISLATION

Since surrogacy is predominantly a cross-border issue, international regulation is inevitable. While children's rights to life and human dignity are absolute and non-negotiable, the right to identity may be negotiable and therefore the negotiation on these rights differ from country to country. Individual states' regulations in various fields of law (i.e. civil, public, criminal, family, or procedural) provide a protective scope for surrogate children to know their origin in administrative procedures, in disputes against their parents, in registering their citizenship, in asserting their right to their name, etc. While national regulations provide a different scope of protection, Article 8 of the ECHR and Article 8 of UNCRC stipulate fundamental rights for every child in a uniform manner. The different national negotiations rule out the uniform interpretation of the fundamental rights.

<sup>93</sup> The right to a fair trial granted by article 47 of the Charter of Fundamental rights of the European Union and by article 6 of the ECHR, these rights are guaranteed in the same way as for all of us.

<sup>94</sup> Article 12 UNCRC

<sup>95</sup> Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, HCCH, 29 May 1993, Article 30(2).

<sup>96</sup> Article 8 UNCRC

<sup>97</sup> Article 5 and 7 UNCRC

<sup>98</sup> Anrò, 'Surrogacy from the Luxembourg and Strasbourg perspectives: divergence, convergence and the chance for a future dialogue', 9 *Geneva Jean Monnet Working Papers* (2016) 1, at 2-35.

<sup>99</sup> Article 7 UNCRC

<sup>100</sup> Article 10 UNCRC

<sup>101</sup> Article 35 UNCRC contains substantive reference to trafficking.

<sup>102</sup> Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, 15 January 2018, A/HRC/37/60, p. 19. The Special Rapporteur examined the consideration of surrogacy solely through a child-rights perspective and as it relates to the sale of children, is intended to complement the private international law focus of HCCH project on parentage/surrogacy.

<sup>103</sup> *Supra* note 80

<sup>104</sup> *Supra* note 24.

<sup>105</sup> Article 3 ECHR

<sup>106</sup> Article 6 ECHR

Consequently, there should be a uniform international legislation to safeguard the best interest of the child in terms of their identity which means that no child can be allowed to suffer discrimination arising from any national laws. We argue that such discrimination could be circumvented if international treaties, establishing the fundamental rights of children, included an amendment extending these laws to surrogate children. Alternatively, member states should have their own national legislation to safeguard surrogate children's fundamental rights, a law which should specify to what extent one's right to identity could be restricted.

## II. EU LEGISLATION

The member states of the EU must guarantee the functioning of the right to life, and human dignity at the same level and, via the above instruments, the right to identity.

Criminal law and child protection are member state competences. But an increased cooperation between EU member states as well as finding common minimum standards is desirable. This does not mean that the legalization of surrogacy must be forced on to states who oppose the concept, but that all countries would need to agree on solutions that safeguard the rights of children already born out of surrogacy.

Besides the possibility of cooperation between member states, we also need to highlight the fact that several aspects of surrogacy fall within the EU's legislative competence, that is there are community problems to solve such as issues of child trafficking, asylum-seeking, ensuring the safety of the child. Furthermore, European citizenship and the free movement of persons are also closely related to surrogacy. Therefore, we argue that beyond the fundamental rights safeguarded by the Charter, there needs to be a common European regulation to guarantee that no national laws discriminate against children born out of surrogacy and to ensure that they have 'access to justice' with the same conditions.

Based on the above, this paper argues that the Article 18 and 19 of the Treaty on the Functioning of the European Union should be amended either with a non-discrimination clause in respect of surrogacy, or a new directive needs to be adopted, one which prohibits the discrimination between surrogate and non-surrogate children's assertion of their right to identity.

## III. THIRD PARTY

It would be advisable if an institution were to be set up in all member states of the Council of Europe and/or in all European countries whose jurisdiction was extended to any questions regarding surrogacy-born children. Such an institution would ensure an expeditious procedure for those children in issues related to nationality and legal parenthood, in accordance with the requirement of a quick and effective mechanism as described by the ECtHR. This forum would ideally consist of experts such as children's right lawyers, child psychologists and other professionals active in the field of child protection. This paper argues that the European Ombudsman should create a separate working area for solutions to the problem of surrogacy ensuring that institutions adopt a fair and balanced approach in how they use their discretion in handling cases.<sup>107</sup>

At least the COVID-19 pandemic seems to have further aggravated the 'ill-legality' – the improperly regulated status – of hundreds of surrogate-born children who are 'stuck' in the Ukraine and India as, due to lockdowns and travel restrictions, they cannot be united with their legal parents.<sup>108</sup>

Consequently, irrespective of the fact whether a state prohibits or allows surrogacy, the status of surrogate children need to be regulated with a view to the best interest of such children.

<sup>107</sup> Strasbourg, 01/10/2019 Emily O'Reilly European Ombudsman. SI/1/2019/AMF

<sup>108</sup> Biswas, *India parents make pandemic road trip to get to stranded infant*, Available at: <https://www.bbc.com/news/world-asia-india-52646024>.



CATARINA BORGES DA PONTE  
MELANIE-ANNE MORAIS  
MÓNICA GONÇALVES MARTINS



Team PORTUGAL

TUTOR: CHANDRA GRACIAS

# UNDRESSING DREAMS: A BURDEN OF PROOF OR A BURDEN TO PROVE?

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Going through the different Member States (hereinafter, MS) of the European Union (henceforth, EU) we can state that age assessment is a complex process and differs from MS to MS, noting that individual rights are often not respected during these procedures.

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 best interest of the child (henceforth, BIC), preventing the erroneous classification of minors as legal adults. 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.

Also, we noticed that there are no binding legal instruments to set the standards of age assessment proceedings, which leads to human rights violations and arbitrariness when dealing with unaccompanied and undocumented children.

We summarized recommendations and tools for the implementation of the BIC when assessing the age of a person, from a multidisciplinary and holistic approach.

## KEY WORDS

Unaccompanied children  
Undocumented children  
First reception centers  
Age Assessment  
Burden of Proof  
Presumption of minority

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# 1. INTRODUCTION

The current thinking, legislative spirit and jurisprudence of the EU Institutions and MS are driven by the Charter of Fundamental Rights of the European Union (henceforth, 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 United Nations Convention on the Rights of the Child (hereinafter, 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,<sup>1</sup> 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, § 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.<sup>2</sup>

The CFR became binding on the EU with the implementation of the Treaty of Lisbon, on the 1<sup>st</sup> December 2009, meaning that, from that date on, it benefitted from the EE for the competences of the EU, the principle of subsidiarity and the rights established in the European Convention on Human Rights (henceforth, ECHR) and the Court of Justice of the European Union (CJEU) jurisprudence, the customs.

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

The CRC (Article 1)<sup>3</sup> 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 21<sup>st</sup> to 24<sup>th</sup> of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, henceforth, RCD recast).<sup>4</sup>

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.<sup>5</sup>

The age assessment process contains several pitfalls, 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'*.<sup>6</sup>

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 the European Asylum Support Office (hereinafter, 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.<sup>7</sup>

<sup>5</sup> 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, §3 CRC, § 1, 3, Recommendation No. 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, §§ 1, 3, 5.2, 5.3, 5.5, 5.12, 5.14, 6.12, and in the Recital and in § 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.

<sup>6</sup> 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).

<sup>7</sup> According to the EASO Practical Guide on Age Assessment, page 18.

<sup>1</sup> Official Journal of the EU No. 2012/C 326, de 26-10-2012, pages. 1-45 (consolidated version of the TEU).

<sup>2</sup> «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 February 2011, e «EU Guidelines for the promotion and protection of the rights of the child», Brussel's, de 10 December 2007.

<sup>3</sup> As well as §II. a. in the Appendix to Recommendation CM/Rec (2019)11, and §1 of the General Recommendations of RUM, and article 2 (l), of the APD recast and article 2 (d), of the RCD recast.

<sup>4</sup> Official Journal of the EU No. L 180/96, 29/06/2013.

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 No. 6<sup>8</sup> namely the non-medical methods and medical methods in place.

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 the Portuguese Immigration and Borders Service (hereinafter, SEF), a representative of EASO, with written replies, and with a Professor from the Portuguese National Institute of Forensic Medicine and Forensic Sciences (henceforth, INMLCF), in a recorded interview.

## 2. PROCEDURES FOR UNACCOMPANIED CHILDREN

### 2.1. RECEPTION

It is not hard to imagine how frightening it must be for an unaccompanied child to arrive at the border of a country, where the fear of the unknown must be overwhelming. And it's unquestionable that an unaccompanied child<sup>9</sup>, 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,<sup>10 11 12</sup> 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.<sup>13</sup>

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,<sup>14</sup> that runs through entire directive<sup>15</sup> (article 23), in line with the [1989] CRC<sup>16</sup> and the CFR,<sup>17</sup>

and also with the Resolution of the European Parliament of 12 September 2013 on the situation of unaccompanied minors in the EU (2012/2263(INI) (hereinafter, RUM)).<sup>18</sup>

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.

<sup>8</sup> 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.

<sup>9</sup> 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."

<sup>10</sup> 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 recognizes the right of persons with disabilities to benefit from measures to ensure their integration and participation in community life.

<sup>11</sup> Convention on the Rights of People with Disabilities (hereinafter, CRPD) was ratified by the 25 EU Members States in September 2015.

<sup>12</sup> 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.

<sup>13</sup> 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.

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

<sup>15</sup> Considering (9), reinforced by Article 11/2.

<sup>16</sup> Article 3 CRC.

<sup>17</sup> Article 24 CFR.

<sup>18</sup> Consolidated version published on the Official Journal of the EU No. C 93/265, 09 March 2016.

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).<sup>19</sup>

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,<sup>20</sup> 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 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 (recast).

In the Portuguese case,<sup>21</sup> 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.

In the case of unaccompanied and undocumented children who declare to be *minors of age*, although over 16 years old, they may remain<sup>22 23</sup> 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 <sup>24</sup>. In these cases, the stay at the Temporary Center should not exceed 7 days.<sup>25</sup>

However, according to very the 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 United Nations High Commissioner for Refugees (hereinafter, UNHCR) and European Council on Refugees and Exiles.<sup>26</sup>

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 [United*

*Nations Children's Fund], 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 [Portuguese Refugee Council], 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!'*<sup>27</sup>

Some numbers of asylum seekers in Portugal.<sup>28</sup>

<sup>19</sup> See the RUM.

<sup>20</sup> 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*'.

<sup>21</sup> Lei n.º 26/2014, 5t May, (Asylum Law), which changed the Lei n.º 27/2008, 30June, 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.

<sup>22</sup> The possibility of detaining migrants is provided for the Article 5 (f) of the ECHR, as well for the Article 27 (c) of the Portuguese Constitution. As for children, Article 37 of the CRC states the detention can only be used as a measure of last resort and will last as short as possible.

<sup>23</sup> ECtHR *Rahimi v. Greece* Case, Application No. C- 8687/08, Judgement of 5 April 2011 '*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*'.

<sup>24</sup> 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 No. 6 (2005) of the Committee on the Rights of the Child and in § 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.

<sup>25</sup> Order of the Portuguese Minister of Internal Administration, of July 24 2018.

<sup>26</sup> Jornal Público, 17 June 2020, at 14.

<sup>27</sup> Compliance with the RUM, Strategic guidelines, § 13.

<sup>28</sup> AIDA, *Country Report: Portugal* (2018), at 50.

**Asylum seekers communicated to CPR and identified as vulnerable: 2017-2018**

Category of vulnerable group	2017	2018
Unaccompanied children	41 <sup>29</sup>	67
Accompanied children	194	219
Single-parent families	67	53
Pregnant women	17	9
Elderly persons	2	3

## 2.2. IDENTIFICATION

Despite continuously changing, age is an innate characteristic of one's identity. Changes in age may result in specific rights and obligations, with implications for children,<sup>30</sup> 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.

As part of the personal status, age defines the relationship between the state and the person and consequently Articles 7 and 8 of the CRC determines 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.'*<sup>31</sup>

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.'*<sup>32 33</sup>

A person recognized as a child should have access to proper care and benefit from a best interest's determination for the identification procedure.<sup>34</sup>

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.

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.<sup>35</sup>

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 Portuguese First Reception Centre (*Espaço*

*Equiparado a Centro de Instalação Temporária*, hereinafter, 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.<sup>36</sup>

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, authorities may need to assess the age to determine whether the person is an adult or a child.

<sup>29</sup> In 2019, the number of unaccompanied children was increased for the number de 55, information available online on <http://www.asylumineurope.org/reports/country/portugal/statistics> (consulted on 9 July 2020)

<sup>30</sup> *"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 UNICEF, *Age assessment practices: a literature review & annotated bibliography*, (2011), at 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).

<sup>31</sup> In: EASO, *Practical guide on age assessment - Second Edition*, (2018), at 16.

<sup>32</sup> In: *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, CoE, (2017), at 6-9.

<sup>33</sup> *"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 centres)"*, in: UNICEF, *Age assessment practices: a literature review & annotated bibliography*, (2011), at 1.

<sup>34</sup> In: *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, CoE, (2017), at 9.

<sup>35</sup> In: EASO, *Guidance on reception conditions: operational standards and indicators*, , 2018, at 39.

<sup>36</sup> *"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), at 108.



We consider 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 (RUM, § 15).

## 2.3. 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.<sup>37</sup> So – as mentioned above – unaccompanied children must prove their age in order to benefit from the afore mentioned rights (RUM, § 18) and to be given asylum and refugee status – article 4, § 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<sup>38</sup>), and such evidence must be credible.<sup>39</sup> 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, magnetic resonance imaging 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, European Asylum Dactyloscopy Database or Interpol's Stolen and Lost Travel Documents).

Then, MS should cross examine the applicant's relatives' documents, in order to estimate 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.<sup>40</sup>

In Resolution 1810 (2011), of the Council of Europe's Parliamentary Assembly, § 5.10., as well as in § 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,<sup>41</sup> and also with his/her private or intimate life,<sup>42</sup> nor with his or her autonomy of decision – RUM, § 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))<sup>43</sup> – and advising giving applicants claiming to be children the benefit of the doubt, firstly suggested by the RUM, §15 (as well as § 5.10 of the Resolution 1810), from the moment

they arrive until their age is accurately estimated. Also, the Guide, compliance with § 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

<sup>37</sup> Apud EASO, *Practical Guide on Age Assessment*, at 26, footnote 21.

<sup>38</sup> 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](https://unstats.un.org/unsd/demographic/crvs/vs_availability.htm) (consulted on 10 June 2020), also referred to, by the EASO Practical Guide on Age Assessment, op. cit., at 18, less than 10% of African countries reported all the live births.

<sup>39</sup> '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.'; § 11 of Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, Office Of The UNHCR Geneva.

<sup>40</sup> Although, in 2011, in the Council of Europe's Parliamentary Assembly on 15 April 2011, MS were exhorted to develop of 'common guidelines on the assessment of the best interests of the child [... and] age assessment'.

<sup>41</sup> 1<sup>st</sup> § of the ECHR, and Articles 3 and 37 of CRC and 1 and 3 of CFR, and §15, of the RUM.

<sup>42</sup> Articles 6 and 8 of ECHR.

<sup>43</sup> 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 10 June 2020.

the applicant's history<sup>44</sup> and on race, ethnicity, nutritional variations, social background and the gender. So some methods aren't adequate for every age gap<sup>45</sup>. 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 (at 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<sup>46</sup>, 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 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 (hereinafter, 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<sup>47</sup>. But there are many countries still using them.<sup>48</sup>

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

### C. BURDEN OF PROOF OR A BURDEN TO PROVE?

Articles 4, § 3, of the Council Resolution, 26 June 1997, 4, § 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 of Law No. 26/2014, 5 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, §5, and §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 § 5.10 of the Resolution 1810 (2011) and in § 15 of the RUM, but wasn't included in any directive.

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 instruments<sup>49</sup>, 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 (*Practical Guide on Age Assessment*, cit., at 69), 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,<sup>50</sup> 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).

<sup>44</sup> 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 five years and ten years of age - Ladwig, K-H., Brockhaus, 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*, at 48.

<sup>45</sup> In the ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta* Case Applications No. 25794/13 and 28151/13, Judgement of 22 November 2016, at 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 Non-Governmental Organization, 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'.

<sup>46</sup> RUM, § 15.

<sup>47</sup> EASO, *Age Assessment Guide*, op. cit., at 36.

<sup>48</sup> 11 states use physical development assessment, and seven use sexual maturity assessment – EASO, *Practical Guide on Age Assessment*, op. cit., at 58.

<sup>49</sup> According to the EASO, *Practical Guide on Age Assessment*, op. cit., at 38, only 16 states apply the benefit of the doubt.

<sup>50</sup> Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, of the Office of the UNHCR Geneva, § 3

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.<sup>51</sup>

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.<sup>52</sup> In fact, the presumption of minority is established only by a single directive (APD recast, article 25 (5)),<sup>53</sup> 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.<sup>54</sup>

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 ECtHR *Abdullahi Elmi and Aweys Abubakar v. Malta* Case, Applications No.25794/13 and 28151/13, 22 November 2016, concerning two children (asylum-seekers) that were in detention (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 No. 6 (2005) of the Committee on the Rights of the Child and of the RUM, § 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*, op. cit., at 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<sup>55</sup> which consist of a degrading treatment, prohibited by article 3 of the ECHR.

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 binding 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.<sup>56</sup>
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 approach, with trained experts, rather than a sectioned one (as established by the RUM, § 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<sup>57</sup>, 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.<sup>58</sup> 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

<sup>51</sup> In this matter, we evoke the *Yazgüi Yılmaz versus Turkey* Case, Application No. 36369/06, Judgement of 1 February 2011, in which a girl had to undertake a gynecological examination, without her legal representative's consent.

<sup>52</sup> According to the EASO, *Practical Guide on Age Assessment*, op. cit., at 58, currently, there are at least 11 states using physical development assessment, and seven using sexual maturity assessment, besides other practices discouraged by EASO, mentioned in the same source.

<sup>53</sup> As well as the right to information and the obligation of an informed consent (of the child and of his/her representative).

<sup>54</sup> According to the EASO, *Practical Guide on Age Assessment*, op. cit., at 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, op. cit., at 87).

<sup>55</sup> 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*, op. cit., at 32).

<sup>56</sup> As suggested by EASO, *Age Assessment Practical Guide*, op. cit. at 47, and the RUM –§15.

<sup>57</sup> Already recommended by §§5.10 of the Resolution 1810(2011), 15 of the RUM, and article 25 of the APD Recast.

<sup>58</sup> There are too many rights in jeopardy to be a decision in the doctors' hands – even if they are specialists.

margin of error in the examinations, the actual need for them, the available documentation and other evidence, and the principle of proportionality (intrusiveness *versus* accuracy and need). And the proceedings should take place 'in a friendly and safe atmosphere'.<sup>59</sup>

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 ECHR).
5. A double vulnerability principle<sup>60</sup> 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),<sup>61</sup> 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.<sup>62,63</sup>

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,<sup>64</sup> 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 ECHR).<sup>65</sup> Concerning this, we recall the ECtHR *Mugenzi v. France* Case, Application No. 2260/10, 10 October 2014, that shows us how these procedures can take a long time and be harmful to

<sup>59</sup> Age Assessment Report, cited.

<sup>60</sup> Already granted – although with a different nomenclature – in article 21 of the RCD recast, and included in the RUM (§ 1).

<sup>61</sup> See RUM, § 15

<sup>62</sup> 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.

<sup>63</sup> Hopefully all these difficulties can be overtaken with the help of the guardian figure, about which the Recommendation CM/Rec(2019)11 of the Committee of Ministers to MS (on effective guardianship for unaccompanied and separated children in context of migration) establishes some guidance. It sounds like EASO hopes that the guardianship would help securing the BIC – Guide EASO Practical Guide on Age Assessment, 2nd Edition, at 13. Nevertheless, the Guide is previous the Recommendation and the latest doesn't address any specific guidance about the guardian's role in the age assessment proceedings... So it is too early to make conclusions about its effectiveness on the BIC beware, through age assessment.

<sup>64</sup> The RUM, § 20, exhorts for the need to prioritize the asylum proceedings, as well as the article 4, § 2 of the Council Resolution of 1997, but don't specify the age assessment procedures.

<sup>65</sup> In Portugal, age assessment reports are ready in two to seven days. Two days in urgent cases – such as situations including detention – and a few more days in the other cases.

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 ECtHR *Abdullahi Elmi and Aweys Abubakar v. Malta* Case, Applications No. 25794/13 and 28151/13, Judgement of 22 November 2016, and in the ECtHR *Mahamed Jama and Moxamed Ismaaciil and Abdirahman Warsame v. Malta* Case, Applications No. 52160/13 and 52165/13, Judgement of 26 November 2015.

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, and the MS suspects the real age is below the latest. Which means that whenever the applicant states an age between 17 and 19 years old, but is apparently below the stated age (taking in account the less intrusive age assessment procedures already made), and the other assessment proceedings available have a margin of error of two years, for instance, the applicant should be spared of undertaking them, because they won't dispel the existing doubt. In these cases, if there are no accurate proceedings available – 'accurate' meaning having a margin of

error small enough to dispel the doubt –, the applicant must be presumed to be a child. This leads to limiting the maximum declared ages to submit children to medical examinations, when the estimated age (based on non-intrusive and non-medical assessment) is below the latest. 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.<sup>66</sup>

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.<sup>67</sup>

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.<sup>68</sup>

10. Minimum standards of written information reports,<sup>69</sup> 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

<sup>66</sup> Age Assessment report, cited, at 29.

<sup>67</sup> EASO, *Age Assessment Practical Guide*, op. cit., at 27.

<sup>68</sup> APD Recast, article 25, § 5 (a) 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.

<sup>69</sup> 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.



assessment used,<sup>70</sup> 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.<sup>71</sup> 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.

Having said that, what kind of a binding legal instrument should it be? Although a directive would be easier to achieve, and probably faster to issue, we believe the best solution would be a regulation. We are aware of all the differences and idiosyncrasies in between MS (concerning to migration flows, population, public policies, financial issues, etc.) that can delay the final version of a regulation, but the facts point out that a directive doesn't standardize in totum the proceedings established. So we are convinced it won't be sufficient to end with all the discrepancies existing in this matter.

So we hope and expect a regulation is issued.

### 3. 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 need of common training, implementing a multidisciplinary approach by the reception officers in the field.

Children's rights (listed in the RCD Recast and § 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 ECHR.

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. We dream of a regulation in these matters.

Finally, we note that the ECtHR 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).

<sup>70</sup> 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 PEREIRA, Cristiana, *Age Estimation of Unaccompanied Minors: A Portuguese Overview*, (2015), at 2.

<sup>71</sup> Which hasn't happened in the above mentioned ECtHR *Abdullahi Elmi and Aweys Abubakar v. Malta and Mahamed Jama and Moxamed Ismaaciil and Abdirahman Warsame v. Malta* cases.



SERBAN-MIHAI BRATU  
GRIGORE SORIN CIUREA  
BIANCA-LUCREȚIA IVAN



TUTOR: AMELIA ONIȘOR

Team ROMANIA

# ‘I CAN’T GO HOME, COULD YOU BRING HOME BACK TO ME?’

## FAMILY REUNIFICATION - A KAFALA EXPERIENCE

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We often say that home is where our family is, thus home is a person, not a place. Due to migration, many children leave their country to reach a safer environment. By telling the story of *Avizeh*, a young Afghan girl, we will emphasize a present-day topic concerning the possibilities of an unaccompanied child to reunify with his kafala family, when his biological parents are alive. International and European legal instruments protect the right to respect of family for every child. European case-law consider *de facto* family ties similar to the biological ones and expand the protection by including kafala in this first category. Although an apparent protection exists, we could not identify a straightforward solution for the reunification, as the Directive 2003/86/EC offers for certain categories of blood relatives and, when they are not alive or cannot be traced, for other categories of persons. Therefore, children under kafala cannot be reunited with the guardian parents as long as the child biological family is alive. Considering that the best interests of the child may be respected within kafala, this principle should be reinforced by means of law and, in our case, by broadening protection for these type of family ties.

### KEY WORDS

Family reunification  
Kafala  
Immigration  
Children’s rights  
De facto family life  
Child’s best interest

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*'There are a thousand ways to go home again' – Rumi*

## 1. INTRODUCTION

'Happy families are all alike; every unhappy family is unhappy in its own way'<sup>1</sup> may be an understatement when it refers to the millions of people whose life threads are spun on the spindle of Tyranny, measured by the hollow rod of Famine and cut by the scissors of War.

The ones who find themselves in such situations are determined to flee their native lands in search for a better life. They become refugees.<sup>2</sup> Unfortunately, this is not a sporadic phenomenon and the last years have even seen an increase in the number of persons who try to escape their countries and seek asylum. To make things worse, among those affected, there are many children. The most fortunate ones have their parents by their side, but there are also numerous cases of orphans, abandoned children or some who simply escape on their own.

The European Union (hereinafter, the 'EU') have been seen as the place with greener pastures by the refugees coming from the Middle East. After all, the majority of those in this situation are from Syria (6.7 million) and Afghanistan (2.7 million).<sup>3</sup>

Therefore, the EU had to face an unprecedented humanitarian challenge due to the massive numbers of people needing help in a short time span. The resources deployed were not just economical but also of legal nature. This is the point where we make our entrance.

The aim of this paper is to analyse and offer a solution to some of the problems that children refugees face in their journey towards a normal life: a method to be with their family again. From the 'thousand ways to go home again', we will present the one that leads not to the physical home which has been unwillingly abandoned, but to the home where the children will find those who love and nurture them.

Let us imagine the following situation. *Avizeh is an Afghan girl born in 2006. At the age of 3, her parents were arrested by the regime and eventually freed. However, they lost their jobs and they didn't have access to employment. Consequently, they gave their consent for their daughter to be entrusted under the kafala<sup>4</sup> tutelage to another family at the age of 4.*

*A few years later, Avizeh set off to West Europe and arrived in Germany in 2019. Here she was granted refugee status and placed in one of the children care centres. Avizeh maintained frequently contacts with her biological parents. Receiving news from Avizeh, her guardian parents apply for family reunification at German consulate. During the proceedings, competent authorities traced and found his biological parents in Afghanistan. Thus, family reunification with kafala parents was rejected because Avizeh's biological parents are alive.*

As it may have already become apparent, the objective of this paper is practical. *The status quo of EU law does not provide yet all the solutions needed to solve such a problem. Moreover, the institution of kafala should be under legal protection regardless the existence of refugees, since it is, as we will see, an international recognized instrument for child protection.*

*Therefore, it is sensible to ask about the legal possibilities for the children under kafala to be reunited with his guardian parents<sup>5</sup>, if their biological parents are still alive.*

In order to answer this question, we will analyse the legal framework of the right to a family life (2), who can apply for a refugee status (3) and the special care needed when there is a minor refugee involved (4). Finally, we will see how the family can be reunited (5).

## 2. THE RIGHT OF FAMILY LIFE IN EU AND EUROPEAN LEGAL INSTRUMENTS

### 2.A. GENERAL EU ACTS

Although the EU is often compared to a macro family, the micro families have not always been its prime point of interest. This is not to say that the Union law neglects family ties. This apparent want of solid regulation is the result of a simple factor: means of action. The purpose of the Union was (and still is) to ensure peace in the Old Continent. At least at first, the means to achieve the goal were economic. Nevertheless, as the organization grew both horizontally (in the number of member states) and vertically (the depth of the harmonization process), it had to integrate other aspects, especially the ones regarding human rights.<sup>6</sup> However, the present state of family-related European law may seem meagre compared to other fields.<sup>7</sup> In fact, they only cover jurisdiction, applicable law, recognition and the enforcement of judicial rulings.

The EU can only take action within the limit of its competences according to the conferral principle.<sup>8</sup>

<sup>1</sup> L. Tolstoy, *Anna Karenina* (2008), at page nine.

<sup>2</sup> According to the United Nations High Commissioner for Refugees (UNHCR), there are 70.8 million forcibly displaced people worldwide, of which 25.9 million are considered refugees. The data can be found on <https://www.unhcr.org/figures-at-a-glance.html>.

<sup>3</sup> *Ibid.*

<sup>4</sup> More on this institution, see *infra*, section 5.B.

<sup>5</sup> The guardian parents are called *kafils*, a term that will be explained *infra*, section 5.B.

<sup>6</sup> See Art. 2, 3, 6, 21 of Treaty on the European Union, Article 205 of Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union.

<sup>7</sup> E.g. divorce, parental responsibility, parental child abduction, maintenance claims, cross-border family mediation, matrimonial property regimes, property consequences of registered partnerships, cross-border placement of a child including foster family. For details, see [https://e-justice.europa.eu/content\\_family\\_matters-44-en](https://e-justice.europa.eu/content_family_matters-44-en).

<sup>8</sup> Art. 5 of Treaty on European Union.

The articles which present the domains in which the EU can pass laws<sup>9</sup> do not mention directly substantive family law, therefore it's the duty of each Member State (hereinafter, the 'MS') to put in place family policies. However, there is one more ace up the sleeve of the European legislator: private international law. It has been stated that 'the European Union lacks, in general, the power to regulate family and child related matters substantively. Rather, it has the power to address those matters from the standpoint of private international law.'<sup>10</sup> The most known normative acts are Regulation 2201/2003<sup>11</sup> and Regulation 4/2009.<sup>12</sup> Unfortunately, the above-mentioned acts do not help us solving the issue of *kafala* because we do not try to recognize a MS judgement in matrimonial matters, parental responsibility or maintenance obligations. Moreover, these regulations deal with procedural matters (e.g. which is the competent court) and not with substantial matters. And our problem, as presented in the imagined case, is a substantial one. Therefore, we must look further on.

An answer may be found in the first level of the European judicial order: The Charter of Fundamental Rights of the European Union (hereinafter, the 'CFR'). It was originally proclaimed by Parliament, the Council and the Commission in 2000, and again in 2007, but it became legally binding with the entry into force

of the Treaty of Lisbon in December 2009. Now it has the same legal force as the EU Treaties [Article 6(1) of Treaty on European Union (hereinafter, the 'TEU')]. The CFR states in Articles 7 and 24 the rights of the child.

For our purpose, we pinpoint Article 24(3) that underlines that 'every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.' However, the MS are not obliged to enforce these provisions in every case. According to Article 51(1) CFR, 'the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the MS only when they are implementing Union law'. Thus, there is no situation where EU law is applicable without the incidence of the fundamental rights. This rule has been clearly stated in the Court of Justice of the European Union (hereinafter, the 'CJEU') case law: 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations.'<sup>13</sup>

As we can gather, the CFR does not act like the European Convention on Human Rights (hereinafter, the 'ECHR'), which can be directly applied if necessary. The first can be seen as the scent of the rose.

If the national law or its interpretation is like a rose, then the judge will know that it is a good one if it has a fragrance. Nevertheless, if the applicability of the law to a peculiar case does not have the desired odour, then the judge should decide if the law itself does not exude the sweet whiff and, in that case, if it is desirable to interpret the law according to the Charter, so that the law could smell of good omens again.

In order to find more tools that can be used for our cause, it would be sensible to pay a visit to the European powerhouse of human rights.

## 2.B. THE PROTECTION OF CHILDREN UNDER THE ECHR

Although this paper aims to find a solution in the EU law, the standards shaped within the Council of Europe should not be overlooked. Fortunately, CFR itself encourages us to make this endeavour in the Article 52(3).

The ECHR, the first Council of Europe's convention<sup>14</sup>, ruled in Article 8(1) that 'everyone has the right to respect for his private and family life (...)' On this basis, MS are obliged not only to refrain from interferences, but to actively employ measures to make these rights effective. The latter obligation was enshrined in the case-law of the European Court of Human Rights (hereinafter, the 'ECtHR') as positive obligation for MS to secure the

rights provided by ECHR. For example, in the case of *Marckx v. Belgium*, ECtHR stated that 'the object of the Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities'<sup>15</sup> which can be also achieved if the state allows 'those concerned to lead a normal family life'<sup>16</sup> and their domestic law must have 'legal safeguards that render possible as from the moment of birth the child's integration in his family'.<sup>17</sup>

Regarding to our subject, there are a few case-laws of great importance concerning the existence of family life. ECtHR stated that family life is present between the foster parents and the child, being defined by the close parent-child similar ties between them.<sup>18</sup> The same conclusion was reached in a case<sup>19</sup> concerning the inability to legally recognize a Peruvian adoption, considering the existence of *de facto family ties for more than ten years between the applicants. In contrast, the absence of biological ties and a steadfast relationship with the child, all wrapped in legal uncertainty weighted heavier against an alleged parental project and the potential emotional bonds, concluding that de facto family life do not exist.*<sup>20</sup>

Furthermore, in a case concerning family life as well as immigration, ECtHR appreciated that the State Parties' (hereinafter, 'SP') obligations to

<sup>9</sup> Art. 3-6 of the Treaty on Functioning of the European Union.

<sup>10</sup> P. Franzina, *The place of human rights in the private international law of the union in family matters*, in *Fundamental Rights and Best Interests of the Child in Transnational Families* (2019), at p. 147.

<sup>11</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003, L 338.

<sup>12</sup> Council regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009, L 7.

<sup>13</sup> C-617/10, *Åklagaren v Hans Åkerberg Fransson* (ECLI:EU:C:2013:105), at para. 19.

<sup>14</sup> Adopted in 1950 at Rome, entered into force in 1953.

<sup>15</sup> ECtHR, *Marckx v. Belgium*, Appl. no. 6833/74, Judgment of 13 June 1979, at para. 31. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> ECtHR, *Moretti and Benedetti v. Italy*, Appl. no. 16318/07, Judgment of 27 April 2010, at para. 48 and *Kopf and Liberda v. Austria*, Appl. no. 1598/06, Judgment of 17 January 2012, at para. 37.

<sup>19</sup> ECtHR, *Wagner and J.M.W.L. v. Luxembourg*, Appl. no. 76240/01, Judgment of 28 June 2007, at para. 117.

<sup>20</sup> Council of Europe/ECtHR, *Guide on Article 8 of the European Convention on Human Rights*, 2019, para. 249, available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf).

admit to its territory residents' relatives will take into account the particular circumstances of the persons involved and the general interest.<sup>21</sup> The States should consider the extent of the ties and how the rupture may affect them, the existing barriers preventing living in the country of origin, as well as if any aspects of immigration control and public order weigh in favour of exclusion.<sup>22</sup> The family reunification process must be marked by transparency and coherence, without undue delays.<sup>23</sup>

In order to connect all these principles with a proper solution to our case, we have to address the issue of the identity of family members under the EU law.

## 2.C. WHO CAN BE A FAMILY MEMBER?

As we have seen, the EU cannot directly regulate family matters. Nevertheless, it has the power to influence some aspects when passing laws in the domains where it has competence, namely the free movement of workers and policies on border checks, asylum and immigration [Article 78(2)(a), (b) and Article 79 of the Treaty on the Functioning of the European Union (hereinafter, the

'TFEU')]. This has been done via several directives.

The general frame is established by the Directive 2004/38/EC.<sup>24</sup> Browsing its Article (2)(2) we learn that a family member is the spouse (a), the partner (b), 'the direct descendants who are under the age of 21' or are 'dependants' (c).

*In addition to that, there are two acts regarding the refugees and their status in the EU. In the light of Article 2(j) of Directive 2011/95/EU<sup>25</sup> and Article 2(c) of Directive 2013/33/EU,<sup>26</sup> 'family members' means, in so far as the family already existed in the country of origin, the father, mother or another adult responsible for the beneficiary of international protection, when that beneficiary/applicant is a minor and unmarried. They must be present in the same MS in relation to the application for international protection.<sup>27</sup>*

Closely tight with the previous act, we add the Directive 2003/86/CE<sup>28</sup> which determines the conditions for the exercise of the right to family reunification by third country nationals. The notion 'family members' is treated in *Chapter II*.

*According to Article 4 of the Directive, family members are divided in two categories. For the first category, MS shall authorize the entry and residence subject to conditions laid down in Chapter IV, as well as in Article 16. For the subsequent one, MS may, by law or regulation, authorize the entry and residence subject to compliance with the conditions laid down in Article 4(2)(3) and Chapter IV.*

## 3. GRANTING PROTECTION TO THE REFUGEES

### 3.A. REFUGEE'S STATUS IN THE EU

As the EU gained competence in more diverse domains, its awareness increased in the same trend. The Union chose not to neglect international problems that also reverberated here, locally. One of these concerns is related to the humanitarian crisis of the refugees.

The TFEU presents its goals to help those seeking protection or asylum.<sup>29</sup> On this basis, several acts have been passed. One of them is the Directive 2011/95/EU which enshrines the right to obtain refugee status by third-country nationals which arrive on European Union territory. The legal framework allows third-country nationals to be protected internationally by obtaining refugee status when, in their country of origin, they are subjected to persecution within the meaning of Article 1 Section A of The 1951 Refugee Convention relating to the

status of refugee and its 1967 Protocol (hereinafter, the 'Geneva Convention') and within the limits defined in Article 9 of Directive, respectively.

Considering the scope of application of the Directive, an act of persecution must be: serious enough in nature or by its repeated nature to constitute a serious violation of fundamental human rights, in particular of rights from which no derogation is possible under Article 15(2)<sup>30</sup> of the ECHR or be a sum of various measures, including human rights violations, that are serious enough to affect an individual in a manner similar to those mentioned above.<sup>31</sup>

Paragraph 2 of Article 9 defines a number of non-exhaustive examples of what may constitute persecution as defined above: acts of physical or mental violence, including acts of sexual violence; legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; prosecution or punishment which is disproportionate or discriminatory; denial of judicial redress resulting in a disproportionate or discriminatory punishment; prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2); or acts of a gender-specific or child-specific nature.

<sup>21</sup> ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Appl. no. 9214/80, 9473/81, 9472/81, Judgment of 28 May 1985, at para. 67-68.

<sup>22</sup> ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, Appl. no. 50435/99, Judgment of 31 January 2006, at para. 38.

<sup>23</sup> *Ibid.*, para. 335-337. ECtHR, *Tanda-Muzinga v. France*, Appl. no. 2260/10, Judgment of 10 July 2014, at para. 82.

<sup>24</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the union and their family members to move and reside freely within the territory of the member states amending regulation (EEC) no 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004, L158.

<sup>25</sup> 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, OJ 2011, L 337.

<sup>26</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on laying down standards for the reception of applicants for international protection, OJ 2013, L 180.

<sup>27</sup> Article 2(j) para. 3 and Article 2(c) para. 3.

<sup>28</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003, L 251.

<sup>29</sup> Articles 77-80 TFEU.

<sup>30</sup> No derogation from Article 2 (Right to life), except in respect of deaths resulting from lawful acts of war, or from Articles 3 (Prohibition of torture), 4 (paragraph 1) (Prohibition of slavery) and 7 (No punishment without law) shall be made under this provision.

<sup>31</sup> Article 9(1) of the Directive 2011/95/EU.

When applicants are under-aged and unaccompanied child, MS shall as soon as possible take measures to ensure that a representative represents and assists him/her to enable to benefit from the rights and comply with the obligations provided for in Directive 2013/33/EU.<sup>32</sup>

The representation of the minor must be ensured following of high procedural guarantees, all these to ensure the best interest of the child.

Therefore, there are several requirements to be fulfilled: making independent and impartial decisions, avoiding the conflict or potential conflict of interests with the minor and continuity of representation. All these together with the necessary means for representing the unaccompanied minor will be regular assessed by the appropriate authorities. In specific cases, the minor must be placed together with foster family/ siblings in suitable accommodation or efforts should be made to trace his/her family members. Moreover, the competent authorities must ensure appropriate training for those working with unaccompanied minors.<sup>33</sup>

In the EU case law and in the recommendations of the European Commission, guardian is a widely used concept to designate the one that ensures the protection for children who are deprived of their family or who cannot have their interests represented by their parents.

However, the concept of guardian and his functions are not defined by EU law as this is a substantive family law issue.

According to EU Agency for Fundamental Rights (hereinafter, the 'FRA'), guardianship is different from legal representation. While a legal representative only ensures representation proceedings, a guardian has three key functions: legal representation, safeguarding the child's best interest and ensuring his/her well-being. According to FRA vision, a guardian is considered to be an independent person who safeguards the child's best interests and general well-being and ensure his/her representation when necessary.<sup>34</sup>

The procedure for appointment a guardian for an unaccompanied minor is provided by national law.

### 3.B. THE RIGHT TO FAMILY REUNIFICATION OF A REFUGEE

The 17<sup>th</sup> and 18<sup>th</sup> centuries may have been the era of Enlightenment for Europe, but the 20<sup>th</sup> was surely the Break of dawn from an international point of view. The experience of the Wars taught the majority of countries a harsh but effective lesson: something must change. Therefore, almost in a haste, the international community adopted the Universal Declaration of human rights in 1948. Its impact was too vast to be fully acknowledged in the present paper

and, consequently, we will underline the fact that it was the first international act which recognized the right of persons to seek asylum from persecution in other countries. The Geneva Convention of 28 July 1951<sup>35</sup> was adopted on its basis.

According to this centrepiece of international refugee protection, the term 'refugee' will be granted in connection with persecution acts for reasons of race, religion, nationality, membership of a particular social group or political opinion in the origin state. At the Conference of Geneva Convention,<sup>36</sup> the participants also agreed unanimously, as a recommendation for SP, that the principle of the unity of the family is an essential right of the refugee.<sup>37</sup>

Despite the lack of provisions regarding family reunification and unity of the refugees, the representatives of the SP to the UN Conference on the Status of Refugees and Stateless Persons recommended that SP 'take the necessary measures for the protection of the refugee's family, especially with a view to: ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country; the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.'<sup>38</sup>

Nonetheless, for the purpose of this paper, another UN Convention has an extensive application. It is UN Convention on the Rights of the Child 1989 (hereinafter, the 'CRC'), which is become the most widely ratified human right treaty in history. All provisions of CRC should be interpreted in the light of whereas no. (5) of preamble which envisage that, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

The provisions of CRC regarding unaccompanied and separated children was interpreted by another UN body<sup>39</sup> and the conclusions were contained in the General Comment no. 6 (2005)<sup>40</sup> (hereinafter, the 'GC 6'). According to GC 6, unaccompanied minors are children, as defined in article 1 of CRC, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. The protection obligations arising from the CRC require SP to take all necessary measures to identify children as being unaccompanied or separated at the earliest possible stage, including at the border, to carry out tracing activities and, where possible and if in the child's best interest, to reunify separated and

<sup>32</sup> EASO *Guidance on reception conditions for unaccompanied children: operational standards and indicators*, December 2018, at p. 18 available at <https://www.easo.europa.eu/sites/default/files/Guidance-on%20reception-%20conditions-%20for-unaccompanied-children.pdf>.

<sup>33</sup> Article 24(4) of the Directive 2013/33/EU.

<sup>34</sup> European Union Agency for Fundamental Rights, *Guardianship for children deprived of parental care. A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, Publication Office of the European Union, Luxembourg (2014), at page 14, 37-38.

<sup>35</sup> The 1951 Convention and The 1967 Protocol Relating to the Status of Refugees.

<sup>36</sup> Conference of Plenipotentiaries to complete the drafting of, and to sign, a Convention relating to the Status of Refugees and a Protocol relating to the Status of Stateless Persons, Geneva, Switzerland, 2-25 July 1951.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> The Committee on the right of the child within the 39th session (17 May - 3 June 2005).

<sup>40</sup> UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, available at: <https://www.refworld.org/docid/42dd174b4.html>.



unaccompanied children with their families as soon as possible.

Finally, when addressing the fate of unaccompanied and separated children, the Committee has considered among other options that family reunification is a durable solution. Such a solution is possible only if SP make considerable efforts to return an unaccompanied and separated child to his/her parents except where further separation is necessary for the best interest of the child, taking full account of the right of the child to express his or her views.<sup>41</sup>

Under the paragraph 83 of GC 6, when family reunification must be done in SP concerned, the Committee emphasized the obligations provided by Article 9 and 10 of CRC, especially Article 10(1) which provides that 'applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner' and 'shall entail no adverse consequences for the applicants and for the members of their family'.

## 4. TO BE OR NOT TO BE... A MINOR REFUGEE?

### 4.A. PARTICULARITIES OF BEING AN UNACCOMPANIED MINOR

When referring to an unaccompanied minor, we should take into consideration the Asylum and Immigration EU acquis perspective.

By examining the *sedes materiae*<sup>42</sup> concerning this notion, our subject's portrait is built as a person below the age of 18 who arrives on the territory of the MS. Two alternative approaches can be fulfilled for a minor to be considered unaccompanied, respectively to arrive alone on the territory of a MS or to be abandoned after arrival. Furthermore, the last element in our portrayal resides in the express statement that the practice of the adult responsible for a minor child is that of the MS in question.

In shorter terms, an unaccompanied minor is a child left in a foreign state with no protection. Starting from the premise that refugees are people who are looking for safety in another country, because their lives are affected in the state of origin due to war, violence, conflict or persecution, granting this status to an unaccompanied child raises the alarm on the immediate need of protection from the MS.

Corroborating Article 10(3) with Article 4(2)(a) of Directive 2003/86/EC, if an unaccompanied minor has been granted refugee status, the MS *will authorize* the entry and stay for the purpose of reuniting the family for his or her first-degree relatives on the direct ascending line without complying the condition to be dependent on him/her and to not enjoy proper family support in the country of origin. When the refugee does not have relatives on the direct ascending line or when they cannot be found, the MS *may authorize* the entry and stay of any other member of the family, for the purpose of family reunification. We can extract from this reasoning an obligation for the authorities to verify if the child is accompanied by people in these categories and, where no parent or legal guardian can be traced, these may authorize the entry and stay for any other member of the family.

According to the Directive evoked, its main purpose is to protect the family life in those situations when it cannot continue in the country of origin, by attempting to transfer it in a safer place. For this objective to be fulfilled, it is mandatory to recognize a right to reunification, as well as legal means to grant the execution of such right. Luckily, the Directive raises no problems concerning the obligation of the MS in this case, if the relatives are among those listed by the legal text.

Following into our young *Avizeh's* case, the situation is uncertain. In the light of the Directive, family reunification could be granted to her only if it concerns authorizing the entry and residence of her family of origin, as the text does not make any reference to *de facto* family relationships. In this case, it seems like the spirit of the Directive is left apart, as there are no means of assuring the right to family life for the *makful* and the *kafil*,<sup>43</sup> leaving their situation under a sad stormy cloud.

Finally, it is to be mentioned that the Directive itself, in Article 4(5) makes a reference to the best interests of the minor child during the examination of a request by a MS. One might wonder if the love between *kafala children and kafils should not be sheltered equally as family love. However, the above-mentioned legal provision fails to protect such family ties.*

Even if the best interest of child is not valued enough for the *makfuls*, a weighted analysis in its favour would be preferable.

### 4.B. THE BEST INTEREST OF THE CHILD

#### 1. QUALIFICATION AND APPLICATION

Apart from the common perception of qualifying the best interest of the child as a principle in the decision-making process regarding the child, it is equally important to mention that beyond this first layer of legal importance there are two more aspects to take into account: being a subjective right and rule of procedure at the same time.

<sup>41</sup> *Ibid.*, para. 78-79.

<sup>42</sup> Article 2(f) Directive 2003/86/EC, Article 2(l) Directive 2011/95/EU and Article 2(e) Directive 2013/33/EU.

<sup>43</sup> Both *kafil* and *makful* are derived from the verb *kafala* which means to take charge, to nurse. *Kafil* is the active participle (the parent), while *makful* is the passive participle (the child).

The triple legal nature enriches the concept which, at first sight, may seem undetermined and susceptible of discretionary application.<sup>44</sup>

To begin with, the best interest of the child as a principle was consecrated by the CRC, stating in Article 3 para. 1 that all actions concerning children, regardless the nature of the procedure in which it is taken,<sup>45</sup> their best interest should be the most important concern.<sup>46</sup> Later on, it was taken by the EU Charter in Article 24 in a similar approach. Traditionally, it is considered to be an interpretative principle, meaning that if a legal text involves several interpretations, we use the one that serves the best interests of the child.

Regarding the concept as a subjective right, it benefits from direct applicability in court, meaning that the child has the right for his interest to be evaluated with priority and the guarantee that his interests would be valued in all decisions regarding himself.

Last but not least, the best interest as a rule of procedure implies a complex evaluation of the positive or negative

repercussions on the child. The SP to CRC must duly argue all decision in order to assure transparency and the most suited approach for the given case.

The triple legal nature was emphasized indirectly by two CJEU case-laws<sup>47</sup> where it was stated that the interpretation of a legal text serves the best interests of the child if it 'is not liable to be detrimental to the situation of the child'.<sup>48</sup> The child, as a subject of law, can evoke the right to respect his best interest when the interpretation given by the CJEU causes harm to his rights, and the latter has the correlative obligation of pronouncing a decision by taking into account all relevant aspects concerning him.

It is fair to say that the best interest is the sum of a child's needs. Therefore, to determinate the child's best interest, factors like the child's identity<sup>49</sup> (the respect for the ethnic, religious, cultural and linguistic background), and aspects concerning his wellbeing (health, education and the right to rest, leisure and play<sup>50</sup>) need to be taken into account. Moreover, an important place is taken by the child's right to be listened, according to age, maturity and capacity.<sup>51</sup>

To conclude, the best interest of the child is the rock that hangs harder on the scale, the premise of children's rights, and, although it may appear indefinite and arbitrary, it benefits from the necessary flexibility to adopt the right position for the child. If we agree that no two children are identical, concerning their personal situation and needs, then their best interests are different as well. These being said, if the same decision is to be taken for five children, the determination and evaluation of their best interest would lead us to five different results. But if five different judges determine the best interest of a single child, the result should be the same.<sup>52</sup>

## 2. FAMILY OVER EVERYTHING

There is nothing new under the sun that family represents the most important source of knowledge for a child, but also the fiercest guardian in front of the great unknown.

The CRC in the whereas no. (5) and (6) of the Preamble emphasize that the main factor with a direct contribution to the wellbeing and development of the child is a family environment. SP are obliged to ensure appropriate measures for the children seeking refugees, as tracing the parents and obtaining information and if there is an impediment to reunification, the child will benefit from special protection, assistance and alternative care<sup>53</sup> as he would have been deprived of his/her family environment.

It's interesting to see that para. 3 of this Article makes an express statement on considering *kafala* as an alternative care form.

Directive 2011/95/EU and Directive 2013/33/EU stipulate the best interest of the child as a primary consideration when implementing the provisions of them, stipulating an obligation of the MS to appreciate on family reunification possibilities when dealing with unaccompanied children.<sup>54</sup> In addition, both acts are raising a statue to the principle of family unity,<sup>55</sup> the latter mentioning that it needs to be applied in accordance to the ECHR.<sup>56</sup> As for the notion of family members, a broader interpretation is desired considering the different circumstances of dependency and the special attention to be paid to the best interests of the child.<sup>57</sup>

We observe that the legal texts manifest a shy tendency on leaving the doors open for interpretation. It is more important though to encourage the reasoning by adding a layer of fundamental rights, bringing the right to family life<sup>58</sup> as it is understood by the ECHR in our story. Corroborating the reasoning in two case-laws<sup>59</sup> of the ECtHR, the relationship that establishes under *kafala* rests under the umbrella of *de facto* family life, and where there is family life, the state should assure legal measures to integrate the children in the family.

<sup>52</sup> *Ibid.*

<sup>53</sup> Article 20 CRC.

<sup>54</sup> Whereas no. 18 of Directive 2011/95/EU and Whereas no. 9 of Directive 2013/33/EU.

<sup>55</sup> *Ibid.*

<sup>56</sup> Whereas no. 19 of Directive 2013/33/EU.

<sup>57</sup> *Ibid.*

<sup>58</sup> Article 8 ECHR.

<sup>59</sup> ECtHR, *Chibihi Loudoudi c. Belgium*, Appl. no. 52265/10, Judgment of 16 December 2014 and *Harroudj c. France*, Appl. no. 43631/09, Judgment of 4 October 2012.

<sup>44</sup> J. C. Llorens, *Présentation de l'Observation générale no 14 : forces et limites, les points de consensus et de dissension apparus dans son élaboration* in Conseil de l'Europe, *L'intérêt supérieur de l'enfant – Un dialogue entre théorie et pratique*, 2017, available at <https://www.cairn.info/l-interet-superieur-de-l-enfant-un-dialogue--9789287183972-page-9.htm>.

<sup>45</sup> Article 3 para. 1 of the CRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

<sup>46</sup> This approach makes justice to the origin of the word interest which comes from the Medieval Latin verb *interesse*. It was a compound of the preposition *inter* (between) and the verb *esse* (to be). Therefore, the interest is a relation between the wanting subject (the child) and the wanted object (family, love, protection, attention).

<sup>47</sup> C-428/15, *Child and Family Agency v. J.D.* (EU:C:2016:819), p. 21 and Case C-530/18, *EP v. FO* (EU:C:2019:583), p. 21.

<sup>48</sup> It is true that the two case-laws have as object the interpretation of the Regulation no. 2201/2003 concerning jurisdiction rules, but the statement can be used as a great example of interpreting a legal text in the light of the best interest of the child.

<sup>49</sup> GC 6 para. 20, p. 9 and GC 14, para 55-57, p. 13-14.

<sup>50</sup> UNCHR, *Guidelines on Determining the Best Interests of the Child*, 2008 p. 75, available at <https://www.unhcr.org/4566b16b2.pdf>.

<sup>51</sup> GC 6, para 29, p. 11.

Currently, there is no obligation on the SP to assimilate *kafala* to a form of guardianship, but this only means that there is something rotten in the state of family protection.

The best interest of the child is a filter. Although the ECtHR recognized a slightly strengthened protection to the *kafala*, it is not enough. It is true that the risk of abuse is present, as simulated *kafala* masking children trafficking may exist. Nevertheless, by using the best interest as described in the previous section, family unity will no longer be an abstract ideal. The *Ursae Minoris* in the constellation of children rights should be the guide, as it points a direction and allows a measure that is possible by means of interpretation.<sup>60</sup> *Kafils* are family members of the *makfuls*, as parents and adoptive parents are family members to the child.

In this context, one can ask: shouldn't family members be granted the right to reunification, regardless of their potential status of refugee?

## 5. GATHERING THE FAMILY TOGETHER

### 5.A. CHOOSING ONE OF THE THOUSAND WAYS TO GO HOME AGAIN

According to Directive 2003/86/EC, in order to exercise the right to family reunification, an application for entry and residence has to be submitted to the competent authorities of the MS concerned either by the refugee or by his/her family member or members.<sup>61</sup>

On the basis of Eurostat, our research examined the concrete possibilities to apply for entry and residence in the MS which are on top of destination for unaccompanied children.

For example, in Germany, if a refugee is a minor, his parents can join him by filing an application at the German diplomatic mission in country of origin or at another responsible embassy/consulate.<sup>62</sup> According to The Federal Office for Migration and Refugees, biological and adoptive<sup>63</sup> parents of foreign and unaccompanied minors have a privileged right to family reunification, as they do not need to prove a secure source of income.<sup>64</sup> Also, it was stated that for the *kafala* institution, the jurisdiction is not clear and a such procedure is not admitted.<sup>65</sup>

In Greece, an unaccompanied minor recognized as a refugee has the right to be reunited with the parents if there are no other adult relatives in Greece. In this situation, Greek national law exempts some conditions: social security coverage, residence and regular and adequate income. However, according to national law transposing the Family Reunification Directive, only recognized refugees have the right to apply for reunification with relatives who are third-country nationals, if they are in their home country or in another country outside the EU.<sup>66</sup>

A report of the Commissioner for Human Rights revealed that in Greece, administrative obstacles result in a low number of beneficiaries of international protection being able to initiate a family reunification procedure. Moreover, the deficiencies in the family reunification procedure sometimes result in families trying to reunite through dangerous irregular routes.<sup>67</sup> On this basis, a long awaited Joint Ministerial Decision was issued in August 2018 which improved the procedures of family reunification with refugees and was followed by more positive family reunification decision.<sup>68</sup>

In Belgium, the parents of an unaccompanied minor (under eighteen years old) with a refugee status or under subsidiary protection has the right to family reunification. It is necessary that minor child has arrived on the Belgian territory unaccompanied by an adult legally responsible and in charge of its care or was left alone after the arrival. Application for family reunification can be asked from abroad by family members.<sup>69</sup> For other forms of legal guardianship, including *kafala*, there is a discretionary possibility to obtain the reunification.<sup>70</sup>

In Italy, there is a right of family reunification regardless of their age and condition for a minor child which gathered the refugee status and whose parents or other family members that take care of him are in the origin state. The procedure is complicated, having two steps: the request of the *Nulla Osta* at the Single Immigration Office of the competent Prefecture and following the visa application at the Italian representation abroad.<sup>71</sup> What is very important to mention is that there is a tendency on extending the right on family reunification, by analogy, to the *kafala*.

<sup>60</sup> J. Fierens, *Alphae ursae minoris - L'étoile polaire et l'intérêt supérieur de l'enfant parmi les intérêts concurrents*, in Conseil de l'Europe, *L'intérêt supérieur de l'enfant - Un dialogue entre théorie et pratique*, available at <https://www.cairn.info/l-interet-superieur-de-l-enfant-un-dialogue--page-38.html>.

<sup>61</sup> Article 11(1) and Article 5(1).

<sup>62</sup> UNHCR, *Family reunification in Germany*, available at <https://help.unhcr.org/germany/admission-to-germany/family-reunification/>.

<sup>63</sup> J. Grote, „Family Reunification of third-country nationals in Germany”, Federal Office for Migration and Refugees, 2017, p. 20, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/11a\\_germany\\_family\\_reunification\\_en\\_final.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/11a_germany_family_reunification_en_final.pdf).

<sup>64</sup> <https://fap.diplo.de/webportal/desktop/index.html#refugee>.

<sup>65</sup> Ad Hoc Query on 2019.88 *Kafala* children, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/201988\\_kafala\\_children.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/201988_kafala_children.pdf).

<sup>66</sup> Greek Council for Refugees, *Criteria and conditions*, available at <https://www.asylumineurope.org/reports/country/greece/content-international-protection/family-reunification/criteria-and-conditions>.

<sup>67</sup> Council of Europe Commissioner for Human Rights, Report of the Commissioner for Human Rights of the Council of Europe Dunja MIJATOVIĆ following her visit to Greece from 25 to 29 June 2018, CommDH (2018)24, 6 November 2018, at para. 68-69.

<sup>68</sup> The Organization for Economic Co-operation and Development, *International Migration Outlook 2019*, Paris, 2019, p. 236.

<sup>69</sup> European Migration Network BELGIUM, S. Sarolea, J. Hardy, *Family reunification with third country national sponsors in Belgium*, July 2017, p. 13-14, 20, available at <https://emnbelgium.be/sites/default/files/publications/Final%20BE%20report%20on%20family%20reunification%20of%20TCN%20July%202017.pdf>.

<sup>70</sup> *Ibid.*

<sup>71</sup> Family First, *Ricongiungimento familiare per i beneficiari di protezione internazionale*, available at <http://ricongiungimento.it/>.

As the doctrine established 'the Italian judges consider as *makful's* best interest, the right to re-join to their own *kafil* regularly resident in Italy, in order to live in a safe familiar environment'.<sup>72</sup>

It is time to return to our young *Avizeh*, as we start to see rays of light through the cloud. As for now, in Germany there are no means for her to return to her family to reunite with his family. On the contrary, in certain countries there might be a chance for her to be reunited with her *kafil*s.

### 5.B. A FAMILY FOR EVERY CHILD – THE KAFALA

*Kafala* is a form of childcare met in Islamic culture. Its root is in Islamic law (*Shariah*) and in a *hadith*.<sup>73</sup> So, according to the Islamic view, raising a child who is not one's genetic child is allowed and, in the case of an orphan, even encouraged. But the child does not become an *adoptive* child of the new parents.<sup>74</sup> *Kafala* is the only institution recognized by the Islamic law aimed at the guardianship and protection of abandoned childhood. It's etymological meaning, translated from Arabic, is 'to add something to something else'.<sup>75</sup>

Muslims consider the family is a shield of defence from the violation of child rights (inheritance, custody, fosterage, maintenance and guardianship) and a necessary tool for the wholesome development of children. Consequently, caring for orphans and vulnerable children generally is a key tenet of Islam in order to provide them with the safety and security that a family environment offers. The *kafala* system addresses to the abandoned, to children whose natural parents or family are incapable of raising them or who are otherwise deprived of a family environment. In this system care, the child is not being entitled to the new family name or an automatic right of inheritance from it.<sup>76</sup>

This Islamic system care constitutes a form of guardianship by which the *kafil*, the new father or mother, assumes responsibility to support the *makful*, the child, until he/she reaches adulthood without creating any legal parent-child status.<sup>77</sup>

In other words, *kafala* system provides alternative care (the maintenance, the education and the protection of a minor) without altering the child's

original kinship status because in Islam the link between an adopted child and his biological parents must remain unbroken. Nonetheless, *kafala* presupposes an *unlimited entrustment* of a child to a new family. The child becomes a part of the new family and is raised in the same manner as the natural children of them. In practice, a child is usually placed in a family that is as closely related to his natural family as possible without the new parents totally replacing the original parents.<sup>78</sup>

Depending on the Muslim state, there are two different procedures of *kafala* approval. The first one involves a judicial procedure where at least one *kafil* has to make a revocable statement before the judge, in which they declare that they will take care of the child. In the other one, the consensual *kafala*, the families may reach an agreement, which must be approved by a judge or a notary.<sup>79</sup> Both hypotheses involve fulfilment of some *legal* requirements.

Conditions that need to be satisfied by the *kafil* to take care of the *makful* are: be of age, believe in Islamic religion, be able to guarantee to the child's adequate care and good growth and fulfil with dignity the parental role and responsibilities deriving from *kafala*.<sup>80</sup>

Regarding to the child, a competent juvenile court must declare him/her as abandoned. When biological parents are alive, they must give their approval for *kafala*. In some Muslim states even the child's opinion and approval are necessary to be listened and obtained.<sup>81</sup>

If the parents fail to provide care for the child in accordance with *kafala* entrustment, it can be revoked by authorities. This is not the only cause for ending the *kafala*, it can be also the death of the child or *kafil* or revocation at the initiative of any of the parties involved. However, the *kafala* placement ends when the child reaches adulthood.<sup>82</sup>

Considering that *kafala* is approved by an authority, a judge or a notary, we are in the presence of a legal guardianship until the child reaches adulthood. In the new family, as shown above, the *kafil* acquires a wide range of authority and obligations, except legal representation of the child and the *makful* enjoy many rights as the right to life, the right to live within their family and the right to be brought up in accordance with their own religious background.<sup>83</sup>

<sup>72</sup> R. Duca, „Family Reunification: The case of the Muslim Migrant Children in Europe”, Athens Journal of Social Sciences-Volume 1, Issue 2, 2014, p. 117.

<sup>73</sup> *Hadith* refers to what Muslims believe to be of the traditions or sayings of the Prophet Muhammad, revered and received as a major source of religious law and moral guidance. Its authority ranks second after that of the Quran. Scriptural authority for hadith comes from the Quran which enjoins Muslims to emulate Muhammad and obey his judgments. A *hadith* might be defined as the biography of Muhammad perpetuated by the long memory of his community for their exemplification and obedience.

<sup>74</sup> *Islamic adoptive jurisprudence*, available at [https://en.wikipedia.org/wiki/Islamic\\_adoptive\\_jurisprudence](https://en.wikipedia.org/wiki/Islamic_adoptive_jurisprudence).

<sup>75</sup> R. Duca, *op. cit.*, Athens Journal of Social Sciences - Volume 1 (2014) 2, p. 113.

<sup>76</sup> U. M. Assim, J. Sloth-Nielsen, *Islamic Kafalah as an alternative care option for children deprived of a family environment*, in African Human Rights Law Journal (AHLJ) (2014) 18, available at <http://www.saflii.org/za/journals/AHLJ/2014/18.html>.

<sup>77</sup> *Hadith* refers to what Muslims believe to be of the traditions or sayings of the Prophet A. Marotta, „Italy and Kafala: Reinventing Traditional Perspectives to Accommodate Diversity”, Italian Law Journal 2, (2016) 1, p. 194.

<sup>78</sup> *Ibid.*, at p. 13.

<sup>79</sup> A. Marotta, *op. cit.*, p. 195.

<sup>80</sup> R. Duca, *op. cit.*, p. 114.

<sup>81</sup> *Ibid.*

<sup>82</sup> A. Marotta, *op. cit.*, p. 196.

<sup>83</sup> *Ibid.*

## 5.C. SHELTERING THE KAFALA UNDER THE EU AND ECHR CASE-LAW

### 1. CJEU JUDGMENTS

Old problem, yet new solutions. In the current migration context, the demands were not long in coming. And as for every new issue in front of the CJEU, baby steps are the key.

There is only one judgment in regard to *kafala* system, Case C-129/18<sup>84</sup>, in which SM, born in Algeria on 27 June 2010 and abandoned by her biological parents at birth, was placed under *kafala* system to Mr. and Ms. M by act of the President of Boufarik Tribunal, Algeria in March 2011, according to Algerian law. In May 2012, SM applied for entry clearance for the United Kingdom (hereinafter, the 'UK') as the adopted child of a European Economic Area (hereinafter, the 'EEA') national. Her application was refused by the Entry Clearance Officer and other UK authorities on the ground that guardianship under the Algerian *kafala* was not recognized as an adoption under UK law and that no application had been made for intercountry adoption.

In these circumstances, the Supreme Court of UK referred three questions to CJEU for a preliminary ruling. In response, CJEU stated that: '... a child, such as SM, who is placed in the legal guardianship of citizens of the Union under that system cannot be regarded as a *direct descendant* of a citizen of the Union for the purposes of Article 2(2)(c) of Directive 2004/38...' and that '... such

a child does fall ... under the definition of one of the *other family members* referred to in Article 3(2)(a) of Directive 2004/38.'<sup>85</sup>

Consequently, CJEU stated that 'it is for the competent national authorities to facilitate the entry and residence of such a child as one of the other family members of a citizen of the Union pursuant to Article 3(2)(a) of that directive, read in the light of Article 7 and Article 24(2) of the Charter, by carrying out a balanced and reasonable assessment of all the current and relevant circumstances of the case which takes account of the various interests in play and, in particular, of the best interests of the child concerned.'<sup>86</sup> The CJEU concluded that, in the respect of the fundamental right of family life, as it is interpreted according to the best interest of the child, a right of entry and residence should be granted to the child, in order to assure the living with his guardian, citizen of the Union, in his MS.

Although the CJEU case presents similarities to our young *Avizeh's* case, the solution is not fully applicable, due to a mirrored perception of the Algerian case presented. However, we face a great step ahead in solving her problem, as the Court directs the MS into assimilating the child placed under *kafala* to other family member. Nevertheless, the ruling was made on the Directive 2004/38/EC. Therefore, we cannot extend this solution to other EU acts, even if they use identical or similar terms. One act that could tempt us to resort to this scheme is the Directive 2003/86/EC.

All things considered, for the time being, the ECJ only solved the problem of *kafala* in relation to one normative act. To know how other acts should be applied in this situation we have to wait for another ruling that will interpret them.

### 2. ECTHR JUDGMENTS

ECTHR has a head start of a couple years over CJEU in addressing this issue.

Case of *Harroudj v. France*, the facts referred to a minor child from unknown parents (born on 3 November 2003 in Algeria) who was put under *kafala* system care at Mrs. *Harroudj* on 13 January 2004. They arrived in France on 1 February 2004 and on 8 November 2006 Mrs. *Harroudj* applied for the full adoption of her child under French law. In support of her request she argued that to enable her child to be adopted was the solution most consistent with the best interests of the child, within the meaning of Article 3 paragraph 1 of the Convention on the Rights of the Child of 20 November 1989 and Article 1 of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. All French instances dismissed her request and redress.<sup>87</sup>

The Court observed that, in French law and in other jurisdictions, *kafala* is not equal to adoption, but it produces effects that are comparable to those of guardianship, curatorship or placement with a view to adoption.<sup>88</sup>

The Court takes the view that respondent State, applying the international conventions that govern such matters, has put in place a flexible arrangement to accommodate the law of the child's State of origin and the national law. Thus, by obviating the prohibition of adoption of a child already placed in the *kafala* system, the respondent State, which seeks to encourage the integration of children of foreign origin without cutting them off immediately from the rules of their country of origin, has shown respect for cultural pluralism and has struck a fair balance between the public interest and that of the applicant.<sup>89</sup>

The Court also stated that adoption is prohibited under Islamic law (*haram*). However, the right is accorded a special institution: *kafala* or *legal care*. In Muslim States, except for Turkey, Indonesia and Tunisia, *kafala* is defined as a voluntary undertaking to provide for a child and take care of his/her welfare, education and protection. The procedural arrangements for establishing *kafala* depend on the domestic law of each Muslim State.

Case of *Affaire Chbihi Loudoudi et Autres v. Belgium*, the facts referred to a Belgian couple, Mr. *Brahim Chbihi Loudoudi* and Mrs. *Loubna Ben Said*, which took in *kafala* care (fulfilling the legal requirements of Morocco law) a Morocco child and wants to bring her into Belgium.

<sup>84</sup> C-129/18, *SM v. Entry Clearance Officer, UK Visa Section* (ECLI:EU:C:2019:248).

<sup>85</sup> *Ibid.*, at para. 56-57.

<sup>86</sup> *Ibid.*, at para. 73.

<sup>87</sup> ECTHR, *Harroudj v. France*, at para. 5-14.

<sup>88</sup> *Ibid.*, at para. 48.

<sup>89</sup> *Ibid.*, at para. 51.



In this context, the Belgium couple applied for a long-term visa for their child (under *kafala*), but the competent authorities released a short-term visa.<sup>90</sup>

According to the principles emerging from the case law of the Court, where the existence of a family link with a child is established, the State must act in such a way as to allow this link to develop and grant legal protection making it possible to integrate the child into his family.<sup>91</sup>

In assessing the best interest of the child, the courts shall carry out an appreciation of social and family reality. Thus, on the one hand, the courts should base their decision on the time spent by the child with new family and the socio-educational and emotional care offered by them and, on the other hand, the existing link with his/her biological parents and the frequency of contacts with them.<sup>92</sup>

## 6. CONCLUSION

All things considered, it is clear that there are no legal provisions directly applicable concerning family reunification for the *makfuls* and the *kafils*, if their biological parents are still alive. This is due to the fact that parents and children, being them linked by blood or by adoption, benefit from a well-done legal framework which protect all the children's rights, including the right of family life.

It is even clearer, and the sun starts to peek even more through the cloud for young *Avizeh*, that the European law is a living instrument that won't cease to adapt to all the new situations that occur, in order to shelter children's rights.

Although we have an interpretation of Article 3(2)(a) of Directive 2004/38/EC, which considers a child placed under *kafala* as another family member, we should consider the same meaning like in the origin state and regard the *kafil* as legal guardian.

Firstly, we have legal guardians stated as beneficiaries of right to family reunification in the Article 10(3)(b) of Directive 2003/86/EC. Secondly, as ECtHR stated in *Harroudj v. France*, MS should encourage the integration of children of foreign origin by maintaining the rules and customs of their country. As we have shown above, it is obvious that the *kafala* reason is to provide children with a family environment conducive to the observance of all rights until the age of maturity without them becoming members of the *kafil's* family.

Finally, we observe that an interpretation given in accordance with the best interest of the child may offer the means for *Avizeh* to benefit from the reunification with her *kafils*. In order for the best interest to be applied in its full spirit, it should be reinforced by means of law.

*De lege ferenda*, we propose a modification of the Directive 2003/86/EC, in order to include *de facto* family ties as holders of the right to family reunification, even if the biological parents are still alive. As relevant criteria for appreciating on the reunification, we emphasize the strength of the ties between the child and the biological parents, respectively the *kafils*<sup>93</sup>, a stronger application of the child's best interest and the child's views, according to his maturity and understanding. Young *Avizeh* should meet a balanced decision of the authorities that will assure her growing beside a family that chose to help her biological parents by offering her a warm home, the respect of her cultural identity and access to education. We must not forget that her blood ties remain solid, but *kafala* ties are the ones who will potentially ensure her securities. All these ties form the outline of a family life that only the law can offer to young *Avizeh*. Then, she and her *kafils* can fill that shape and become a happy or an unhappy family.

But the latter is only up to them.

<sup>90</sup> ECtHR, *Chbihi Loudoudi and Others v. Belgium*, at para. 6-12.

<sup>91</sup> *Hadith* refers to what Muslims believe to be of the traditions or sayings of the Prophet/*bid.*, at para. 89 and *Wagner and JMWL v. Luxembourg*, Appl. no. 76240/01, Judgment of 28 June 2007, at para. 119.

<sup>92</sup> ECtHR, *Chbihi Loudoudi and Others v. Belgium*, supra note 28, at para. 100.

<sup>93</sup> And every other alternative care that is similar to *kafala*, in a *lato sensu* view.

SEMI-FINAL C

# EU AND EUROPEAN CIVIL PROCEDURE

## PARTICIPATING TEAMS

ALBANIA, FRANCE, ITALY, PORTUGAL, SLOVENIA, SPAIN

1<sup>st</sup> place: Team France

2<sup>nd</sup> place: Team Italy

3<sup>rd</sup> place: Team Spain

Selected papers for TAJ:

Team Albania

Team France



30 JUNE - 1 JULY 2020, ONLINE

# JURY MEMBERS

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## HALDI KOIT (EE)

JUSTICE COUNSELLOR OF THE MINISTRY OF JUSTICE OF ESTONIA  
AT THE PERMANENT REPRESENTATION OF ESTONIA TO THE EU,  
LECTURER IN PRIVATE INTERNATIONAL LAW

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2020 was the third time I was asked to be a Jury member in the Themis competition EU and European civil procedure semi-final. The semi-finals in 2018 and 2019 were very compelling and interesting, so I gladly accepted also the invitation this year. This year I had the great honour to be chair of the Jury.

While the competition in 2020 was affected by the crisis, EJTN brought it to a new level with eThemis – allow me to thank the EJTN for all of their work on making this happen. The teams lived up to the challenge, produced video presentations in addition to writing papers while some of them were stuck in different cities. Regardless of this obstacle, the teams were able to find novel legal problems to analyse or novel approaches to known problems. This is one of the things I as a jury member have come to expect from teams – fresh eyes and minds looking at subjects, which have been thoroughly analysed by many, but still being able to find topics that need more attention or problems that would benefit from new solutions. It is good to know that those are the minds that will take Europe further, while still being united!

The teams were pushed out of their comfort zones, but they seemed even more motivated than during the previous years! Even during the online moot part – most teams did not have a possibility of discussing among themselves, some had technical problems, but they were still striving for more with a sense of teamwork and competitiveness! Hopefully winning the teams will still have the possibility of meeting each other in the final!

I personally hope that the future Themis competitions will be a hybrid competition – physical competitions, but also including some sort of video presentations.

Finally, I'd like to thank all the participants of this year, the ETJN organisational team without whom it would have not been possible. I also take this possibility to call upon the readers of this second TAJ – if you haven't done so yet, take part of next year's Themis competition! It is a great opportunity to challenge yourself in a fields of law you might now be particularly used to, see how you deal with stressful situations, but also get to know colleagues from all around Europe. This also helps build mutual trust which is the foundation of European law and the Union itself!

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## HRVOJE GRUBIŠIĆ (EC)

EUROPEAN COMMISSION, DG JUST: CIVIL JUSTICE POLICY UNIT,  
SECRETARY OF THE EUROPEAN JUDICIAL NETWORK (EJN) IN CIVIL  
AND COMMERCIAL MATTERS

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Working in the civil justice policy unit of the European Commission's Directorate General for Justice and Consumers, and having the honour of serving since 2017 as the secretary of the European Judicial Network in civil and commercial matters, I can proudly say that I am well acquainted with the activities of our partner network – the European Judicial Training Network, and that I have on multiple occasions been well placed to appreciate their unique and irreplaceable contribution to the formation of European legal professionals. This being said, 2020 has marked my very first time in serving as a jury member in the THEMIS competition, and I am happy to say that I have not expected the experience to be as rewarding as it was.

As was to be expected of the participants in the advanced stages of an international legal competition, the teams were quite well prepared and very enthusiastic to present their individual topics. However, I can honestly say that I was quite surprised by the high level of innovative thinking that the individual teams invested into their work. Private international law is a very academic branch of law – which is natural given that in the context of the EU, this area is still expanding, and year-by-year new instruments, mechanisms and procedures are introduced into its library of rules and provisions. This means that, many times, articles written on EU private international law have a theoretical character. Against this background, I was – as a lawyer first and then as a jury member – impressed when I saw the level of practical thinking that many of the teams imbued their presentations with. This is, of course, not just admirable, but also appropriate for judicial professionals, who are the very ones that European citizens look toward to apply complicated legal rules to practical situations. It should also be mentioned that many of the topics which were covered in this leg of the competition are ones which have been extensively researched and written about, and it is no small feat that in every case where this applied, the teams found new issues to be considered and new ways in which the matter at hand could be interpreted. Coupled with what I've already mentioned on the practical-minded approach of dissecting the topics, the European Judicial Training Network and the THEMIS project staff can be proud of the mentality and analytical spirit which this competition is fostering with Europe's judicial professionals.

It should also be mentioned that even though the competition was held in the difficult times of mid-2020 (a year, which is by now almost certainly universally abhorred), the THEMIS staff managed to make the best of it, and employing an approach where the teams were given the opportunity to express themselves in written, in a prepared video segment and in an oral discussion. This gave us, the members of the jury, a singular chance to judge – and to appreciate – all aspects of the teams' communications skills. A category in which all delivered admirably.

As I write this, I simultaneously look forward – again, primarily as a lawyer – to adding the articles of this THEMIS Annual Journal to my library of academic references as a worthy inclusion indeed.

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## DANUTĖ JOČIENĖ (LT)

JUSTICE OF THE CONSTITUTIONAL COURT OF THE  
REPUBLIC OF LITHUANIA, PROFESSOR AT MYKOLAS  
ROMERIS UNIVERSITY, VILNIUS, LITHUANIA

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First of all, I would like to express my sincere gratitude to the EJTN for allowing me to be a member of the Semi-final Jury of the Themis Competition of 2020. This was my second time when I was asked to be a Jury member of this unique competition, this time – for the Semi-final C: EU and European Civil Procedure. This year the organization of the Themis Competition was extremely complicated following the COVID-19 pandemic across Europe and also, worldwide. Therefore, many thanks to organisers, Mr Arno Vinkovič and IT team of the EJTN in particular, who have designed an excellent competition framework both to you and us, Jury members.

Secondly, to confess you in all honesty, I dream to return back to our traditional form of the Themis Competition and the possibility meeting you face-to-face in the future. Thirdly, I have to admit that due to the high level of Themis Competition and interesting topics analysed in the year of 2018 Semi-final B: European Family LAW, which took place in Vilnius, Lithuania and where I was asked to act as a Chairperson of the Jury, I gladly accepted the EJTN's second proposal to serve as a Jury member in the Semi-final of 2020.

For lawyers and judges European Civil Procedure can be regarded as only one small field, however, the importance of this small field has increasingly been growing. This continuously developing branch of law is quite complex and raises many practical questions in its application, therefore, all developments in this field should strictly be followed and accordingly, observed in the practice. Therefore, during the competition it was very important for me to see whether Teams participating in the Semi-final C have knowledge on the latest development in this field and also, to testify how they are able to comment and (or) to express their opinion on such latest trends, ongoing discussions, recent case law of the EU Court of Justice, European Court of Human Rights, etc. Moreover, I was always genuinely respectful of fact that these young lawyers participating in the competition have actually made that decision to spend not only months of their time but also significant amount of their personal vigour to research, analyse, deconstruct a particular legal issue in order to be able to formulate their unique legal proposition. This year six excellent Teams were participating in Semi-final C: EU and European Civil Procedure: Albania, Italy, France, Portugal, Slovenia and Spain.

When reading the papers submitted by all six Teams, I was very positively impressed by very deep inter alia legal analysis provided in their written papers in the selected area. I was also extremely surprised by the topics they have chosen for their presentations.

The topics were varying a lot from more classical topics on European Civil Procedure matters (e.g. Team Italy “Rule of law and circulation of judgments in civil matters” or Team France “Insight into the Recognition of Provisional measures in the European Judicial Space”, etc.) to more complex legal, scientific and also, technical issues such as Team's Slovenia presentation on “Precarious Work in the New Era of Gig Economy and Forum Shopping” or Team's Portugal presentation on “Walking in the Matrix: comment on the European Parliament Resolution of 16 February 2017, regarding legal personality of Artificial Intelligence”.

Interestingly all six Teams presented quite different topics in the area of the European Civil Procedure. Some of them were analysing more classical procedural issues concerning the status quo of the circulation of judgments in civil matters within the EU or recognition of provisional measures between Member States including the recent Regulation establishing a European Account Preservation Order (“EAPO Regulation”). Other Teams decided for more complex and specific issues such as the creation a specific legal status for robots, determining the international jurisdiction in cases of defamation in cyberspace or discussing various aspects on Gestational Surrogacy.

It should also be noted that the Jury members chose unanimously the paper of the Albanian team “Defamation as a form of violation or personality rights in cyberspace and issues of determining the international judicial jurisdiction from the perspective of a non-EU member state” for publication, since it was forward-looking, demonstrating an in-depth overview of the Albanian legal situation in the discussed field, and also, providing the possible choice for the Albanian judges when deciding the issues on the international jurisdiction in defamation cases violating personality rights in cyberspace. I hope that this publication will be very positively accepted by the readers and will provide a specific example of Albania as not EU Member State concerning problematic issues faced by a national judge when deciding questions related to the international jurisdiction.

I also take this possibility to call upon the readers, who haven't done so yet, to take part of EJTN's Themis Competition in the upcoming years! It is a great opportunity not only to learn about European law, to develop deeper competence in the specific area of EU law, but, more importantly, to learn to act as a Team, to deal with stressful situations, to be able to answer uncomfortable questions the Jury might pose. The Themis Competition gives also a possibility of finding contacts, having good times, obtaining new communication skills and new friends from all around Europe.

Therefore, in this Competition all participants are equally winners. I congratulate sincerely all six Teams which participated in the Semi-final C: EU and European Civil Procedure in 2020. This Themis Competition which was held under the specific pandemic circumstances has also created for me a great source of professional satisfaction.

And, finally, the Themis Competition helps to build a mutual trust which is the foundation of European law and the European Union itself!



ADRIAN SHEGA  
ALDA SADIKU  
JETA QINAMI



TUTOR: DR. ARTAN HAJDARI

Team ALBANIA

# DEFAMATION AS A FORM OF VIOLATION OF PERSONALITY RIGHTS

## IN CYBERSPACE AND ISSUES OF DETERMINING THE INTERNATIONAL JUDICIAL JURISDICTION FROM THE PERSPECTIVE OF A NON-EU MEMBER STATE

Nowadays development of digitalization and worldwide online interaction, is highlighting the phenomenon of violation of personality rights from offensive online publications, increasing the problem of determining the responsible international jurisdiction. This issue is becoming sensitive both among EU and non-EU states, such as Albania. The paper examines some main aspects of international judicial jurisdiction in matters related to the violation of personality rights in cyberspace, focusing on the criteria developed by the ECtHR and CJEU case law, in determining the responsible jurisdiction. One of the main topics of the paper is the approach and perspective of a non-EU state, as well as the legislative and jurisprudential challenges of the Albanian judiciary, in determining the international jurisdiction in cases of damage from online publications. Despite all challenges, Albanian judges relying on the principles of direct effect and superiority of EU law, may set aside national laws that are contrary to EU norms and perform the power of legally reviewing national laws from the perspective of EU law.

### KEY WORDS

International jurisdiction  
Online defamatory comment  
Personality rights  
Center of interests  
The place of the harmful event  
Online service provider

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## INTRODUCTION

The development of digitalization and interaction through online communication channels has made it easy for information to spread beyond national borders. Statistics from the International Telecommunication Union at the end of 2019, report that 53.6% of the global population use the Internet.<sup>1</sup> In Albania, for 2019, it is reported that 68.6% of the population aged 16-74 uses the Internet, of which 87.1% on a daily basis.<sup>2</sup> This level of digitalization has caused the phenomenon of “unlimited violation” of personality rights, resulting from offensive online publications, increasing the problem of determining the responsible jurisdiction, issue which is sensitive both in the community and “extra-community” space, in cases of non-member states such as Albania.

This paper aims at presenting the perspective of a non-EU state as well as the legislative and jurisprudential challenges of the Albanian judiciary, in determining the international jurisdiction in cases of damage from online publications. As a starting point in treating this topic serves one of the few cases in the Albanian court practice, in which the international jurisdiction has been discussed on a lawsuit for the removal of insulting materials published on an online media platform.

In 2015, an audiovisual recording was published in the Albanian media, made in an unauthorized manner in the apartment of the Albanian journalist S.B, where the latter appeared in intimate moments. The Kosovo portal of online news “T...i” published an article entitled “Here is why S.B’s employment was terminated”, where S.B’s photos were shown, taken from the published video. Insulting and denigrating comments were allowed towards the journalist in the comments section below the article. S.B filed a lawsuit before the Tirana District Court against the infringing material. The Albanian court found a lack of jurisdiction, arguing that the place where the harmful action occurred is not in Albania but in Kosovo, where the online portal operates and that the criterion for determining jurisdiction is not related to the consequence (damage), but to the cause (action) which brought the consequence.<sup>3</sup>

Given this case of Albanian judicial practice and the ever-evolving case law of European courts, this paper addresses aspects of international judicial jurisdiction in matters related to the violation of personality rights in cyberspace, focusing on these main topics: the concept of violation of personality rights by online publications; principle *lex loci delicti* in the optics of

the Albanian legal and jurisprudential framework; the role of the infringing entity as well as the connecting criteria for determining the international jurisdiction in cases of damage from online publications; the approach between the Albanian international jurisdiction and the European model and last but not least issues of recognition of foreign decisions in a non-member state.

## A. INTERNATIONAL JURISDICTION OF ALBANIAN COURTS IN CASES OF DAMAGE FROM ONLINE PUBLICATIONS

Albania was identified as a possible candidate country for EU membership during the European Council Summit of Thessaloniki (2003). From that moment, the path of membership has passed important stages, where the most recent one is the decision of the Council dated 25 March 2020 on the opening of negotiations for Albania’s membership in the EU.<sup>4</sup>

Opening of the negotiations path brings about an increase in Albania’s commitment to fulfilling the obligations already undertaken under the Stabilization and Association Agreement (SAA).<sup>5</sup> The Albanian Constitution gives an important position and hierarchy to international law and the law of international organizations in which Albania is part. According to article 122(2) of the Albanian Constitution: ‘An international agreement ratified by law takes precedence over domestic laws that do not comply with it’. This ‘primacy clause’ defines the position of international agreements such as SAA and European Convention of Human Rights over Albanian domestic law, which means that such agreements are applied directly and with priority in relation to the domestic legislation in case of non-compliance. Despite the primacy position, one of the main SAA aspects, is to ensure an identical legal protection through the approximation of Albanian domestic legislation with the *acquis communautaire*.<sup>6</sup> Such an example is the Law no.10428, dated 2 June 2011 *On Private International Law* (PIL). This law is approximated in its entirety with EU regulations.<sup>7</sup>

<sup>4</sup> *Enlargement and Stabilization and Association Process-Republic of North Macedonia and the Republic of Albania*, 25 March 2020, (OR.en) 7002/20, available at <https://data.consilium.europa.eu/doc/document/ST-7002-2020-INIT/en/pdf>.

<sup>5</sup> *The Stabilization and Association Agreement (SAA) between the Republic of Albania and the European Communities and their Member States*, ratified by the Assembly of Albania with Law no. 9590, dated 27 July 2006, entered into force on 1 April 2009.

<sup>6</sup> Xh. Zaganjori, A. Anastasi, E. Çani, *Shteti i së Drejtës në Kushtetutën e Republikës së Shqipërisë*, Adelprint, (2011), at 67-71.

<sup>7</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJL 177, 4.7.2008; Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJL 12, 16.1.2001.

<sup>1</sup> International Telecommunication Union data, ITU, available at <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

<sup>2</sup> *Survey on the use of ICT by families and individuals 2018-2019*, INSTAT, available at [www.instat.gov.al/media/6435/anketa-mbi-p%C3%ABrdorimin-e-teknologjis%C3%AB-s%C3%AB-informacionit-dhe-komunikimit-tik-n%C3%AB-familje-dhe-nga-individ%C3%ABt-2018-2019.pdf](http://www.instat.gov.al/media/6435/anketa-mbi-p%C3%ABrdorimin-e-teknologjis%C3%AB-s%C3%AB-informacionit-dhe-komunikimit-tik-n%C3%AB-familje-dhe-nga-individ%C3%ABt-2018-2019.pdf).

<sup>3</sup> Tirana District Court, Decision no.6340, of 27 July 2015.

## A.1 VIOLATION OF PERSONALITY BY OFFENSIVE ONLINE PUBLICATIONS, CONFLICT BETWEEN RIGHTS

Publications with offensive content often cause criminal liability for defamation,<sup>8</sup> despite disputes of a non-contractual nature for damage compensation. In cases of damage caused from offensive publications, a fair balance must be struck in the conflict between the two fundamental rights, which deserve equal respect:<sup>9</sup> the right to personality (which includes the right to dignity<sup>10</sup> and reputation of the damaged person) interpreted as part of the private life under article 8 of ECHR and freedom of expression. In today's virtual world of information technology,<sup>11</sup> the risk of violation of personality rights by an offensive publication becomes increasingly difficult to control, due to the universal access to the content of the online publication. The ability of new digital devices such as computers or mobile phones to transmit information globally constitutes a challenge for the

right to privacy.<sup>12</sup> In order to guarantee this right, the EU has adopted the General Regulation on Data Protection 2016/679, which repealed Directive 95/46/EC.<sup>13</sup> Meanwhile, in Albania this right is guaranteed by article 35 of the Constitution and also by law no.9887 dated 10 March 2008 *On personal data protection*, amended by law no.120/2014.<sup>14</sup>

The classical concept of the right to personality (including the right to dignity) has found room for treatment in the ECtHR case law, mainly under the analysis of the right to privacy guaranteed by Article 8 of the Convention. Article 8 protects the right to personal development without external interference, the personality of the individual in his relations with other human beings,<sup>15</sup> including aspects of personal identity and autonomy such as: name, photograph, physical and moral integrity, gender identity, sexual orientation and in general any personal information, the individual has legitimate expectations that is not going to be

published without his/her consent.<sup>16</sup> However, an individual's private life is not limited to an 'inner circle' where the individual can live as he/she chooses, excluding the outside world.<sup>17</sup> Private life is often 'victim' of numerous abuses, including defamation. The concept of defamation is related to giving false or untrue statements about a person, in order to damage his reputation in the eyes of reasonable members of society.<sup>18</sup> These statements may be in the form of accusations, verbal attacks or any other form of words or actions and may be disseminated by various means or devices.

Regarding the right to privacy in today's dimensions of modernization of means of disseminating information, the ECtHR has found that the Internet differs from the print media and the risk it poses to the right to privacy is certainly higher.<sup>19</sup> In the case *K.U v. Finland* ECtHR has stressed: 'Although freedom of expression and confidentiality of communications are primary considerations and users of internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others'.<sup>20</sup>

On the other hand, freedom of expression, as one of the basic foundations for a democratic society<sup>21</sup> is guaranteed by a number of international instruments such as: the Universal Declaration of Human Rights (Article 19), the European Convention on Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 19) etc. The Constitution of the Republic of Albania, in its Article 22, provides that freedom of expression, freedom of the press, radio and television is guaranteed.<sup>22</sup> In addition to the three classical elements of freedom of expression: freedom to think, freedom to receive and impart information and ideas, the scope of Article 10 of the ECHR includes online publications, although not explicitly mentioned in the provision. In case *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, the ECtHR has acknowledged that Article 10 imposes on states a positive obligation to ensure the effective protection of journalists' freedom of expression on the Internet. According to the court: 'It is true that the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information...

<sup>8</sup> Albanian Criminal Code sanctions the criminal contravention of 'Defamation' (Art.120) and that of 'Unfair intrusion in private life' (Art.121).

<sup>9</sup> ECtHR, *Axel Springer AG v. Germany*, Application no.39954/08, Judgement of 7 February 2012. All ECtHR decisions cited in this paper are available at <http://hudoc.echr.coe.int/>.

<sup>10</sup> According to article 1 of Charter of Fundamental Rights of the European Union: 'Human dignity is inviolable. It must be respected and protected'.

<sup>11</sup> In the current context of Covid-19 pandemic, the online video conferencing platform Zoom, is facing a class action lawsuit filed before the federal court of California for distributing and violating user data with companies like Facebook without the consent of data subjects, available at <https://www.globenewswire.com/news-release/2020/04/08/2013267/0/en/Pomerantz-Law-Firm-Announces-the-Filing-of-a-Class-Action-against-Zoom-Video-Communications-Inc-and-Certain-Of-ficers-ZM.html>.

<sup>12</sup> J. D. Lipton, *Digital Multi-Media and the Limits of Privacy Law*, 42 Case W. Res. J. Int'l L.551 (2010), available at <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1244&context=jil>.

<sup>13</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJL 119, 4.5.2016.

<sup>14</sup> The purpose of this law is to determine the rules for the protection and lawful processing of personal data, while respecting and guaranteeing fundamental human rights and freedoms and, in particular, the right to privacy. This law is not approximated with EU legal framework.

<sup>15</sup> ECtHR, *Von Hannover v. Germany* (no.2), Application no.40660/08 and no.60641/08, Judgement of 7 February 2012.

<sup>16</sup> ECtHR, *Axel Springer AG v. Germany*, Application nr.39954/08, Judgement of 7 February 2012.

<sup>17</sup> *Guide on Article 8 of the Convention-Right to respect for private and family life*, Council of Europe, August (2019), at 20, available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf).

<sup>18</sup> T. McGonagle, *Freedom of expression and defamation. A study of the case-law of the European Court of Human Rights*, Council of Europe, June (2018), at 14.

<sup>19</sup> ECtHR, *Węgrzynowski and Smolczewski v. Poland*, Application no.33846/07, Judgement of 16 July 2013.

<sup>20</sup> ECtHR, *K.U v. Finland*, Application no.2872/02, Judgement of 2 March 2009, § 49.

<sup>21</sup> ECtHR, *Handyside v. United Kingdom*, Application no.5493/72, Judgement of 7 December 1976.

<sup>22</sup> Also, article 23 of the Albanian Constitution guarantees the right to information.

The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press.<sup>23</sup>

According to the ECtHR, subject to Article 10 are not only 'welcomed' opinions that are not harmful, but also those that offend, disturb or shock.<sup>24</sup> However, the ECtHR has not recognized such guarantees in cases of publications that go beyond satire and defamation<sup>25</sup> or in cases of false information<sup>26</sup>.

## A.2 PRINCIPLE LEX LOCI DELICTI UNDER THE OPTICS OF ALBANIAN LEGAL AND JURISPRUDENTIAL FRAMEWORK

According to PIL, the general rule for determining the Albanian international jurisdiction is that of *lex domicilii*, i.e. the habitual place of residence of the respondent,<sup>27</sup> unless otherwise provided by law.<sup>28</sup> Meanwhile, regarding the determination of the special jurisdiction in cases of non-contractual damage, PIL in article 80(c) sanctions the principle *lex loci delicti*.

According to this provision, Albanian courts have international jurisdiction in cases of claims arising from the infliction of damage and the place where the event that caused the damage was carried out or occurred is in the Republic of Albania. This legal provision is identical to that of Article 7(2) of the Brussels I Recast,<sup>29</sup> according to which: 'A person domiciled in a Member State may be sued in another Member State: ...(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'.

In order to determine the jurisdiction based on Article 80(c) of the PIL, the Albanian judge must identify one of the two criteria: the place where the harmful event occurred or the place where the damage occurred. Usually the place where the damage occurred and the place where the harmful action occurred coincide. However, even in cases where they are different, it is enough for one of these places to be in the Republic of Albania and the Albanian courts have international jurisdiction.

<sup>23</sup> ECtHR, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, Application no.33014/05, Judgement of 5 May 2011, § 63.

<sup>24</sup> ECtHR, *Stoll v. Switzerland*, Application no.69698/01, Judgement of 10 December 2007.

<sup>25</sup> ECtHR, *Bartnik v. Poland*, Application no.53628/10, Judgement of 11 March 2014.

<sup>26</sup> ECtHR, *Schuman v. Poland*, Application no.52517/13, Judgement of 3 June 2014.

<sup>27</sup> According to Art.12 and 17 of the PIL, the place of residence of the natural person is the place where he/she has decided to stay for most of the time, even in the absence of registration and regardless of the permit or authorization to stay. The habitual place of residence of a legal person is the place where the headquarters are located, while that of a natural person, who carries out business activities, is his main place of business.

<sup>28</sup> According to Art.71, Albanian courts have jurisdiction in resolving legal-civil disputes with foreign elements, if the habitual residence of the respondent party is in the Republic of Albania, except when the rules of this chapter provide otherwise.

<sup>29</sup> Amended by Regulation no.1215/2012 (Brussels I Recast).

The result is that depending on the choice of the plaintiff, the defendant can be sued either in the courts of the place where the damage occurred, or in the courts of the place where the harmful action at the source of the damage occurred.<sup>30</sup>

PIL does not provide specific provisions for jurisdiction over claims for damages from online offensive publications. In a purposeful interpretation of the norm, as well as in the systematic interpretation of the PIL as a whole (Articles 56-65) we can say that Article 80(c) contains general provisions and is applicable to any type of claim for non-contractual damages,<sup>31</sup> including lawsuits for damage from online publications. This interpretation is in accordance with CJEU practice, which has stated that the concept of 'issues related to damage' involves any claim regarding damages that is not related to a 'contractual relationship'.<sup>32</sup>

The Supreme Court of the Republic of Albania, in some of its few cases, has analysed Article 80(c) of the PIL, finding that the jurisdiction over cases arising from the infliction of damage belongs

to the court of the country where the action that caused the damage has occurred (*lex loci delicti*). In this context, the Supreme Court has rejected the Albanian judicial jurisdiction in the case *Kalivaç Green Energy shpk v. Sace spa and Hydro s.r.l.*, arguing that the place where the action causing the damage suffered by the plaintiff is not the Republic of Albania, but the Republic of Italy, because the damaging omissions regarding the refusal to issue a guarantee by the respondent, have been committed by Italian entities within the territory of the Italian state.<sup>33</sup> Meanwhile, in the case of *Euroalb International Group shpk v. Bulgar Tabac Holding Ad*, the Supreme Court has considered the case of stopping unfair competition in commercial activity and compensation for non-contractual damage, caused as a result of the respondent getting a quantity of cigarettes in the Albanian territory, with the fiscal stamp issued on behalf of the plaintiff. In this case, the Supreme Court accepted the international jurisdiction of Albanian courts on the grounds that the claims of the plaintiff are related to non-contractual damage in the territory of the Republic of Albania.<sup>34</sup>

<sup>30</sup> Group of authors, *Commentary on the Law on Private International Law no.10428*, dated 2 June 2011, Tirana (2018), at 582.

<sup>31</sup> Ut supra, at 581.

<sup>32</sup> Judgements of CJEU, *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst und Co.* (Case C-189/87, ECLI:EU:C:1988:459), dated 27 September 1988; *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v. Dresdner Bank AG*, (Case C-261/90, ECLI:EU:C:1992:149), dated 16 March 1992; *Réunion européenne SA and Others v. Spliethoff's Bevrachtings kantoor BV and the Master of the vessel Alblasgracht V002*, (Case C-51/97, ECLI:EU:C:1998:509), dated 27 October 1998.

<sup>33</sup> Albanian Supreme Court decision no.392, dated 30 September 2015 *Kalivaçi Green Energy shpk k. Shoqëria Saces.p.& Hydro s.r.l.*, available on the official website of the court: <http://www.gjykataelarte.gov.al/>.

<sup>34</sup> Albanian Supreme Court decision no.251, dated 5 October 2016 *Euroalb International Group shpk v. BulgarTabac Holding Ad*, available on the official website of the court: <http://www.gjykataelarte.gov.al/>.

The analysis of the Albanian jurisprudential framework shows that the Albanian practice regarding international jurisdiction in non-contractual damage cases is not very consolidated. This is due to the fact that PIL is a relatively new law, adopted in 2011 and its predecessor, law no.3920, dated 21 November 1964 *On the enjoyment of civil rights by foreigners and the implementation of foreign law*, did not provide for the *lex loci delicti* principle, but only the general rule for determining jurisdiction based on the place of the defendant's residence. Also, the Albanian courts are limited to the criteria 'place where the damage occurred' and 'place where the action that caused the damage has occurred', while the European case law is oriented more and more towards criteria such as: the center of interests of the injured person or the place where the consequences of the damage have been felt.

### A.3 THE ROLE OF THE OFFENDING ENTITY IN DETERMINING JURISDICTION IN ONLINE DEFAMATION CASES

In addition to the concept of place of the harmful event, the determination of judicial jurisdiction in cases of online defamation is also conditioned by the influence of the infringing entity, depending on the fact whether the author of the infringing comment/material or the entity who owns the online media in which the defamation is reflected, is presented as such.

#### A. LIABILITY OF THE AUTHOR OF THE DEFAMATORY COMMENT

Any user or commenter of an online portal or platform, even anonymous, who publishes a comment or gives an opinion with offensive content, is considered the author of the comment and is responsible for the damage caused, as long as he is identifiable. In a recent year's judgement *Pihl v. Sweden*, the ECtHR considered the request of an applicant, who was subject to a defamatory comment anonymously published on an online blog. The applicant claimed that the blog should be held responsible for the third party's comments, while the ECtHR found that: '...liability for third-party comments may have negative consequences on the internet portal and thus a chilling effect on freedom of expression via internet'.<sup>35</sup>

#### B. LIABILITY OF THE ONLINE SERVICE PROVIDER AND THE ENTITY THAT OWNS THE WEBSITE

In today's internet society, some intermediary entities, known as online service providers, play a very important role in providing information.<sup>36</sup> Concerning these subjects, naturally arises the discussion whether: Online service providers should or should not be held accountable when they themselves are not the authors or publishers of the defamatory material, but merely technical service providers? Should the online portal be responsible for third users' comments?<sup>37</sup> Some answers to these questions are found in the ECtHR case law.

In the case *Mouvement Raëlien Suisse v. Switzerland*,<sup>38</sup> the issue was related to a ban on advertising in public places imposed on an Internet site that had a certain proselytizing function, rather than the actual content of the site.<sup>39</sup> Despite the fact that the court found no violation of article 10, by analyzing this decision in its entirety, we can conclude that the general spirit of ECtHR decision is that an online service provider that includes a link cannot predict what may be published on that link. The Grand Chamber in the current decision upheld the statement of the Chamber 'that there was never any question of banning the applicant association itself or its website'.<sup>40</sup>

Meanwhile, in case *Delfi AS v. Estonia*, the ECtHR has considered the owner of the online portal responsible for the defamatory and unfair statements appearing in the anonymous comments section below the text. The court conducted a four-part test in determining whether there had been a violation of the freedom of expression, assessing these elements: (a) the context of the comments, (b) the measures applied by the applicant company in order to prevent or remove defamatory comments, (c) the liability of the actual authors of the comments and (d) the consequences of the domestic proceedings for the applicant. According

to the court: 'Based...in particular the insulting and threatening nature of the comments, the fact that the comments were posted in reaction to an article published by the applicant company in its professionally-managed news portal run on a commercial basis, the insufficiency of the measures taken by the applicant company to avoid damage being caused to other parties' reputations and to ensure a realistic possibility that the authors of the comments will be held liable...the applicant company was liable for the defamatory comments posted by readers on its Internet news portal'.<sup>41</sup>

Regarding the 'insulting and vulgar' online comments, in the case *Magyar Tartalomszolgáltatók Egyesülete and Index.hu. Zrt v. Hungary* ECtHR analysed the position of online service provider and the online portal, considering them as protagonists of free electronic media not responsible for the insulting comments of readers of the online portal.<sup>42</sup> According to the Court: 'It is true that, in cases where third-party user comments take the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and of the society as a whole might entitle Contracting States to impose liability on Internet news portals if they failed to take measures to remove clearly unlawful comments

<sup>38</sup> ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, Application no.16354/06, Judgement of 13 July 2012.

<sup>39</sup> *Internet: Case-law of the European Court of Human Rights*, Council of Europe/European Court of Human Rights, June (2015) (update), at 25, available at [https://www.echr.coe.int/Documents/Research\\_report\\_internet\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf).

<sup>40</sup> ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, Application no.16354/06, Judgement of 13 July 2012, § 73.

<sup>41</sup> ECtHR, *Delfi v. Estonia*, Application no. 64569/09, Judgement of 16 June 2015, § 94.

<sup>42</sup> ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu. Zrt v. Hungary*, Application no. 22947/13, Judgement of 2 February 2016.

<sup>35</sup> ECtHR, *Rolf Anders Daniel PIHL v. Sweden*, Application no.74742/14, Judgement of 7 February 2017, § 35.

<sup>36</sup> F. Buffa, *Freedom of expression in the internet society*, Cendom/Book, Edizione Marzo (2016,) at 31-32.

<sup>37</sup> T. McGonagle, *Freedom of expression and defamation. A study of the case-law of the European Court of Human Rights*, Council of Europe, June (2018), at 42.



without delay, even without notice from the alleged victim or from third parties.<sup>43</sup>

On the other hand, CJEU in the joined case *Google France v. Louis Vuitton*<sup>44</sup> and the case *L'Oréal SA and Others v. eBay International AG and Others*<sup>45</sup> has acknowledged that online service providers are not responsible for facts relating to third parties if they have not played an active role of such a kind as to give it knowledge of, or control over, the illegality of the stored data.<sup>46</sup> In the decision *Scarlet Extended SA v. SABAM*<sup>47</sup> CJEU found that the internet service provider (ISP) could not be required to install a system for filtering all electronic communications that pass through its service, because such an injunction would result in a serious infringement of the freedom of the ISP. While in the well-known decision *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*<sup>48</sup> CJEU analysed the responsibility of the search engine provider in maintaining a fair balance between the legitimate interest of internet users to have access to the internet and the privacy and personality rights of the data entity.

## B. CONNECTING FACTORS FOR DETERMINING INTERNATIONAL JURISDICTION OVER CASES OF VIOLATION OF PERSONALITY RIGHTS BY ONLINE PUBLICATIONS

Defamation online or in the Internet is considered to be 'the act of defamation, insult, offence or infliction of harm through false statements belonging to an individual in the cyberspace'.<sup>49</sup> The challenge, judges are facing in cases of online defamation, is that the Internet is not an easily identifiable body that is administered or regulated within internationally recognized strict parameters or boundaries.<sup>50</sup> Due to the fact that the online defamatory content (comment, material or information) is accessible all over the world and only one click apart from a variety of people in different countries, the question that arises is which court has jurisdiction to deal with the case regarding online defamation.

As stated in the introduction part of this paper, the issue of determining jurisdiction is sensitive not only in the 'extra-community' but also in the community space, as long as in the EU legislation there are no unifying rules regarding jurisdiction over internet defamation claims. The UNCITRAL Model Law on Electronic Commerce and the UN Convention on the Use of Electronic Communications in International Contracts do not contain any jurisdictional provisions.<sup>51</sup> So, the UNCITRAL Model Law in article 15 states that: '...It is not uncommon for users of electronic commerce to communicate from one State to another without knowing the location of information systems through which communication is operated'.<sup>52</sup> To resolve this situation the Model Law offers some objective criteria such as: the place of business of the parties (Article 15(4)); the closest relationship to the relevant contract (Article 15(4/a)), habitual residence (Article 15(4/b)). These criteria may help to analyse parties' business location to ascertain jurisdiction.<sup>53</sup>

On the other hand, article 6 of the United Nations Convention on the Use of Electronic Communications in International Contracts,<sup>54</sup> states as a primary criterion for determining a party's place of business, the location indicated by that party. If the latter is unknown, then, criteria like: the place that has the closest relationship to the relevant contract or the place where a natural person has his habitual residence, are taken into consideration.

Determining international jurisdiction and applicable law on issues with foreign elements is based on connecting factors, which are factual and legal circumstances that serve to define the correlation between civil/commercial relations with foreign elements and the applicable law of a state.<sup>55</sup> In private international law, jurisdiction over non-contractual damage cases is usually governed by the principles *lex loci delicti* (the law of the place where the violation was committed) and/or *lex domicili* (law of the domicile) of the defendant.<sup>56</sup>

<sup>43</sup> Ut supra, at § 91.

<sup>44</sup> CJEU joined cases C-236/08 to C-238/08, Judgement of 23 March 2010, ECLI:EU:C:2010:159.

<sup>45</sup> CJEU Case C-324/09, *L'Oréal SA and Others v eBay International AG and Others*, Judgement of 12 July 2011, ECLI:EU:C:2011:474.

<sup>46</sup> Ut supra CJEU joined cases C-236/08 to C-238/08, § 120 and C-324/09, § 123.

<sup>47</sup> CJEU Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Judgement of 24 November 2011, ECLI:EU:C:2011:771, § 47-48.

<sup>48</sup> CJEU Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Judgement of 13 May 2014, ECLI:EU:C:2014:317, § 81.

<sup>49</sup> J. Neethling, J. M. Potgieter and P. J. Visser, *Law of delict*, Lexis Nexis 5 ed, (2006), at 325.

<sup>50</sup> D. Iyer, *An Analytical Look Into the Concept of Online Defamation in South Africa*, *Speculum Juris*, Vol.32, no.2, (2018), at 127, available at <http://www.saflii.org/za/journals/SPECJU/2018/10.pdf>.

<sup>51</sup> Dr. F. F. Wang, *Obstacles and Solutions to Internet Jurisdiction. A Comparative Analysis of the EU and US laws*, *Journal of International Commercial Law and Technology* Vol. 3, Issue 4 (2008), at 233, available at <https://media.neliti.com/media/publications/28768-EN-obstacles-and-solutions-to-internet-jurisdiction-a-comparative-analysis-of-the-e.pdf>.

<sup>52</sup> Article 15, Model Law on Electronic Commerce UNCITRAL, available at [https://www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Wbook.pdf](https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Wbook.pdf).

<sup>53</sup> Ut supra, Dr. F. F. Wang, *Obstacles and Solutions to Internet Jurisdiction. A Comparative Analysis of the EU and US laws*, at 233.

<sup>54</sup> United Nations Convention on the Use of Electronic Communications in International Contracts, available at [https://www.uncitral.org/pdf/english/texts/electcom/06-57452\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf).

<sup>55</sup> A. Kalia, *Private International Law*, Sejko (2015).

<sup>56</sup> Council of Europe study DGI (2019) 04, *Liability and jurisdictional issues in online defamation cases*, at 12, available at <https://rm.coe.int/liability-and-jurisdictional-issues-in-online-defamation-cases-en/168097d9c3>.



## B.1 CRITERIA SET BY THE EUROPEAN UNION LEGAL FRAMEWORK AND THE COURT OF JUSTICE OF EUROPEAN UNION

This section analyses the provisions of European legislation legal framework and jurisprudence of the Court of Justice of European Union regarding the identification of connecting factors for determining jurisdiction over cases of defamation via Internet. In the EU, there is substantial harmonization of rules regarding jurisdiction in civil matters in the Brussels I Regulation.<sup>57</sup> The basic jurisdiction rule according to article 4 of Brussels I, is that for persons domiciled in the territory of a Member State, jurisdiction is exercised by the courts of the Member State, in which the defendant is domiciled, regardless of his or her nationality.<sup>58</sup> Thus, when a defendant is domiciled e.g. in Germany, German courts have no discretion to refuse to hear the case. However, referring the provision of Article 7(2) of Brussels I Regulation, in cases relating to non-contractual damage, a person may also be sued in the courts of another Member State where the harmful event occurred or may occur. The place where the harmful event occurred must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it occurred.<sup>59</sup> Consequently,

the plaintiff has the option to choose the competent court, according to one of the connecting factors: the place where the action that caused the damage was committed or the place where the damage occurred. However, this applies to a dispute between an EU citizen and a defendant domiciled in another EU Member State (Article 4(2) of the Regulation). If the defendant is not located in an EU/EEA state,<sup>60</sup> then the relevant national rules on jurisdiction apply, e.g. in a lawsuit regarding non-contractual damage (defamation) between a German resident and a defendant domiciled in Albania, the rules of German domestic will be applied.<sup>61</sup>

## B.2 CONNECTING CRITERIA: THE PLACE WHERE THE ACTION THAT CAUSED THE DAMAGE OCCURRED

As mentioned above in the case *Bier*,<sup>62</sup> CJEU decided that the place where the harmful event occurred must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it occurred. It is important to state that a broad interpretation of the place where the action that caused the damage occurred, gives rise to an unpredictable number of competent courts. Meanwhile, the jurisdiction much more requires a close connection between the court and the concrete

action that took place.<sup>63</sup> There are a variety of available connecting factors related to online defamation and place determination such as: place where the information was created, where it was uploaded, where it was downloaded, where the information readers are, or where the server is located expecting the information.

In the *Shevill* case<sup>64</sup> CJEU analysed the place where the action that caused the damage occurred, regarding the field of the printed media, reasoning that the criteria for determining jurisdiction is the place where the person that has made the defamatory statement is established.<sup>65</sup> The doctrine accepts that in cases of online defamation, the editor's office equivalent may be the place of the server through which the controversial content has become accessible to the public.<sup>66</sup> But on the other hand, the CJEU jurisprudence in the case *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH* has made a different interpretation from this opinion, stating that: '...in view of the objective of foreseeability, which the rules on jurisdiction must pursue, the place of establishment of that server cannot, by reason of its uncertain location, be considered to be the place

where the event giving rise to the damage occurred for the purpose of the application of Article 5(3) of Regulation No 44/2001'.<sup>67</sup>

In *Shevill*, CJEU applied what is known by the doctrine<sup>68</sup> and by the case law as the 'Mosaic Approach', which allows the plaintiff to file a lawsuit in any Member State in which the defamatory material was distributed and in which the plaintiff claimed that he had suffered damage to his reputation.<sup>69</sup> 'Mosaic Approach' was related to defamation caused by publications in the printed media, while in online cases this approach would allow the plaintiff to file a lawsuit in the courts of each Member State, in which the online content in question may be accessed,<sup>70</sup> provided that the right allegedly infringed is protected in the jurisdiction of these courts, being limited to the damage caused within that Member State. The CJEU has applied this standard for online breaches of privacy and personality rights.<sup>71</sup>

The 'Mosaic Approach' creates dozens of possible forums giving the plaintiff more options and advantages in choosing the court. CJEU in the case *E-Date/Martinez*,<sup>72</sup> presented a more 'evolving' view of this

<sup>57</sup> Regulation of (EU) no.1215/2012 *On the jurisdiction and recognition and enforcement of judgments in civil and commercial matters*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1215&from=EN>.

<sup>58</sup> European Commission, *Judicial cooperation in civil matters. A guide for legal practitioners in the European Union*, at 14, available at [file:///C:/Users/Dell-A/Downloads/civil\\_justice\\_guide\\_EU\\_en.pdf](file:///C:/Users/Dell-A/Downloads/civil_justice_guide_EU_en.pdf).

<sup>59</sup> CJEU, Case C-21/76, *Handelskækerij G. J. Bier BV v. Mines de potasse d'Alsace SA*, Judgement of 30 November 1976, ECLI:EU:C:1976:166, § 24-25.

<sup>60</sup> The EEA includes also Iceland, Liechtenstein and Norway, allowing them to be part of the EU's single market.

<sup>61</sup> Art.6.1 of the Regulation.

<sup>62</sup> Ut supra *Bier* Case.

<sup>63</sup> ECtHR, *Arlewin v. Sweden*, Application no. 22302/10, Judgement of 1 March 2016, § 65-72-73.

<sup>64</sup> CJEU, Case C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance*, Judgement of 7 March 1995, ECLI:EU:C:1995:61.

<sup>65</sup> Ut supra, § 25 and 32.

<sup>66</sup> J. K. Škerl I, *Jurisdiction in On-line Defamation and Violations of Privacy: In Search of a Right Balance*, LEXONOMICA Vol.9, No.2, December (2017), at 95, § 87-108.

<sup>67</sup> CJEU, Case C-523/10, *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH*, Judgement of 19 April 2012, § 36, ECLI:EU:C:2012:220.

<sup>68</sup> Council of Europe study DGI (2019) 04, "Liability and jurisdictional issues in online defamation cases", at 13, available at <https://rm.coe.int/liability-and-jurisdictional-issues-in-online-defamation-cases-en/168097d9c3>.

<sup>69</sup> Ut supra *Fiona Shevill* Case.

<sup>70</sup> CJEU, Case 441/13, *Pez Hejduk v Energie Agentur.NRW GmbH*, Judgement of 22 January 2015, ECLI:EU:C:2015:28, § 38.

<sup>71</sup> Joined Cases C-509/09 and C-161/10 *EDate Advertising and Martinez*, Judgement of 25 October 2011, ECLI:EU:C:2011:685, § 42-44-51.

<sup>72</sup> Ut supra.

approach stating that in the event of an alleged infringement of personality rights by means of content on an internet website, the plaintiff has two options of bringing an action for liability: (1) before the courts of the Member State in which the publisher of that content is established or (2) before the courts of the Member State in which the center of his interests is based. The latter corresponds in general to the victim's habitual residence or to a place where the victim's interests can be harmed by the online publication.<sup>73</sup>

In the case *Bolagsupplysningen OÜ*, Advocate General analysed the difficulties in maintaining the 'mosaic approach' and suggested restricting the choice of the court in two options: The state courts where the event giving rise to harm occurred (most likely the place of the domicile of the defendant, according to article 4 (1) of the Brussels I Regulation), or the state courts where the plaintiff has its center of interest (which usually corresponds to the plaintiff's residence).<sup>74</sup> However, CJEU did not support the opinion of Advocate General Bobek in the case *Bolagsupplysningen OÜ and Ms Ilsjan v. Svensk Handel AB*<sup>75</sup> and reconfirmed the 'mosaic approach', limiting the jurisdiction of the courts to hear claims for defamatory content only for courts with jurisdiction to decide on the entirety of a claim for damages.

In this case, the court interpreted the concept 'center of interest', arguing that in the case of legal entities, this is the place where the company has established a commercial reputation and where it carries out most of the economic activity.<sup>76</sup>

In consideration of the evolving case law of CJEU and the provision of article 7(2) of the Brussels I Regulation and also in consideration of the doctrine view, we consider that in cases of defamation via internet means, the most effective solution is to interpret the place where the harmful event occurred as the place where the defamatory comment was made, so in other words the place where the author of an on-line defamatory comment acted.

### B.3 CONNECTING CRITERIA: THE PLACE WHERE THE DAMAGE OCCURRED

In cases of violations in cyberspace, we do not have a classic and accurately defined concept of the place where the damage has occurred, due to the fact that the damage can come not only in several places but also at the same time. Also, the author of an online defamatory comment cannot predict where the consequences of his actions will be caused, because the internet (a link) is accessed by an indeterminate number of users. Some of the connecting criteria analysed in this paper such as place of domicile and place of establishment usually do not cause problems.

On the other hand, the connecting criterion related to the place where the damage occurred has been more problematic and has encountered a series of uncertainties.

In avoiding such problems, CJEU has taken positive steps in its case law, especially in analyzing the also called concept of 'target audience', in other words the subjects (internet users) to whom the online material is addressed. It is important to emphasize that this concept for the moment is focused in the area of jurisdiction in consumer contracts via internet, but it can serve as an example also for online tort cases. As the court stated in the joined cases *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG* and *Hotel Alpenhof GesmbH v. Oliver Heller*: 'Since this method of communication inherently has a worldwide reach, advertising on a website by a trader is in principle accessible in all States, and, therefore, throughout the European Union, without any need to incur additional expenditure and irrespective of the intention or otherwise of the trader to target consumers outside the territory of the State in which it is established.'<sup>77</sup>

The same approach is found in the Convention on Third Party Liability in the Field of Nuclear Energy, regarding the phenomenon of 'global-damage'.<sup>78</sup> Article 13(1) of the Convention states that: 'Except as otherwise provided in this Article, jurisdiction over actions under Articles 3, 4, 6(a) and 6(e) shall lie only with the courts of the Contracting Party in whose territory the nuclear incident occurred'. Another similar problem identified by the doctrine is the phenomenon of 'net economic loss'.<sup>79</sup> On this type of issues related to exclusively financial damage issues, CJEU in the case *Universal Music* stated that: 'In a situation such as that in the main proceedings, the 'place where the harmful event occurred' may not be construed as being, failing any other connecting factors, the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage which materializes directly in the bank account of the applicant and is the direct result of an unlawful act committed in another Member State.'<sup>80</sup>

<sup>73</sup> Ut supra, § 49.

<sup>74</sup> See Advocate General Bobek's opinion in *Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB*, Case C-194/16, ECLI:EU:C:2017:554, § 73-96.

<sup>75</sup> CJEU, Case C-194/16, *Bolagsupplysningen OÜ and Ms Ilsjan v. Svensk Handel AB*, C194/16, ECLI:EU:C:2017:766, § 44-47-49.

<sup>76</sup> Ut supra, § 41-42-43.

<sup>77</sup> Joined cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG* and *Hotel Alpenhof GesmbH v. Oliver Heller*, Judgement of 7 December 2010, ECLI:EU:C:2010:740, §68.

<sup>78</sup> *Convention on Third Party Liability in the Field of Nuclear Energy* of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982, available at [https://www.oecd-nea.org/law/nlparis\\_conv.html](https://www.oecd-nea.org/law/nlparis_conv.html).

<sup>79</sup> J. K. Škerl I, *Jurisdiction in On-line Defamation and Violations of Privacy: In Search of a Right Balance*, LEXONOMICA Vol. 9, No. 2, December (2017), at 96, § 87-108.

<sup>80</sup> CJEU Case C-12/15, *Universal Music International Holding BV v. Michael Tétéreault Schilling, Irwin Schwartz, Josef Brož*, Judgement of 16 June 2016, ECLI:EU:C:2016:449, § 40.

## C. APPROXIMATION WITH THE EUROPEAN MODEL

This part of the paper is focused mainly on the practical aspects, especially the positions of Albanian and EU courts on determining jurisdiction in matters relating to defamation committed in a space that is already being used by more and more people in the whole world, the 'cyberspace'. The analysis begins with a case submitted to the Albanian courts and a court case of one of the EU countries and continues with an analysis of the treated cases, to understand the role of the Albanian and EU judge in determining jurisdiction in online defamation cases. The second part will focus on practical cases of CJEU, regarding the jurisdiction of these typologies of cases.

### C.1 DIFFERENCES IN DETERMINING JURISDICTION BETWEEN ALBANIAN AND EU COURTS

In the Albanian court case, presented in the introductory part of the paper,<sup>81</sup> the plaintiff asked the court to force a news portal based in Kosovo to ban the publication and remove the materials in all formats in which they were published, as they violated his private life. The plaintiff even claimed that the publication of these materials online, through the portal in several forms, had caused him considerable damage.

According to the sued portal, due to the content of these materials, he was fired from his job on television, a fact which is not true. The plaintiff claimed that the Albanian court has jurisdiction to try the case, as the damage occurred in the Albanian state, where he also resides and lives.

The court eventually ruled to take the case out of Albanian jurisdiction. The court bases its conclusion on Article 80(c) of the PIL, which stipulates that Albanian courts have international jurisdiction if the subject of the trial are claims arising from the infliction of damage and the place where the action that caused the damage was committed or occurred is in the Republic of Albania.<sup>82</sup> The court argued that the place where the action alleged by him where the violation was committed is not in the Republic of Albania but in the Republic of Kosovo, where the online portal of the defendant operates. The criterion for determining whether the Albanian court has jurisdiction to hear this case is not related to the consequence 'the damage caused', but to the cause 'action' that brought about the consequence. Based on the law, the lawsuit could be brought in the Albanian courts, only if the illegal act is carried out in the Albanian territory, and is not related to the place where the damage comes.

In an almost identical court case,<sup>83</sup> brought before the Italian courts, an EU member state, the plaintiff, a commercial company, with headquarters in the Italian state, claimed damage caused by an Albanian editorial company, based in Albania, as a result of the online publication of some defamatory and untrue materials related to the commercial activity of this company. The court has deemed that the case is under the jurisdiction of the Italian courts. In its reasoning, the court first stops in the law applicable to the concrete case, and identifies the law on the private international law of the Italian state. The provision of the law, identified by the court, refers to the Regulation I of Brussels, for the determination of jurisdiction in matters relating to damages as a result of online defamation, a regulation which leaves it up to the plaintiff to choose the court where he will file his lawsuit in the court of the state where the damage was caused or in the court of the state where the action that caused the damage was carried out. In conclusion, the court noted that the victim of defamation via the Internet can take action before the court of the place of residence for all damages suffered, regardless of the country and the form of online presentation of the defamatory content.

Based on the factual situation of court cases, we find that we are facing two identical court cases, while the conclusions of the courts are completely opposite. However, the fact that the cases are identical from the point of view of factual circumstances is not enough to determine whether the courts have a misjudgment of the issue of jurisdiction. Another important element must be analyzed, the law applicable in determining the jurisdiction.

The Albanian court has applied Article 80(1)(c) of the PIL, and the Italian court has applied the same law, which refers to EU law, and specifically, Brussels I Regulation. In view of Albanian and Italian laws, we note that the provision that applies is completely the same, while the interpretation of the courts is different.

The Albanian Court has made a very limited analysis of Article 80(c) of the PIL, linking its jurisdiction only in cases where the action that caused the damage is in the Republic of Albania. The court did not delve into the interpretation of the provision, but simply quoted it, also the court did not address the case law of the CJEU. If the court were more careful and dealt with these issues, of course the decision regarding the jurisdiction would be different, as the place where the damage was caused is in the Republic of Albania, where the victim's center of interest is.

<sup>81</sup> Case no. 6340, Judgment of 27 July 2015, Tirana Judicial District Court.

<sup>82</sup> Law no.10428, of 2 June 2011 *On Private International Law*, Article 80(1)(c).

<sup>83</sup> *Foro competente per danni da diffamazione a mezzo internet*, available at <https://www.saccuccipariners.com/2017/01/07/foro-competente-per-danni-da-diffamazione-a-mezzo-internet/>.

From the beginning, the PIL aimed to determine the jurisdiction of the Albanian courts in lawsuits related to damages, both in the place where the damage was caused and, in the place where the action that caused the damage was carried out. This interpretation of Article 80(1)(c) of the PIL is based on the fact that the provisions of the law have been approximated to the Brussels I Recast Regulation. The fact that in Article 80(1)(c) of the PIL the same provision of the Brussels Regulation has been transposed is also reflected in the PIL commentary, which states that Article 80(c) is approximated with Article 7(2) of the Brussels I Regulation.<sup>84</sup>

In the Albanian legal doctrine, it is already clear that Article 80(1)(c) links the jurisdiction of the Albanian courts with the place where the damage was inflicted or the place where the action that caused the damage was carried out. It is sufficient to prove one of the conditions and the Albanian court has international jurisdiction to try these cases. However, even when they are different, it is enough for one of these places to be in the Republic of Albania and the Albanian court has international jurisdiction.<sup>85</sup> The conclusion reached by the Albanian court, that the lawsuit can be filed in the Albanian courts only if the illegal action is carried out in the Albanian territory, is not in compliance with the interpretation of the law and the CJEU case law.

In the Albanian judicial practice, there are few cases related to online defamation. The above conclusions are not categorical but are based mainly on two identified cases, which are directly related to online defamation.

## C.2 CJEU CASE LAW REGARDING JURISDICTION IN ONLINE DEFAMATION CASES

On the adoption of 'Convention on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters' concluded at Brussels on 27 September 1968, among other things, the jurisdiction of the courts in cases related to the compensation of damage caused by various entities was regulated. It is worth noting that since the adoption of the Convention in 1968, the wording of the provision regulating jurisdiction in these types of cases has remained unchanged. However, CJEU, due to the diversity of litigation, has had to occasionally be forced to interpret EU law, especially after the rush that online technology has taken in recent years.

In *Bier* case,<sup>86</sup> CJEU set the standard regarding the determination of jurisdiction in cases where the place where the action took place and the place where this action brought the consequences are different, determining that the expression 'place where the harmful event occurred', in Article 5(3) of the Convention, must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.

<sup>84</sup> Group of authors, *Commentary on the Law on Private International Law no.10428*, 2 June 2011, (2018) at 580.

<sup>85</sup> Group of authors, *Commentary on the Law on Private International Law no.10428*, 2 June 2011, (2018) at 582.

<sup>86</sup> Case C-21/76, Judgment of 30 November 1976, *Handelskækerij G. J. Bier BV v Mines de potasse d'Alsace SA*, (EU:C:1976:166).

The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage.<sup>87</sup>

The first case brought before the CJEU, which sought an interpretation to determine jurisdiction over online defamation, was the *Fiona Shevill* case.<sup>88</sup> CJEU, in its reasoning, stated that the court of the place where the publisher of the defamatory statements is based has jurisdiction to decide on all the damage caused by the defamatory statements.<sup>89</sup> In addition, CJEU asserted that, the lawsuit could be brought before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered a breach of his reputation, which have jurisdiction to decide only in respect of the damage caused in that State.<sup>90</sup>

However, in 2011, CJEU would make a new interpretation of the provision regarding the determination of jurisdiction in online defamations, given the extremely rapid development of technology. In *E Date Advertising* joint cases,<sup>91</sup> CJEU, based its reasoning on a new criterion, 'center of interest', a place where a person has the center of his interests corresponds in general to his habitual residence. However, a person

may also have the center of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.<sup>92</sup> CJEU stated that, Centre-of-interests criterion allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court, he may be sued.<sup>93</sup>

In *Bolagsupplysningen* case,<sup>94</sup> CJEU, interpreted Article 7(2) of the Brussels I Regulation, regarding the determination of jurisdiction in online defamation cases, when the plaintiff is a commercial company. CJEU confirmed that, the center of interest of a trading company must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities. While the center of interest of a legal person may coincide with the place of its registered office. Thus, when the relevant legal person carries out the main part of its activities in a Member State other than the one in which its registered office is located, as is the case in the main proceedings, it is necessary to assume that the commercial reputation of that legal person, which is liable to be affected by the publication at issue, is greater in that Member State

<sup>87</sup> Ut supra, § 24-25.

<sup>88</sup> Case C-68/93, Judgment of 7 March 1995, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance*, (EU:C:1995:61).

<sup>89</sup> Ut supra, § 24.

<sup>90</sup> Ut supra, § 30.

<sup>91</sup> Case C-509/09 and C-161/10, Judgment of 25 October 2011, *E Date Advertising GmbH v X and Olivier Martinez and Robert Martinez v. MGN Limited*, (EU:C:2011:685).

<sup>92</sup> Ut supra § 49.

<sup>93</sup> Ut supra § 50.

<sup>94</sup> Case C194/16, Judgment of 17 October 2017, *Bolagsupplysningen OÜ and Ms IIsjan v Svensk Handel AB*, (EU:C:2017:766).

than in any other and that, consequently, any injury to that reputation would be felt most keenly there. To that extent, the courts of that Member State are best placed to assess the existence and the potential scope of that alleged injury. The center of interest of the legal person which is claiming to be the victim of an infringement of its personality rights cannot be identified, that person cannot benefit from the right to sue the alleged perpetrator of the infringement pursuant to Article 7(2) of Regulation No.1215/2012 for the entirety of the compensation on the basis of the place where the damage occurred.<sup>95</sup> Also in this case, the CJEU confirmed that, a person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to him cannot bring an action for rectification of that information and removal of those comments before the courts of each Member State in which the information published on the internet is or was accessible, because an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage.<sup>96</sup>

The Albanian state is already at an advanced stage in terms of EU integration, a process which has been accompanied by the approximation of domestic legislation with that of the EU. Almost a good portion of national legislation is aligned with EU law norms. From our research on Albanian case law, however, as far as the courts are concerned, there is still hesitation among judges in referring to the CJEU case law. It is quite rare for the national courts<sup>97</sup> to accompany their decision-making with the CJEU case law. However, we are of the opinion that, given that most of the national legislation is close to that of the EU, national courts should not hesitate to refer in their decisions to the CJEU case law, as long as the applicable norms are almost identical and there is an interpretation of them by a higher court. We also encounter this approach in the Albanian legal doctrine, which emphasizes the idea that there is no obstacle for Albanian judges if they want to refer to the case law of CJEU.<sup>98</sup>

The above conclusions are based mainly on our research in the Albanian case law and on no other official state document.

## D. PROBLEMS OF RECOGNITION OF DECISIONS REGARDING ONLINE DEFAMATION IN A NON-MEMBER STATE

The place where the damage occurred and the place where the harmful act that caused the damage occurred, do not always match, especially when a defamatory material has been published on several online portals. In these cases, if one of the countries is in the Republic of Albania, then the Albanian courts have jurisdiction. However, it may happen that the court of an EU member state has accepted jurisdiction over a claim, for which an Albanian court has also accepted jurisdiction. In this regard, problems related to the phenomenon of *forum shopping*<sup>99</sup> as well as the recognition of foreign decisions may arise, mainly in terms of differences between member and non-member states. Unlike member states, that apply the provision of Article 37 of the Recast Regulation, according to which the decision given in a member state is recognized in all member states without the need to carry out a recognition procedure, in Albania a final foreign decision must be subject to the procedural means and legal criteria of recognition, in order to make the decision valid.<sup>100</sup>

A decision of a foreign court, which cannot be recognized and executed in Albania is invalid,<sup>101</sup> in relation to an Albanian court decision for the same reason and between the same parties.

With the amendment of its Article 33, the Recast Regulation has exceeded the application of the *lis pendens* rule beyond EU member states, allowing a Member State court to suspend a trial in favor of a non-member state court in certain circumstances. Under this provision, non-EU countries have an obligation to provide specific rules in their legislation in order to guarantee the harmonized application of the *lis pendens* rule. Albania, as a non-member state, has also foreseen the necessary changes in Article 38 of the Code of Civil Procedure (CPC),<sup>102</sup> recognizing the possibility of the Albanian court to suspend the case in favor of a foreign court, when it is before the same lawsuit, between the same parties with the same cause and object. However, even before the amendment of Article 38 of the CPC, the Supreme Court has held that: 'Despite the fact that Albania is not an EU member, the adopted EU instruments are a guide in our practice. National courts may refer to Community legislation in the case of legal omissions or collisions (*praeter legem*), but this interpretation should not be inconsistent with the provisions of national legislation (*contra legem*).'<sup>103</sup>

<sup>95</sup> Ut supra § 41-42-43.

<sup>96</sup> Ut supra, § 48.

<sup>97</sup> Case no.00-2015-315(42), Judgment of 23 January 2015, Supreme Court of Albania, § 38.

<sup>98</sup> A. G. Bushati, N. Dollani, *Albanian PIL Act and Its Implementation in Judicial Practice*, Pravnifakultet - Univerzitet u Zenici, (2016) 18, available at <https://www.prf.unze.ba/Docs/Analib/Analibr18god9/8.pdf>.

<sup>99</sup> Intentional selection by the plaintiff of competent courts before which can be reached the quickest or most successful settlement of the case.

<sup>100</sup> Art.393-398 of the Albanian Civil Procedure Code.

<sup>101</sup> A.Dickinson, E.Lein, *The Brussels I Regulation recast*, Oxford University Press, (2015), First Edition, at 350.

<sup>102</sup> The most recent changes to the Code of Civil Procedure of the Republic of Albania with law no.38/2017.

<sup>103</sup> Albanian Supreme Court Decision no.81, of 29 June 2017 and no.411, of 25 January 2018.



In this regard, if a court has declared jurisdiction over the same case relating to damage from online defamation, as long as the criteria of Article 38 of the CPC are met, the Albanian court may decide to suspend the case. In assessing the fulfillment of the criteria of Article 38 of the CPC, the Albanian court may refer to the jurisprudence of the CJEU, which in *Bier* case says that: 'When the place where the event that caused the damage occurred and the place where the event brought the consequences are not identical, the expression "the place where the event that caused the damage occurred" must be understood to include both, the place where the damage was caused and the place where the event that caused the damage occurred'.<sup>104</sup>

What is problematic for Albania, in relation to Member States court decisions, is the fact that the Albanian legislation does not provide any rules similar to the *lis pendens* principle, regarding *res judicata* decisions. If it happens that a decision regarding online defamation issues has received the status of *res judicata* in a Member State and for various reasons it has not yet been recognized in Albania under the recognition procedures, Albanian courts find it impossible to refuse or exclude from their jurisdiction the judgement of an identical lawsuit (with same cause, object and litigants) with the one that has received *res judicata* status in a Member State. This is a flaw in the Albanian legislation, which can create problems in judicial practice, especially in matters related to defamation in the 'borderless online space'.

## CONCLUSIONS

The so-called pro-European interpretation of national law requires Albanian judges to refer to the CJEU when applying national legislation. Albanian judges should be aware of their new role after the opening of negotiations for Albania's EU membership, currently there is no legal impediment to the implementation of EU legislation as provided by the SAA, especially during the other stages of integration, until full membership. Albanian courts of all levels are already legally eligible to be guarantors of the implementation of EU law in Albania, so they are de jure '*local branches of the EU judiciary*'. Like other judges of the Member States, Albanian judges are not only judges of their country, but also guarantors of the EU legal order.

The efforts of the Albanian state in terms of EU membership are already at an advanced stage. These efforts are mainly related to the full implementation of the SAA and also to the fulfillment of concrete tasks regarding the approximation of legislation with that of the EU. This approximation of legislation also includes the field of civil damages, which includes legal acts that regulate damages from online defamation.

They have been entrusted with the '*sacred*' task of protecting the rights of the individual deriving from the EU Treaties and the Stabilization and Association Agreement (SAA) with Albania. In the concrete cases at hand, Albanian judges, relying on the principles of direct effect and superiority of EU law, may set aside national laws<sup>105</sup> that are contrary to EU norms. This process has given them the power to legally review national laws from the perspective of EU law. Although not always expressed by their constitutions, the competence of all courts of the Member States and of the candidate countries to consider the compatibility of national law with that of the EU is a very important power, given directly from the EU through CJEU.

<sup>104</sup> Group of authors, *Commentary on the Law on Private International Law no. 10428, dated 2 June 2011*, Tirana (2018), at 581.

<sup>105</sup> Article 122 of the Albanian Constitution, "*An international agreement ratified by law takes precedence over state laws that do not comply with it*".

MATHILDE LE COLONNIER  
ANTONIO MUSELLA  
JULIA SKOP



TUTOR: SONIA DESAGES

Team FRANCE

# TRUST, BUT VERIFY.

## INSIGHT INTO THE RECOGNITION OF PROVISIONAL MEASURES IN THE EUROPEAN JUDICIAL SPACE

The European Union's ambitious project to develop civil judicial cooperation hinges on the almost sacred principle of mutual trust. However, trust cannot be unlimited, and the regime of recognition of provisional measures is a good example of the balance sought between this ideal and the concrete consequences that such recognition may engender in the different Member States, notably in terms of "forum shopping" or protecting the right of defence. In light of the recent Regulation establishing a European Account Preservation Order ("EAPO Regulation"), the purpose of this paper is twofold. On the one hand, the aim is to establish to what extent provisional measures can actually be recognised in other Member States by confronting one legal instrument with another, from Brussels I Recast to Brussels II ter. On the other hand, the goal consists in making legal proposals in order to strengthen the efficiency of the European Union's area of freedom, security and justice. As such, one of the main proposals of this study is the general recognition between Member States of ex parte provisional measures in the name of the child's best interests.

### KEY WORDS

Mutual Trust  
Provisional Measures  
European Account Preservation Order [EAPO]  
Brussels Regulations  
Ex parte provisional measures  
Res judicata

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## 1. INTRODUCTION

“Trust, but verify”. This Russian proverb popularised by President Ronald Reagan in the context of rapprochement with the Soviet Union appears to be an accurate synthesis of the approach towards recognition of provisional measures in the European judicial space. The European Union’s ambitious project to develop civil judicial cooperation hinges on the almost sacred principle of mutual trust. But trust cannot be unlimited, and the regime of recognition of provisional measures is a good example of the balance sought between this ideal and the concrete consequences that such recognition may engender in the different Member States, notably in terms of “forum shopping” or protecting the right of defence.

In addition to this growing importance of mutual trust based on article 81 of the Treaty on the Functioning of the European Union,<sup>1</sup> this subject is particularly relevant in light of the topical legislative and global history of civil judicial cooperation in the European Union. Indeed, analysing recognition of provisional measures between Member States will lead to the recent Regulation establishing a

European Account Preservation Order (“EAPO Regulation”) procedure to facilitate cross-border debt recovery in civil and commercial matters. The EAPO Regulation<sup>2</sup> constitutes the third generation of Regulations, the first generation being Brussels I<sup>3</sup> and II<sup>4</sup> and the Insolvency Regulation,<sup>5</sup> and the second generation concentrating on the Regulation relating to the taking of evidence<sup>6</sup> and the Legal Aid Directive<sup>7,8</sup>

Provisional measures, which, according to Brussels I Recast,<sup>9</sup> include protective measures, only intend to preserve a factual or legal situation to safeguard rights, the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case.<sup>10</sup> Despite this interim feature, they are particularly decisive in cross-border disputes given the length of court proceedings abroad. But provisional measures vary in their nature and regime depending on national judicial systems, some appearing more attractive than others. Refusing to allow the European Union to become a “marketplace” where one might choose in which Member State provisional measures are sought, has led to the adoption of several European instruments.

Brussels I Recast is the key regulation for civil and commercial cases, but other regulations exist, such as Brussels IIbis,<sup>11</sup> applicable to matrimonial and parental matters. A strict analysis of provisional measures limited to civil and commercial matters would not reflect the overall European pattern and the critical opinion that may be drawn from it. This paper will thus broaden the scope of provisional measures in order to confront one instrument with another, as trust differs drastically depending on the issues at stake.

If the principle of mutual trust irrigates European judicial cooperation, to what extent can provisional measures actually be recognised in other Member States? What kind of balance should be sought between the ideal of free circulation of decisions and the necessary limits that must be set to avoid this trust being abused? Finally, what improvements can be made on a European level?

Recognition of provisional measures is based mainly on a “two-track system” in which trust differs depending on the jurisdiction’s competence on the merits (**Part One**).

Additional criteria must however be met, making the Russian proverb assuredly topical: “trust, but verify” (**Part Two**).

## 2. PART ONE. PROVISIONAL MEASURES IN THE EUROPEAN UNION: A TALE OF TWO TRACKS

While mutual trust is the cornerstone for the recognition of provisional and conservatory measures, the risk of a party manipulating this trust has led to the creation of a “two-track system” in the European Union. Trust granted for the free circulation of these measures will differ depending on whether the judge is only competent as to the provisional (A), or also the merits of the dispute (B).

### A. MISTRUST TOWARDS THE JUDGE NOT HAVING JURISDICTION AS TO THE MERITS

It is widely accepted that the judge of substance has jurisdiction for provisional measures. However, on an international level, the situation is often more complex and it may be necessary that a judge – different from the one having jurisdiction on the merits of the dispute – decides on a provisional measure (often because the goods, the debtor or the creditor are on his territory), irrespective of jurisdiction on the merits.<sup>12</sup> Traditionally, the European Union distinguishes between litigations in civil and commercial matters (i) and disputes relating to marriage and children (ii).

<sup>1</sup> [Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union](#) (TFEU), 2016, OJ C202/1.

<sup>2</sup> [Regulation No. 655/2014 of 15 May 2014](#), OJ 2014 L 189/59.

<sup>3</sup> [Regulation No. 44/2001 of 22 December 2000](#), OJ 2001 L 12/1.

<sup>4</sup> [Regulation No. 1347/2000 of 29 May 2000](#), OJ 2000 L 160/19.

<sup>5</sup> [Regulation No. 2015/848 of 20 May 2015](#), OJ 2015 L 141/19.

<sup>6</sup> [Regulation No. 1206/2001 of 28 May 2001](#) on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001 L 174/1.

<sup>7</sup> [Council Directive 2002/8/EC of 27 January 2003](#) to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003,

<sup>8</sup> E. Jeuland, “La clef de voûte de l’espace judiciaire européen: le règlement n° 655/2014 du 15 mai 2014 créant une procédure d’ordonnance européenne de saisie conservatoire des comptes bancaires”, (OESC), 2019, available at hal-02025794, <https://hal.archives-ouvertes.fr/hal-02025794/document>.

<sup>9</sup> [Regulation No. 1215/2012 of 12 December 2012](#), OJ 2012 L 12/15.

<sup>10</sup> ECJ, 26 March 1992, [case C-261/90, Reichert](#) (EU:C:1992:149).

<sup>11</sup> [Regulation No. 2201/2003 of 27 November 2003](#), OJ L338, 23.12.2003.

<sup>12</sup> For a general study, see H. Gaudemet-Tallon, M.-E. Ancel, *Compétence et exécution des jugements en Europe*, 2018, pp. 479 et seq., P. Mayer, V. Heuzé, B. Remy, *Droit international privé*, 2019, para 367 et seq.

## 1. THE BRUSSELS I SYSTEM

European Regulations in civil and commercial matters provide for the possibility to request a provisional or a protective measure from a judge even if the court in question does not have jurisdiction on the merits.<sup>13</sup> When such a judge is seized on an international level, the issue very quickly becomes whether such provisional measures can produce an effect or could be recognised in another Member State.

Historically, the different Regulations (and Convention) were silent on this question. In 1980, on the basis of the 1968 Brussels Convention,<sup>14</sup> the European Court of Justice took a favourable position, based on the principle of mutual trust between

Member States. Faced with the question of the recognition of a provisional measure, the ECJ considered quite broadly, in the well-known *Denilauler case*, that “Article 24 does not preclude provisional or protective measures [...] from being the subject of recognition and an authorisation for enforcement”.<sup>15</sup>

However, in order to avoid the recognition of a decision amounting to the creation of a *forum actoris*<sup>16</sup> circumventing the general rules of jurisdiction of the Brussels system,<sup>17</sup> the ECJ established a “double-condition test” in the late 90’s. The judge not having jurisdiction on the merits could issue interim relief under two cumulative conditions: the reversibility of the measure’s effects<sup>18</sup> and the existence of a connection between the jurisdiction

and the object of the measure,<sup>19</sup> for example the location of the debtor or of the enforcement.

Once such a double-condition test was passed, only the rules applicable to the circulation of decisions in the European Union, such as the public policy exception<sup>20</sup> or the irreconcilability of decisions,<sup>21</sup> could paralyse the “recognition and enforcement of the judgment of the court of origin”.<sup>22</sup> Consequently, even if subject to strict conditions, the recognition of a provisional measure issued by the judge not having jurisdiction on the merits was not formally excluded before Brussels I Recast Regulation.<sup>23</sup>

A French court made an interesting application of such principles in the *Mastergiorgis* case. A Greek judge had issued a conservatory measure over a boat but later revoked the measure. The boat then being in Marseille, the applicant seized the French jurisdiction on the ground of Article 31 of the Regulation. The *Cour de cassation* rejected the request considering that the decision revoking the provisional

measure had to be recognised in France. Such recognition rendered it impossible for the French judge to order a new provisional measure, given the absence of any new fact and the request was rejected.<sup>24</sup> The French Cour de cassation, even referring implicitly to the *res judicata* effect, did not use such an expression, probably because some authors refuse to recognise *res judicata* of provisional measures.<sup>25</sup> Consequently, it could be concluded that the ECJ took a favourable position towards the recognition of provisional measures issued by a judge not having jurisdiction on the merits.<sup>26</sup>

However, the position changed in the recast of Brussels I, which led to a quite different position since Recital no.33 states:

*Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State.*

<sup>13</sup> Provisions related expressly to provisional measures:

Article 24 of the Brussels Convention 1968 ([Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters](#), OJ L 299, 31/12/1972);

Article 24 of the Lugano Convention 1988 ([Convention on jurisdiction and the enforcement of judgments in civil and commercial matters](#) - Done at Lugano on 16 September 1988, OJ L 319, 25.11.1988)

Article 31 of the Brussels I Regulation;

Article 35 of the “Brussels IIbis Regulation” ([Regulation No. 1215/2012 of 12 December 2012](#), OJ 2012 L 351/1).

Article 19 of the “Succession Regulation” ([Regulation No. 650/2012 of 4 July 2012](#), OJ 2012 L 201/107);

Article 14 of the “Maintenance Obligation Regulation” ([Regulation No. 4/2009 of 18 December 2008](#), OJ 2009 L 7/1);

Article 19 of the “Matrimonial Property Regulation” ([Regulation No. 2016/1103 of 24 June 2016](#), OJ 2016 L 183/1);

Article 19 of the “Registered Partnerships Regulation” ([Regulation No. 2016/1104 of 24 June 2016](#), OJ 2016 L 183/30).

There is one exception to such a regime: the European Account Preservation Order [Regulation No. 655/2014](#) (OJ 2014 L 189/59) whose scope is limited to one type of provisional measure, see below at para. 57 and following.

<sup>14</sup> 1968 [Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters](#), OJ C 27, 26.1.1968.

<sup>15</sup> ECJ, 21 May 1980, [case C-125/79, Bernard Denilauler](#) (EU:C:1980:130), at para. 17.

<sup>16</sup> Brussels I system being based on the competence of the judge in the country in which the defendant has his domicile.

<sup>17</sup> ECJ 17 November 1998, [case C-391/95, Van Uden](#) (EU:C:1998:543), at para. 46. In this case, parallel to arbitration proceedings, a party asks a Dutch court to issue interim measures. The other party objects given the incompetence of the Dutch court due to the arbitration clause. The ECJ highlights the fact that on the ground of the Brussels system, no court is competent to deliver provisional measures. But on the ground of national law (Netherlands’ legislation in the case at stake), provisional measures can be issued by a court incompetent as to the substance of the dispute if a real connecting link exists.

<sup>18</sup> ECJ 27 April 1999, [case C-99/96, Mietz](#) (EU:C:1999:202), at para. 37: the case concerned an order of payment issued by a Dutch judge, the issue being whether such order constituted a provisional measure. The Court concluded that the Dutch judgment could not be qualified as a provisional measure and thus refusing the possibility to benefit from the provisional system of the Brussels Convention.

<sup>19</sup> See I. Pretelli, “Provisional and Protective Measures in the European Civil Procedure of the Brussels I System”, in V. Lazic’ and S. Stuij (eds.), *Brussels Ibis Regulation, Short Studies*, 2017, pp. 97-117 [available at <https://www.isdc.ch/media/1740/provisional-measures-in-the-brussels-i-system-by-ip.pdf>].

<sup>20</sup> See below para. 48 *et seq.*

<sup>21</sup> See below, in particular regarding consistency with a previous decision of a judge of a Member State, para. 51 *et seq.*

<sup>22</sup> ECJ 27 April 1999, [case C-99/96, Mietz](#) (EU:C:1999:202), at para. 51.

<sup>23</sup> G. Slynny, M. Tønnesson Andenæs, D. Fairgrieve, *Judicial Review in International Perspective, Volume 2, Kluwer Law International*, 2000, pp. 499-502.

<sup>24</sup> Cour de cassation, Commercial chamber, 8 March 2011, [no.09-13.830](#). See G. Cuniberti, “Commentary of the decision of the Cour de cassation dated 8 March 2011”, *JDI*, 2011, no.16.

<sup>25</sup> “The words *res judicata* which appear in a number of conventions have expressly been omitted since judgments given in interlocutory proceedings may be recognized, and these do not always have the force of *res judicata*” in P. Jenard, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, OJ 1990 C 189/57. However, the *res judicata* effect does not need the exequatur of the decision (and thus the enforcement) but it concerns exclusively the recognition of the decision, See M. Nioche, “*Décision provisoire et autorité de chose jugée*”, *RCDIP*, 2012, p. 277, para. 47.

<sup>26</sup> Article 24 of the Brussels Convention became Article 31 of the Brussels I Regulation. See, N. Nisi, “Provisional measures in the new Brussels I Regulation”, *Cuadernos de Derecho Transnacional*, 2015, vol. 7, no.1, pp. 128-141.

In addition, Article 2 (a) of the Regulation specifies that:

*For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter.*

In a nutshell, the new Brussels Regulation forbids a provisional measure issued by a judge not having jurisdiction as to the merits to be recognised in a different Member State. This choice aims at avoiding a circumvention of the general rules of jurisdiction in the European Union and solves difficulties in the identification of the "connection" between the measure and the judge seized.<sup>27</sup>

However, the total refusal to recognise a decision issued by a jurisdiction of a Member State can be quite surprising, for two reasons. First, this new framework appears to move away from the principle of mutual trust, especially given the already strict conditions identified by the ECJ in its case law.<sup>28</sup> Second, *in personam* measures elude Brussels I bis since they produce extraterritorial effects without requiring recognition or enforcement, as we will analyse in the following sections.<sup>29</sup>

## 2. THE BRUSSELS II SYSTEM

Brussels IIbis Regulation applicable to matrimonial and parental responsibility matters, also builds a two-track system where both the court having jurisdiction as to the substance and the court of any place where a provisional measure may (or needs to) be enforced, can successfully issue a provisional measure. However, the competence of the judge not having jurisdiction as to the substance "must be interpreted strictly".<sup>30</sup> Besides, the role of such jurisdiction is even more reduced in an international context, as the measure ceases to produce effects from the moment the court competent as to the merits takes the appropriate measures.<sup>31</sup>

Historically, regarding recognition of provisional measures in family law matters more specifically, the ECJ considered that provisional measures issued by a judge not having jurisdiction on the merits could not benefit from the regime of recognition of the Brussels system, such as indicated in the *Purrucker case*.<sup>32</sup> Consequently, the characteristics of family law, hinging on the best interests of the child, rendered totally impossible the recognition and thus circulation of a provisional measure.

However, Brussels IIbis introduces an initial exception, which will be developed in Brussels IIter<sup>33</sup> by specifically providing that when aimed at protecting a child from a grave risk of harm, the measures issued by a judge not having jurisdiction on the merits may have extraterritorial effects, as analysed in the following sections.<sup>34</sup>

To conclude on the Brussels I and II systems, provisional measures issued by the judge not having jurisdiction on the merits are not welcome in the European Union, contrary to the situation in which the judge has jurisdiction as to the substance of the case.

## B. TRUST TOWARDS THE JUDGE HAVING JURISDICTION AS TO THE MERITS OF THE DISPUTE

To prevent exploitation of mutual trust, only provisional measures issued by the judge competent as to the merits of the dispute can circulate freely (i). Common rules define which jurisdiction is competent on the substance of the dispute (ii). However, there is still no harmonised definition of provisional measures, which is problematic given the differences in Member States (iii).

## 1. THE CRITERION OF COMPETENCE AS TO THE MERITS OF THE DISPUTE

In 2009, the European Commission issued a report<sup>35</sup> on the application of Brussels I Regulation showing that improvements were needed to reinforce the circulation of judgments. A judge having jurisdiction as to the merits of the dispute can always issue provisional measures, which can be recognised in other Member States without any procedure being required.<sup>36</sup> The only formality required is to provide the enforcing court with a copy of the judgment and a certificate issued by the court of origin showing that the judgment is enforceable. This growing mutual trust could not be implemented without safeguards. This is why Brussels I Recast Regulation tightens the criteria for the recognition of provisional measures by creating an autonomous concept of judgment.<sup>37</sup>

A part of the legal doctrine criticises the autonomous and restricted concept of "judgment" created in the Brussels I Recast Regulation for two reasons: *one theoretical and the other practical. On a theoretical basis, judgments that are not covered by Brussels I Recast Regulation still remain judgments procedurally speaking, the nature of these acts being the same, which is inconsistent in terms of procedural terminology. But the most important criticism regarding this restriction is its practical opportunity. Since only judgments issued by the*

<sup>27</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Brussels I Regulation, [COM/2009/0174 final](#), 21 April 2009, especially para. 3.6.

<sup>28</sup> See above at para. 12 *et seq.*

<sup>29</sup> See below at para. 51 *et seq.*

<sup>30</sup> ECJ, 26 April 2012, [case C-92/12, Health Service Executive](#) (EU:C:2012:255), at para. 130.

<sup>31</sup> ECJ, 23 December 2009, [case C-403/09, Detiček](#), (EU:C:2009:810) at para. 61; Article 20 (2) of the [Regulation No. 2201/2003 of 27 November 2003](#), OJ 2003 L 338/1.

<sup>32</sup> ECJ, 15 July 2010, [case C-256/09, Purrucker I](#) (EU:C:2010:437).

<sup>33</sup> The [Regulation 2019/1111 of 25 June 2019](#) (OJ 2019 L 178/1) on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), hereinafter the "Brussels IIter Regulation", will enter into force only on 1<sup>st</sup> August 2022.

<sup>34</sup> See below, para. 53 *et seq.*

<sup>35</sup> Report on the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [COM/2009/0174 final](#), 21 April 2009

<sup>36</sup> Article 36 of Brussels I Recast Regulation.

<sup>37</sup> Article 2 of Brussels I Recast Regulation. See above at para. 23.



court competent as to the merits can be recognised, the choice of this court now becomes even more of a determining factor.<sup>38</sup> Therefore, there is an increased risk of *forum shopping*, not on a provisional nature but on the substance of the dispute. Fortunately, Brussels I Recast Regulation defines special and exclusive rules of competence as to the merits that limit this phenomenon.

## 2. A HARMONISED REGIME OF COMPETENCE

Since trust varies depending on the competence of the court as to the merits of the dispute, knowing which court is competent is vital. Brussels I Recast Regulation set out special and exclusive<sup>39</sup> rules of competence in the perspective of good administration of justice and balance between parties. For instance, in proceedings relating to immovable property, courts of the Member State in which the property is situated have exclusive competence as to the merits of the dispute, regardless of the domicile of the parties. The fact that a court is exclusively competent as to the substance does not mean a foreign court cannot deliver provisional measures. Since they do not affect the

outcome of the dispute, they can be issued;<sup>40</sup> but if special or exclusive rules of competence are violated, recognition can be refused. Therefore, trust granted through this regulation is not unlimited and can be withdrawn if the criterion of competence as to the substance is not met. The *Mietz case* offers a good example.<sup>41</sup>

Rules determining the competence of the court are not absolute: even if such rules are violated, a judgment shall be recognised if the court that issues the judgment is competent by virtue of an express or tacit prorogation of competence. In the *Ceskà case*,<sup>42</sup> the ECJ holds that the appearance of the policyholder before the incompetent court as to the substance of the dispute, without contesting said dispute, must be considered a tacit prorogation. Therefore, recognition of measures cannot be refused.<sup>43</sup>

Similarly, in family law matters, the court competence as to the merits of the substance is based on specific rules like the habitual residence of the child in matters of parental responsibility.<sup>44</sup> However, since the best interest of the

child must be taken into account, the rules are more flexible. As such, Recital 13 of the Brussels II bis Regulation enables in the interest of the child, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case, the second court should not be allowed to transfer the case to a third court.

The regime of competence as to the substance of the dispute appears clear in both civil and family matters, unlike the concept of “provisional measures” which remains somewhat vague.

## 3. A POOR DEFINITION OF PROVISIONAL MEASURES

Provisional measures must necessarily fall under the scope of the relevant Regulation. According to the ECJ, whether or not provisional measures fall under this scope should be determined not by their own nature, but by the nature of the rights they are protecting.<sup>45</sup> The decisive element is the subject matter lying at the heart of the dispute.

While the scope is clear, there is no harmonised definition of provisional measures, in both civil and family matters, despite several attempts. Interim measures are only defined by their functions: they have a provisional purpose and are not intended to provide an outcome to the dispute.

Recital 25 of Brussels I Recast Regulation gives some precisions: “*The notion of provisional, including protective, measures, should include, for example, protective orders aimed at obtaining information or preserving evidence.*” Similarly, Brussels II ter provides for provisional measures examples: “*a provisional, including protective measure from that Member State allowing the child to stay with the abducting parent who is the primary carer until a decision on the substance of rights of custody has been made in that Member State following the return, or the demonstration of available medical facilities for a child in need of treatment.*”<sup>46</sup>

In the *Reichert case*,<sup>47</sup> the ECJ defines provisional measures as measures intended to preserve a factual or legal situation to safeguard rights, the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case. They do not include measures which are not of a protective nature, such as measures ordering the hearing of a witness.<sup>48</sup>

There is no harmonised definition of provisional measures and they vary in their terminology, nature and regime in national legislations. Therefore, if a judgment contains a measure or an order which is unknown in the Member State addressed, it shall be adapted to a measure which has equivalent effects.

<sup>45</sup> ECJ, 27 March 1979, *case C-143/78, Jacques de Cavel* (EU:C:1979:83).

<sup>46</sup> Recital 45 of Brussels II ter Regulation.

<sup>47</sup> ECJ, 26 March 1992, *case C-261/90, Reichert* (EU:C:1992:149), at para. 34 and 36. German parents decide to transfer the ownership of their real estate located in France to their son. The bank considers this transfer has a negative impact on its position as creditor and requests an interim measure consisting in declaring the transfer null and void. The ECJ holds that this measure is not aimed at preserving a factual or legal situation; therefore, it does not enter into the scope of provisional measures under the Regulation.

<sup>48</sup> ECJ, 28 April 2005, *case C-104/03, St. Paul Dairy* (EU:C:2005:255).

<sup>38</sup> A. Nuyts, “La refonte du Règlement Bruxelles I”, *RCDIP*, 2013, pp. 1 *et seq.*

<sup>39</sup> Article 24 of Brussels I Recast Regulation determines the scope of these exclusive rules which applies notably to rights in rem in immovable property, certain matters concerning corporate law, public registers, or patents.

<sup>40</sup> ECJ, 12 July 2012, *case C-616/10, Solvay* (EU:C:2012:445).

<sup>41</sup> ECJ 27 April 1999, *case C-99/96, Mietz* (ECLI:EU:C:1999:202). A dispute arises between a Dutch company and a German buyer (Mr. Mietz) concerning a sales contract, since the buyer did not pay the full price. A court in the Netherlands delivers a provisional order to pay addressed to Mr Mietz. German courts are requested to enforce it. Mr. Mietz lodges an appeal, as he considers that even though the contract was signed in the Netherlands, he is a consumer and can only be sued in the court of his domicile where preparatory acts were made. The ECJ states that this contract falls within the consumer protective regime, but it also holds that the ruling is based on the Dutch code of civil procedure, which allows urgent provisional measures without the need to bring substantive proceedings before the court having jurisdiction. Therefore, provisional measures could be delivered by the Dutch court in the first place, but Germany could not enforce these measures, special rules of competence having been violated.

<sup>42</sup> ECJ, 20 May 2010, *case C-111/09, Česká* (EU:C:2010:290).

<sup>43</sup> ECJ, 4 September 2019, *case C-347/18, Alessandro Salvoni* (EU:C:2019:661).

<sup>44</sup> Article 8 §1 of the Brussels IIbis Regulation.

**Proposal no. 1: As pointed out several times by the European Commission in 1998 and 2010, the notion of provisional measure needs to be clarified. Further harmonisation in terms of terminology aims at facilitating the circulation of judgments at the cornerstone of mutual trust.**

### 3. PART TWO. PROVISIONAL MEASURES IN THE EUROPEAN UNION: A PATH FILLED WITH PITFALLS

Irrespective of the judge having issued the measure, recognition of provisional measures is subject to the fulfilment of some general conditions: some aim at protecting fundamental values commonly shared by Member States (A), others at preserving consistency within the European Union (B).

#### A. TRUST CONDITIONAL ON THE RESPECT OF FUNDAMENTAL VALUES

If the recognition and the enforcement of provisional measures in Europe is the product of judicial cooperation, one may observe that this trust has been, on the one hand, challenged by the right of defence (i) but on the other hand, strengthened by the modern principle of the child's best interests (ii).

#### 1. THE RIGHT OF DEFENCE

The right of defence consists, in substance, in hearing the defendant during a contradictory proceeding. This key judicial principle is explicitly addressed by the cardinal Article 6 of the European Convention on Human Rights,<sup>49</sup> which has been considered applicable to provisional measures.<sup>50</sup>

However, interim measures granted without previously summoning the debtor presents the benefit of preventing the debtor from disposing of his assets or from adopting tactics to frustrate the effectiveness of final judgements. Being an exception to the fundamental principle of the right of defence, these measures, also referred to as *ex parte* or *inaudita altera parte measures*, embody a means to protect the creditor's assets with the surprise effect.

A quick glance at ECJ case law highlights the initial restrictive approach to the recognition of *ex parte* provisional measures.<sup>51</sup> However, in the late 2000s, the Court introduced a more flexible approach to the *ex parte* measures. In the *Gambazzi case*,<sup>52</sup> the ECJ widened the Member State margin of appreciation regarding whether proceedings before the Court had conformed to the right to a fair trial. The Member State in which the decision should be enforced can assess, through the public policy limitation,<sup>53</sup> whether the *ex parte* measure granted constitutes a violation of the right of defence and the fair trial principle.

Today, this historical evolution contributes to a narrow recognition of *ex parte* provisional measures among Member States. While *inaudita altera parte* measures still suffer from a general ban, the raising of both direct and indirect exceptions renders the analysis more complex.

The general ban is common to all European Regulations relating to Civil Procedure.<sup>54</sup> However, two indirect exceptions are to be noted. *Firstly*, Article 2 (a) of Brussels I Recast Regulation enables the recognition of *ex parte* measures if «the judgment containing the measure is served on the defendant prior to the enforcement». The measure's applicant must thus provide the competent authority with proof of service of the judgement.

*Secondly*, the general ban does not prevent an interested party from obtaining *ex parte* measures directly from Member States where they aim at producing effects in order to maintain «the surprise effect».<sup>55</sup>

More interestingly, one direct exception has emerged through the EAPO Regulation in order to take into account interests differing from the principle of the right of defence. Applicable to civil and commercial matters, it is the first uniform and very first *ex parte* provisional measure in the European Union. Entering into force on 18 January 2017, this Regulation establishes a procedure to facilitate cross-border debt recovery. By filing a standard application form, a creditor can obtain a freezing order of the cash held in a bank account located in the European Union, including those of branches of non-EU banks. The competent court will have to decide based only on the arguments and evidence the creditor provides. If the court accepts the application, the debtor must be served with the EAPO and copies of all documents submitted by the creditor. Besides, the debtor can always appeal the provisional measure ordered through the EAPO proceedings, particularly if the circumstances have changed, thus underlining the protection of the respondent's right of defence.

This pragmatic and flexible approach to *ex parte* provisional measures by EU authorities is still open to controversy, which leads us to make some proposals.

<sup>49</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.1950.

<sup>50</sup> ECHR, 4 February 2005, *Mamatkulov and Askarov v. Turkey* (Application nos. 46827/99 and 46951/99), in particular para. 108.

<sup>51</sup> ECJ, 21 May 1980, *case C-125/79, Bernard Denilauler* (EU:C:1980:130).

<sup>52</sup> ECJ, 2 April 2009, *case C-394/07, Gambazzi* (EU:C:2009:219).

<sup>53</sup> See below para. 48 *et seq.*

<sup>54</sup> Article 42 (2) of the Brussels I Recast Regulation; Article 35 of the Brussels IIbis Regulation; Article 15 of the Brussels IIter Regulation; Article 37 of the Matrimonial Property Regimes Regulation; Article 24 of the Maintenance Obligations Regulation and Article 40 of the Succession Regulation. Article 42 (2) (c) of the Brussels I Recast Regulation.

<sup>55</sup> Article 35 of Brussels I Recast Regulation; Article 19 of the Matrimonial Property Regimes Regulation, of the Property of Registered Partnerships Regulation and of the Succession Regulation; Article 14 of the Maintenance Obligations Regulation. Article 20 of the Brussels IIbis Regulation; Article 15 of the Brussels IIter Regulation.

**Proposal n°2: Regarding the indirect exception of requesting *ex parte* measures from the Member State in which the measures should be enforced,<sup>56</sup> this situation can engender practical difficulties as some commentators have highlighted.<sup>57</sup> Moreover, the actual system could give an incentive to the debtor to relocate his assets in jurisdictions with a less liberal regime. Thus, we recommend clarifying and specifying this indirect exception.**

**Proposal n°3: In light of the exception embodied by the EAPO Regulation, the best solution may be to recognise *ex parte* provisional measures in general, as also proposed in 2006 by the American Law Institute and UNIDROIT in its Principles of Transnational Civil Procedure.<sup>58</sup> This would simplify the actual legal framework and represent a further step towards mutual trust.**

Thus if the trust between Member States towards provisional measures is challenged by the ECHR and ECJ in respect of the right of defence, some exceptions, such as the best interests of the child, highlight a new and innovating trend : the recognition of provisional measures is today conditioned by the protection of a category of individuals.

## 2. THE PROTECTION OF CATEGORIES OF INDIVIDUALS

The protection of categories of individuals has grown into a major concern for the European Union. From the Brussels Convention to the Brussels I Recast Regulation, this is illustrated by the adjustment of rules on jurisdiction, so as to protect the position of a weaker party such as the insurance policyholder, the consumer or the employee.

In terms of interim measures, children constitute a particular category to protect. This trend is observable from two aspects: on the one hand, the possibility for a court to grant an interim measure and, on the other hand, the choice of law rule.

*Firstly*, this is the reason why Brussels Ibis Regulation introduced an exception to the traditional rule regarding the jurisdiction competent to take into account the best interests of the child. The ECJ identified the conditions for recognising the competence of the jurisdiction (urgency, presence of the child in the Member State and reversibility character of the measure) but Article 20 leaves an important margin of appreciation to the judge.<sup>59</sup>

In addition, Brussels I ter Regulation goes even further: Article 15 insists on urgency and considers the child both as a person and as an owner of assets; Article 27 (5) reinforces the judge's power to take into account the best interests of the child through extraterritorial measures, if there are specific circumstances such as the exposure to a "grave risk".

*Secondly*, trust between Member States is also highlighted by the choice of law offered to national courts. Under the current regime, measures falling within the scope of Article 20 of the Brussels Ibis Regulation seem to be entirely governed by the law of the forum, as the ECJ has frequently stressed.<sup>60</sup> However, the content of the measure, may – and sometimes should – take into account the law applicable to the substance of the case. Thus, in provisional litigation, applying the law applicable to the substance, rather than that of the forum, seems to be more respectful of the final solution to the litigation. As such, without ruling on this specific matter, the ECJ and the EU legislator leave a margin of appreciation to national judges by deciding which relevant law to apply.

**Proposal no. 4: Relating to *ex parte* provisional measures, Recital 59 of the Brussels I ter Regulation only refers to the possibility of national law for the recognition and enforcement of *ex parte* measures issued by the court having jurisdiction as to the substance.**

**Consequently, we propose that such measures should have, in the name of the child's best interests, extraterritorial effect by virtue of the national law of the Member State where the measure needs to be enforced (and subject to the coordination rule that prescribes that the measure expire once the court having jurisdiction as to the substance adopts an incompatible measure).<sup>61</sup>**

## B. TRUST CONDITIONAL ON CONSISTENCY

Recognition and trust between Member States should not only aim at protecting values but also at ensuring consistency in the European Union through the respect of each Member State's own public policy (i). Besides, the national judge must ensure that his decision is consistent with another decision issued by a different judge (ii). More specifically, the EAPO appears to be a tool consistent with the European common market (iii).

### 1. CONSISTENCY WITH PUBLIC POLICY

Free circulation of judgments is based on mutual trust. But recognising all provisional measures is difficult, as some may be incompatible with the internal public policy of the requested Member State. This is why Brussels I Recast Regulation seeks to find a balance: the recognition of a judgment shall be refused if *manifestly contrary* to public policy in the Member State addressed.<sup>62</sup>

<sup>56</sup> O. Boskovic, "Chapter 7: Provisional Measures", in V. Rijavec, W. Kennett, T. Keresteš, T. Ivanc, *Remedies Concerning Enforcement of Foreign Judgments: Brussels 1 Recast*, Kluwer Law International, 2018.

<sup>57</sup> C. Honorati, "Provisional Measures and the recast of Brussels 1 Regulation: a missed opportunity for a better ruling", *Rivista di diritto internazionale private e processuale*, 2012, pp. 525 et seq.

<sup>58</sup> Article 8 (2) - UNIDROIT Principles of Transnational Civil Procedure, 2006, The American Law Institute and UNIDROIT.

<sup>59</sup> I. Pretelli, "Provisional Measures in Family Law and the Brussels II ter Regulation", *Yearbook of Private International Law*, 2019, available at [https://www.academia.edu/41121471/PROVISIONAL\\_MEASURES\\_IN\\_FAMILY\\_LAW\\_AND\\_THE\\_BRUSSELS\\_II\\_TER\\_REGULATION](https://www.academia.edu/41121471/PROVISIONAL_MEASURES_IN_FAMILY_LAW_AND_THE_BRUSSELS_II_TER_REGULATION).

<sup>60</sup> The ECJ held that "the taking of the measure and its binding nature are determined in accordance with national law"; ECJ, 2 April 2009, case C-523/07, A (EU:C:2009:225), at para. 65.

<sup>61</sup> I. Pretelli, "Provisional Measures in Family Law and the Brussels II ter Regulation", *Yearbook of Private International Law*, 2019, available at [https://www.academia.edu/41121471/PROVISIONAL\\_MEASURES\\_IN\\_FAMILY\\_LAW\\_AND\\_THE\\_BRUSSELS\\_II\\_TER\\_REGULATION](https://www.academia.edu/41121471/PROVISIONAL_MEASURES_IN_FAMILY_LAW_AND_THE_BRUSSELS_II_TER_REGULATION).

<sup>62</sup> Article 45 of Brussels I Recast Regulation. Article 45 (1) (b) of the Brussels I Recast Regulation specifically protects the right to be heard, one of the elements of the fair trial of Article 6 of the European Convention on Human Rights. In this respect, see above para. 33.

This restrictive conception of public policy confirms the position of the European Court of Justice which considers that the public policy clause must be interpreted strictly and in exceptional cases.<sup>63</sup> As such, only the infringement of *fundamental principles* or rights of a State will be interpreted as a violation of public policy.

In addition, the ECJ can review the limits within which the courts of a Member State may use public policy to refuse the recognition of a judgment.<sup>64</sup> Moreover, the ECJ adds another requirement: public policy can be invoked to refuse the recognition of a judgment only if all remedies have been used by litigants in the Member State of origin.<sup>65</sup> Through this reasoning, the Court restrains the use of public policy even more, the principle being mutual trust between Member States, leaving a margin of appreciation to Member States nonetheless.<sup>66</sup>

Finally, the refusal to recognise a provisional measure cannot only be grounded on internal public policy but also on European public policy, as we can see through the example of anti-suit injunctions.

Anti-suit injunctions consist in a prohibition imposed by a court and backed by a penalty, restraining a party from initiating or continuing proceedings before a foreign court.<sup>67</sup> According to the ECJ, and as detailed in the *West Tankers case*,<sup>68</sup> these measures cannot be adopted or enforced, as they are contrary to the principle of mutual trust between Member States. Thus, in the context of an anti-suit injunction, a national court shall determine according to both its national law and European civil procedure, whether it has jurisdiction to resolve the dispute before it.

## 2. CONSISTENCY WITH ANOTHER DECISION

Another issue that has to be taken into account when recognising provisional measures is the existence of previous decisions. Even if the *res judicata principle for provisional measures can somehow be criticised*,<sup>69</sup> Member States refuse recognition “if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed”<sup>70</sup>

Consequently, the judge requested for recognition has to verify – on the basis of his own procedural national law – whether there is any decision between the same parties which could be irreconcilable with the one that has to be recognised. Such a principle is applicable to provisional measures, but its application may be more complex because of the variety of provisional measures that each State encounters.

This complexity may be questioned through the distinction of provisional measures *in rem* and those *in personam*. In fact, Civil Law jurisdictions, when aiming at prohibiting the debtor from dissipating his assets, only have *in rem* interim relief. On the contrary, Member States with Common Law traditions have *in personam* provisional measures. One of them is the freezing order, more commonly known as the *Mareva* injunction. Such injunctions “require the person against whom they are made not to deal with his assets in a way that would prejudice this objective. They operate only *in personam*”<sup>71</sup>

In this respect, French jurisdictions had to decide whether they could issue a provisional measure *in rem*, specifically a *saisie conservatoire*, when a freezing order had been issued previously.<sup>72</sup>

The French *Cour de cassation* considered that the *Mareva* injunction and the *saisie conservatoire* were not incompatible since the object of the relief was not identical: the person for the freezing order, and the assets for the *saisie conservatoire*.<sup>73</sup> Such a point should be carefully considered for two reasons.

*Firstly*, the answer can be considered as frustrating<sup>74</sup> since the purpose of the interim relief (*Mareva* injunction or *saisie conservatoire*) is identical. What would happen if the *Mareva* injunction were presented for recognition in a Member State in which the parties have already requested a conservatory measure having the same effect?<sup>75</sup> The answer to such a question is not addressed by the current provisions.

*Secondly*, since Brussels I Recast Regulation, interim relief issued by a judge not having jurisdiction as to the merits of the case, is not considered as a “judgment” in the new Regulation and should not produce any extraterritorial effect.

<sup>63</sup> ECJ, 28 April 2009, *case C-420/07, Apostolides* (EU:C:2009:271), at para. 55.

<sup>64</sup> ECJ, 28 March 2000, *case C-7/98, Krombach* (EU:C:2000:164).

<sup>65</sup> ECJ, 25 May 2016, *case C-559/14, Meroni* (EU:C:2016:349). An order issued by a court without a prior hearing of a third person whose rights may be affected by that order, cannot be regarded as manifestly contrary to public policy in the addressed Member State or manifestly contrary to the right to a fair trial, in so far as that third person is entitled to assert his rights before that court.

<sup>66</sup> ECJ, 2 April 2009, *case C-394/07, Gambazzi* (EU:C:2009:219).

<sup>67</sup> ECJ, 27 April 2004, *case C-159/02, Turner v. Grovit* (EU:C:2004:228).

<sup>68</sup> ECJ, 10 February 2009, *case C-185/07, West Tankers* (EU:C:2009:69).

<sup>69</sup> See above para. 14 *et seq.*

<sup>70</sup> Article 45 of the Brussels I Recast Regulation and Article 22 of the Brussels IIbis Regulation. Article 39 of the Brussels IIter Regulation contains the same provision, however, the definition of a judgment being different, its application may be quite different.

<sup>71</sup> T.C. Hartley, “Jurisdiction in conflict of laws - disclosure, third-party debt and freezing orders”, *L.Q.R.* 2010, pp. 194-221, especially p. 211.

<sup>72</sup> Commercial Chamber, 3 October 2018, *no.17-20.296*, published. In this case, a Cypriot judge issued a *Mareva* injunction against a French company. The creditor requested a *saisie conservatoire* against the same company before the French judge, who granted it. The French *Cour de cassation* considered that the *Mareva* injunction was different from the *saisie conservatoire* since it did not render the assets paralysed.

<sup>73</sup> On this decision, see Ph. Théry, “À propos des mesures conservatoires: la difficile combinaison des injonctions personnelles et des saisies conservatoires...”, *RTD Civ.*, 2019, p. 395; S. Clavel, F. Jault-Seseke, “Droit international privé”, *D.*, 2019, p. 1016.

<sup>74</sup> See S. Ménétrey, G. Cuniberti, “Saisie conservatoire en France sur des biens gelés par une injonction *Mareva* chypriote : le (faible) jeu de l'autorité de chose jugée”, *RCDIP*, 2019, p. 215.

<sup>75</sup> In fact, a *Mareva* injunction has been recognised previously by the French jurisdictions (Cass. Civ., 1<sup>st</sup> section, 30 June 2004, *no.01-03.248, Stolzenberg c/ Daimler Chrysler Canada*).



However, in personam injunctions do not need any recognition as they produce extraterritorial effects on the basis of their own *in personam* character.<sup>76</sup> Jurisdictions issuing in personam interim relief will thus solely control its effect.

**Proposal no. 5: In order to ensure equal treatment between the parties and the different jurisdictions, it would be beneficial for each Member State to make an official list, according to its own law, of in personam provisional measures.**

**Proposal no. 6: It seems that despite the absence of the notion in European Regulations, it could be interesting to expressly recognise as a provisional measure the *res judicata* effect as to the provisional. This would allow us to clarify (a) whether a judge of a Member State has to recognise without any specific procedure an effect of a measure issued by a judge having jurisdiction on the merits; (b) whether a judge can issue a provisional measure having the same purpose, but on the basis of his own law.**

### 3. CONSISTENCY WITH THE EUROPEAN UNION'S AREA OF FREEDOM, SECURITY AND JUSTICE

Trust between Member States has to be analysed in parallel with the European Union's objective of maintaining and developing an area of freedom, security and justice in which free circulation of persons, goods and services is ensured.

In order to build such an area, the Union adopts measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.<sup>77</sup> As such, with the EAPO Regulation, "*Debt recovery is made faster, cheaper and more efficient*".<sup>78</sup>

This EAPO applicable to bank accounts located in the EU, including those of European branches of non-EU banks, may be requested at various moments: before initiating proceedings on the merits, any time during such proceedings up until the issuing of the judgement, or after having obtained a judgement. Besides, the EAPO Regulation preserves a minimum amount for the daily needs of the debtor and his family, underlying the EU legislator's quest for a fair balance between the creditor's and the debtor's interests.

The EAPO Regulation relies on each Member State's underlying trust and embodies a valuable example of harmonisation of civil procedure in the European Union, with the foreseeable help of the ECJ to fill in the legal loopholes or conflicts of interpretation, as already demonstrated in the recent decision of 7 November 2019.<sup>79</sup>

Nonetheless, some criticism could arise. Despite the precision of the Regulation, there are still many references to domestic provisions.

Indeed, domestic law regulates evidence admissibility, appeals from third parties, like banks, and the seizing of joint and nominee accounts.<sup>80</sup>

**Proposal no. 7: Fewer referrals should be made to Member State domestic civil procedure in order to guarantee a clear and uniform application of this EAPO.**<sup>81</sup>

## 4. CONCLUSION

In light of the above, we cannot but notice that the balance sought between the ideal of free circulation of provisional measures and the necessary limits that are set up to avoid forum shopping is thorny and imperfect.

Firstly, the legal framework of provisional measures between Member States appears to be delicate: not because it covers topics as various as civil and family matters, but rather since it hinges on both a two-track system – in which trust differs depending on the jurisdiction's competence on the merits – and on additional and movable criteria.

Secondly, this analysis leads us to note that improvements based on more accuracy and flexibility could be proposed on a European level in order to clarify the recognition of provisional measures and strengthen judicial cooperation between Member States. As such, seven proposals have been made throughout this study, relying on both more harmonisation and more cooperation between Member States.

To conclude, this subject could open up a discussion on a broader dimension, such as European institution law. Indeed, the recognition of provisional measures between Member States relies on different Regulations which sometimes, have not been sufficiently analysed through an economic and social perspective. Even if the Commission prepares an impact assessment before any legislative proposal, as it is also the case in France since its constitutional reform of 2008, this economic and social study should be constantly kept in mind and deeply analysed to guarantee that the different tools are relevant to practitioners' needs.

<sup>76</sup> It should be noted that *in personam* freezing orders are not exclusively proper to the United Kingdom system. They are used in Cyprus, Hungary and Northern Ireland.

<sup>77</sup> Recital no.1 of the EAPO Regulation.

<sup>78</sup> European Commission, Debt recovery made faster, cheaper and more efficient, available at [https://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=52464](https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=52464).

<sup>79</sup> ECJ, 7 November 2019, *case C-555/18, K.H.K.* (EU:C:2019:937).

<sup>80</sup> M. Requejo, "ERA conference, "Freezing Bank Accounts Across Europe (and Beyond)": compte-rendu", Conflictolaws.net, 9 January 2017, available at <https://conflictolaws.net/2017/era-conference-freezing-bank-accounts-across-europe-and-beyond-compte-rendu/>.

<sup>81</sup> E. Jeuland, "La clef de voûte de l'espace judiciaire européen: le règlement n° 655/2014 du 15 mai 2014 créant une procédure d'ordonnance européenne de saisie conservatoire des comptes bancaires, (OESC)", 2019. hal-02025794, available at <https://scanr.enseignementsup-recherche.gouv.fr/publication/hal-02025794>.



SEMI-FINAL D

# JUDICIAL ETHICS AND PROFESSIONAL CONDUCT

PARTICIPATING TEAMS

FRANCE, LATVIA, POLAND, PORTUGAL, SERBIA

1<sup>st</sup> place: Team France

2<sup>nd</sup> place: Team Serbia

3<sup>rd</sup> place: Team Poland

Selected papers for TAJ:

Team France

Team Serbia



07 - 08 JULY 2020, ONLINE

# JURY MEMBERS

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## JEREMY COOPER (UK)

PROFESSOR, RETIRED JUDGE AND CONSULTANT TO THE UNODC ON JUDICIAL INTEGRITY, CONDUCT AND ETHICS

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Having been the Chairman of the THEMIS Jury for Semi Final D in 2019, which was conducted as a 'live event' at the National Institute of Justice in Sofia, Bulgaria I wondered how the competition would be conducted in 2020, under the iron umbrella of Covid 19? I was therefore delighted to be invited to act as Chairman of the Jury once more, alongside two expert professional colleagues from Spain and Austria. The EJTN management were resolute in their determination to ensure that nothing could derail the 2020 competition – *The Show must Go On* - and it certainly did, in memorable fashion under the ever stylish direction of EJTN staffer Arno Vinkovic.

Teams from 5 different member states participated in this year's competition, and all wrote excellent and challenging papers on the generic theme of **Judicial Ethics and Professional Conduct**. The topics selected within the theme differed significantly from one another which led to a very stimulating competition, both for participants and jury members. The topics chosen reflected significant contemporary concerns including the need for judges to adapt a more responsive sensitivity in their approach to the media, and the dangers facing judges in countries where attempts are being made to politicise the judiciary. The teams had to defend their papers via an entirely on-line forum and did a brilliant job in responding to this challenge. Each team made a short video using thoughtful and original methods to get their points across to the jury, whose questioning was as ever direct, succinct, challenging and robust. In response, teams defended their position with confidence and flair, always in impeccable English.

There were two outstanding teams this year: France and Serbia. The professionalism of their conduct throughout the competition was exemplary, and their mastery of their subject matter detailed and palpable. It is with great pleasure therefore that we publish both papers in this year's edition of the Themis Annual Journal. In my view, both papers will command a large and respectful audience, and their influence will be potentially wide. The papers could both be published and sit comfortably in the pages of any quality, internationally respected law journal.

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## CAROLINA FONS RODRÍGUEZ (ES)

MAGISTRATE, DOCTOR IN LAW, HEAD OF AREA IN THE EXTERNAL AND INSTITUTIONAL RELATIONS DEPARTMENT OF THE SPANISH JUDICIAL SCHOOL

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This year 2020 I have had the honour of being a member of the jury for the Themis D Semi-Final on Judicial Ethics. It has been a very rewarding experience due to the extraordinary quality of the works presented by the different teams, as well as the enthusiasm, energy and exquisiteness with which the young European judges have defended their legal theses.

Furthermore, it has been extremely interesting to see the agility and flexibility of these jurists when they have presented an argument, their opponent and, finally, they have reached a conclusion defended in a very professional way.

To the above, we must add the originality with which the works have been presented by the contestants, and the challenge that has meant that this year the works have been defended on line.

For all this, I can say that it has been a privilege not only to participate in this wonderful activity organized by the EJTN that promotes cooperation between the judges of the Schools of the Member States (having to work as a team), but also to see the high quality of the work presented that can be due to a great professional dedication of our young judges.

In my opinion, this type of activities organized by the EJTN promote the comradeship and the union of different forces to achieve a common goal and, above all, make the new European judges relate to each other on the basis of a common Europe, hopefully in the style of the dream of great Europeanists, such as Robert Schuman or Stefan Zweig.

In short, thank you for having the opportunity to participate in this very special and positive training activity.

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## ROBERTA SOLIS (UNODC)

JUDICIAL INTEGRITY TEAM LEADER, SECRETARIAT OF THE  
GLOBAL JUDICIAL INTEGRITY NETWORK AT THE UNITED NATIONS  
OFFICE ON DRUGS AND CRIME

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2020 was my first participation as a jury in the THEMIS Semi Final D. It was an absolute pleasure to work with the EJTN Secretariat, my fellow jury members – all experienced EJTN members and contributors –, and the teams competing in this Semi Final. It was a great opportunity to share with future European judges the work being developed by the United Nations Office on Drugs and Crime through the Global Judicial Integrity Network ([www.unodc.org/ji](http://www.unodc.org/ji)) to support judges and judiciaries in promoting judicial integrity and preventing corruption within the justice system. However, more importantly, it was an extremely enriching experience to have the opportunity to hear from future judges and discuss with them so many deep and important issues related to judicial ethics and professional conduct.

It was very encouraging to see them delving deeply into so many important and difficult issues such as cognitive biases and their influence in the adjudicatory process, limits to the freedom of expression of judges, enhancing public trust through tailored communications strategies, ethical requirements for the recruitment of judges and risks to judicial independence. Each team chose a completely different topic from the other, and, although various cross-cutting judicial ethics and integrity issues could be repeatedly identified in the written papers, videos and presentations, each team brought to the competition a very different point of view, unique considerations and different ways to tackle these issues through their works.

It was also extremely interesting to see the creativity of all the teams when adapting to the virtual format of the competition imposed by the Covid-19 pandemic – not only they presented comprehensive academic papers, strong debate and argumentative skills, but also brought great humour and innovation to the videos they had to develop to present their works. It was also very encouraging to see the teams striving to apply gender-sensitive and inclusive language in their works!

The Global Judicial Integrity Network was established as a platform for judges and judiciaries to collectively address existing and emerging challenges to judicial integrity. It is a platform “of judges, for judges”, based on collegiality and peer learning and support. So, it was very enriching and an honour to be able to participate in the jury of Semi Final D and see all the teams embody these principles in their work. The THEMIS competition is certainly a very important and commendable initiative carried out by the EJTN to foster exchanges among future judges in Europe and an excellent training opportunity for them.

I wish all the teams that participated in the competition all the best in their careers as judges and hope that they carry on in the same spirit of collegiality, critical thinking and peer support. A special thanks as well to the EJTN Secretariat for the opportunity to be a part of this great initiative.

TOMMY BIRAMBEAU  
STÉPHANE FISCHER  
DELPHINE VERHEYDE



TUTOR: MATHILDE LACROIX

Team FRANCE

# HOW JUDGES THINK?

## UNDERSTANDING AND ADDRESSING JUDICIAL BIASES

This article questions judges' impartiality in the judicial decision-making process. As many statistical studies show, judges, like everybody else, are subject to various prejudices and biases, due to racism, sexism, their political opinions or working environment. Moreover, new insights from cognitive psychology allow us to measure the influence of specific biases, such as the anchoring effect, on their decision-making. However, as illustrated in this article, the existing legal guarantees implemented both at national and international levels appear insufficient to cope with this issue. While a growing number of codes of conduct and ethical principles tend to identify circumstances in which partiality may arise, they fail to provide satisfactory tools to prevent them from emerging.

To this end, and in order to ensure the right to a fair trial, as guaranteed under Article 6 of the European Convention on Human Rights, the core of this paper is to formulate twelve proposals that aim at preventing these biases or mitigating their effects in the judicial decision-making process. These proposals rely on procedural (duty to give reasons, collegiality), institutional (judicial management, professional training) and individual (self-awareness, critical thinking) solutions.

### KEY WORDS

Decision-making process  
Biases and prejudices  
Impartiality  
Cognitive psychology  
Fair trial  
Debiasing

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## 1. INTRODUCTION

Like 'everybody else does', answered Richard Posner in a 1993 article discussing how judges think and reach their decisions.<sup>1</sup> Far from what legal theory has long wanted to believe, the judicial mind is no longer an unfathomable and sacred mystery.

On the contrary, recent developments in social sciences, particularly in Europe over the last two decades, suggest that the judicial decision-making process is not an unsinkable vessel but rather a boat taking on water. It is not a shipwreck that threatens judges, but the numerous biases and prejudices that penetrate their mind, distort their judgment and jeopardize the rights of the defence, as shown throughout many statistical studies.

According to the *Commentary on the Bangalore Principles of Judicial Conduct*, established by the Judicial Integrity Group, with the support of the United Nations Office on Drugs and Crime, such biases can be defined as 'a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction.'<sup>2</sup>

Like 'everybody else', the judge, indeed, might suffer prejudice of all types: racism, sexism, preference for political opinions similar to his or her own, etc.

In addition, the judge's own working environment seems to be a source of biases: duration of hearings, types of cases handled, or an immediately preceding case, all tend to significantly influence judicial decisions. Finally, cognitive sciences offer new insights into the psychological mechanisms that affect judicial decision-making. The question of the anchoring effect, for instance, is particularly important with regard to the procedural guarantees that are supposed to protect the rights of the defendant but could, on the contrary, have the opposite effect. Statistical tools make it possible to accurately and rigorously measure the extent of these phenomena.

However, as the human psyche seems inscrutable, courts and guidelines have preferred to address only the concrete manifestations of these biases or prejudices, through legal rationality and objective impartiality, rather than to deal with the judge's elusive subjectivity. On this matter, the European Court of Human Rights (hereinafter 'ECHR') case law with regards to objective impartiality and the appearance of justice is telling. Judges' discretion appears as the unknown in the judicial decision.

This finding necessarily prompts us to reflect on the solutions to be found. While Article 6 of the European Convention on Human Rights, like many other legal texts in France and in Europe, proclaims the right to a fair trial, it seems more crucial than ever to address the issue of biases in the judicial decision-making process, that constitute a major threat to such a guarantee.

This paper will therefore tend to establish, firstly (2), in what way the classical approaches to the judicial decision-making process have proved to be insufficient in the perception of judicial biases, and how this insufficiency is reflected in the current legal and ethical framework supposed to address these biases. In particular, we will argue that the common requirement of 'objective' impartiality alone is insufficient to guarantee the rights of the defence and that subjective impartiality is by no means an unattainable objective.

In the second part (3), we will therefore make a number of concrete proposals seeking to reduce the influence of these biases in the judicial decision-making process. We will argue that while these biases are difficult to perceive, they should not be ignored. This is why we will propose both legal and procedural solutions (3. A) so as to better take into account the subjectivity of the judge in the judicial process, but also ethical and professional solutions (3. B) aimed at raising awareness of, and consequently reducing, the flaws in the judicial mind.

## 2. RETHINKING JUDICIAL DECISION-MAKING IN LIGHT OF BIASES AFFECTING IT

Current understanding of how judges think addresses judicial biases imperfectly (A), which is why it appears necessary to discuss the limits of existing models and further investigate judges' social and cognitive biases by referring to recent studies on the matter (B).

### A. LIMITS TO THE CLASSICAL APPROACHES TO THE JUDICIAL MIND

The judicial mind's classical approaches refer to formalist and realist theories that have both demonstrated their limits in the understanding of the judicial decision-making process (1). Moreover, these theoretical limits lead to practical flaws in the legal and ethical frameworks (2).

#### 1. THEORETICAL LIMITS: UNSATISFACTORY FORMALIST AND REALIST APPROACHES

In this subsection, we do not pretend to give an exhaustive account of legal theories that addressed the judicial mind in the 20<sup>th</sup> century. As stated above, by 'classical approaches', we will only refer to formalist and realist theories as representative of the dominant theories in contemporary legal thought. We argue that these theories missed the issue of judicial biases by overestimating legal objectivity and rationality.

<sup>1</sup> Posner, 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)', 3 *Supreme Court Economic Review* (1993).

<sup>2</sup> Judicial Integrity Group, *Commentary on the Bangalore Principles of Judicial Conduct* (2007).



In a narrow sense, legal formalism designates a specific school of thought, which was notably represented by Christopher Columbus Langdell, Dean of Harvard Law School from 1870 to 1895. However, in a broader sense, formalism might also refer to legal theories from various legal traditions presenting theoretical similarities. Indeed, Langdell's formalism might coincide with the French *École de l'exégèse*, which saw the *Code civil* and statutes in general as the very ground of the legal system,<sup>3</sup> or the Austrian Hans Kelsen's normativism, according to which a legal system is like a pyramid of norms rooted in a constitution, itself validated by a basic norm.<sup>4</sup> These formalist models have three assumptions in common. Firstly, the Law is founded on objective principles: it is not up to judges to determine what the Law is or is not. Secondly, legal reasoning depends on lawyers' ability to correctly interpret the preexisting state of the law, whether found in legal precedent in the common law tradition or in the statutes of the civil law tradition. Thirdly, judicial interpretation proceeds by deducing specific solutions from general principles. Thus, these different approaches can be called formalist as they think the law objectively, which leads to voluntarily restraining the judge's subjectivity in the judicial decision-making process. To quote Lee Epstein and Jack Knight: 'For decades, political scientists treated (read: venerated) judges as apolitical, apartisan, value-free umpires who resolved disputes with reference to the law alone.'<sup>5</sup>

However, formalist theories also share common limits. Indeed, especially in civil law tradition, formalism leads to underestimating the importance of caselaw in comparison with statutory law. Even Portalis, one of the French *Civil Code's* fathers, said that 'one can no more do without caselaw than without laws.'<sup>6</sup> When general principles are lacking or obscure, judges need to interpret and extend the letter of the law according to their own interpretation of its spirit. This implies that judges actually interpret subjectively – and thus partly create – the Law, which is unacceptable from a formalist perspective. Formalism therefore leads to unrealistic assumptions on how judges think, or more precisely, on how they do not think. More importantly, it leads to a form of blindness regarding judicial power. For instance, American lawyer Mitchel Lasser showed how the French *Cour de Cassation's* (Highest Court in the French judiciary) formalist self-portrait, also illustrated by its judgments' syllogistic style, has contributed to hide the extent of its jurisprudential creativity.<sup>7</sup>

Legal realism finds its roots in the critique of the formalist model. One of its precursors, US Supreme Court Justice Oliver Wendell Holmes Jr., famously adopted the 'bad men' perspective to explain why, far from being a set of principles or axioms, the Law should be 'the prophecies of what the courts will do in fact, and nothing more pretentious'.<sup>8</sup> Indeed, the bad man does not care about the law in books; he wants to

know what the court will decide in order to act accordingly. Legal realism has had the merit to address the complex issue of approaching the judge's subjectivity by using transdisciplinary means. In the analysis of the Supreme Court's decisions, political sciences, as well as economic sciences, were predominant,<sup>9</sup> which was best represented by Richard Posner. The shared assumption in these political and economic approaches was that some inner rationality was to be discovered in the judicial decision-making process.

However, as much as these studies participated in a better understanding of how judges think, they were blind to judicial biases as they failed to address judges' irrationality. Indeed, Epstein and Knight first held that judges 'may be primarily seekers of legal policy',<sup>10</sup> by which they meant that judges have agendas and that their decisions can be primarily analyzed as politically oriented. Then, they acknowledged that 'We were wrong. Data and research developed by scholars (mostly from other disciplines) have demonstrated that although the policy goal is crucial to understanding judicial behavior, it is not the only motivation; it may not even be dominant for many judges.'<sup>11</sup>

Therefore, both the formalist and realist approaches appear to have failed to successfully grasp the judicial mind. These theoretical shortcomings have direct consequences on the practical legal and ethical framework supposed

to address the biases affecting judicial decision-making.

## 2. PRACTICAL LIMITS: INSUFFICIENT LEGAL AND ETHICAL GUARANTEES

Due to the theoretical limits in the understanding of the judicial decision-making process described above, legal and ethical guarantees put in place to address biases and prejudices that could affect such a process appear insufficient.

The right to a fair trial which requires that a case be heard by an 'independent and impartial tribunal' is a legal standard stated under Article 6(1) of the European Convention of Human Rights. Judges' impartiality, foreseen by domestic legal frameworks as well as by the Convention, is a keystone of Member States' judicial systems. As a result, the Court has, on the one hand, developed criteria to systematically assess any possible lack of impartiality, and on the other hand, identified circumstances in which partiality may arise.<sup>12</sup>

In order to assess whether a situation of partiality lies in the case submitted to the scrutiny of the Court, European judges will refer to subjective and objective tests. As defined in the 2009 *Micallef v. Malta* case,<sup>13</sup> an objective test will 'ascertain whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality' whereas a subjective test refers to 'the personal conviction and behavior of a particular judge, that

<sup>3</sup> R.-T. Troplong, *Droit civil expliqué* (1833).

<sup>4</sup> H. Kelsen, *Pure Theory of Law* (1960).

<sup>5</sup> Epstein and Knight, 'Reconsidering Judicial Preferences', *Annual Review of Political Sciences* (2013).

<sup>6</sup> J.-E.-M. Portalis, *Discours préliminaire du premier projet de Code civil* (1801).

<sup>7</sup> Lasser, 'Judicial (Self-)Portraits: Judicial Discourse in the French Legal System', *Cornell Law Faculty Publications* (1995).

<sup>8</sup> Holmes Jr., 'The Path of Law', *Harvard Law Review* (1897).

<sup>9</sup> Espinosa, 'L'indépendance du Conseil constitutionnel français en question', 4 *Les Cahiers de la Justice* (2015) 547.

<sup>10</sup> L. Epstein and J. Knight, *The Choices Justices Make* (1998).

<sup>11</sup> Epstein and Knight, 'Reconsidering Judicial Preferences', *supra* note 5.

<sup>12</sup> See, in particular, ECHR's *guides on Article 6 – Right to a fair trial* (2019), available on [www.echr.coe.int](http://www.echr.coe.int).

<sup>13</sup> ECHR, *Micallef v. Malta*, Appl. no. 17056/06, Judgment of 15 October 2009, at § 93.

is, whether the judge held any personal prejudice or bias in a given case'. However, while the subjective approach could lead some to think that there is an effective remedy to fight against judges' prejudices and bias, such remedy is truly limited. Indeed, the Court has stated that 'the personal impartiality of each member must be presumed until there is proof to the contrary' (*Le Compte, Van Leuven and De Meyere v. Belgium*<sup>14</sup>). Finally, such a standpoint of the Court reveals a need to establish the subjectivity of the judge through an objective fact. However, is it reasonable to argue that judges' bias and prejudices cannot always be demonstrated – if not almost never demonstrated. Moreover, it remains uncertain whether or not judges' bias and prejudices can be proved in a timely manner for the defendant.

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To overcome this difficulty, the Court has identified circumstances in which impartiality may arise. According to the Court, impartiality may be of a functional nature 'for instance, the exercise of different functions within the judicial process by the same person, or hierarchical or other links between the judge and other actors in the proceedings'<sup>15</sup> (*Micallef v. Malta*).

Moreover, according to the Court, impartiality may also result from 'the personal character and derives from the conduct of the judges in a given case or the existence of links to a party to the case or a party's representative'. It clearly appears however that these indicators may only reveal a potential bias and could even have a counter-productive effect by reinforcing the presumption of impartiality in cases where none of these circumstances are met.

Regarding judicial ethics, we may wonder whether deontological standards provide an effective remedy against judges' bias and ensure a fair judicial decision-making process. Indeed, deontological standards and norms have flourished within judicial institutions at national, European and international level to guide judges in their decision-making process and prevent impartiality. However, most codes of conduct do not address the issue of judges' personal and cognitive bias.

At the national level, the *United Kingdom Guide of Judicial Conduct* addresses the issue of judges' bias by prohibiting or limiting extra-judicial activities 'because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.'<sup>16</sup>

<sup>14</sup> ECHR, *Le Compte, Van Leuven And De Meyere v. Belgium*, Appl. no. 6878/75 and 7238/75, Judgement of 23 June 1981, at § 58.

<sup>15</sup> According to the ECHR's *guide on Article 6 (criminal limb)* (*supra* note 12, at 24-27), impartiality will arise when there is a successive exercise of the functions of investigating judge and trial judge by one and the same person in the same case (*De Cubber v. Belgium*, § 27-30); or when all the members of the court martial were subordinate in rank to the convening officer and fell within his chain of command (*Findlay v. the United Kingdom*, § 76), or in case a criminal trial was held against an applicant in a court where the victim's mother worked as a judge (*Mitrov v. the former Yugoslav Republic of Macedonia*, § 49-56).

<sup>16</sup> United Kingdom Supreme Court, *Guide to Judicial Conduct*, United Kingdom (2020), at 7.

The Guide also foresees, for example, judges' disqualification in cases where judges' relatives are involved with the parties. However, the Guide does not take into account how judges' personal bias could undermine the judicial decision-making process. Impartiality is treated from an objective approach only while subjective impartiality remains a theoretical and impractical postulate.

The Spanish *Principles of Judicial Ethics* mention that 'impartiality is a judge internal process, which requires, before deciding on a case, to identify and to try to overcome prejudices and bias that could undermine the decision making.'<sup>17</sup> The *French Compendium of the Judiciary's Ethical Obligations*<sup>18</sup> makes a similar statement. Contrary to the judicial codes of conduct mentioned earlier, the Spanish ethical principles acknowledge that the way judges think or feel may impact their decisions. However, the Spanish principles do not provide any guidance to the judge to overcome the situation.

At the European level, the *Code of Conduct for Members and former Members of the Court of Justice of the European Union* only provides for two articles<sup>19</sup> about impartiality, which exclusively focus on the risks posed by possible conflicts of personal interest and inappropriate communication by judges to the public. The question of personal bias is not tackled in the Code of Conduct.

<sup>17</sup> Consejo General Del Poder Judicial, *Código Ético para la Carrera Judicial*, Spain (2016), at 4.

<sup>18</sup> Conseil Supérieur de la Magistrature, *Compendium of the Judiciary's Ethical Obligations*, France (2019).

<sup>19</sup> Court of Justice of the European Union, *Code of Conduct for Members and former Members of the Court of Justice of the European Union* (2016/C 483/01), 59 OJUE (23 December 2016), at art. 4 and 5.

<sup>20</sup> Judicial Integrity Group, *The Bangalore Principles of Judicial Conduct* (2002).

<sup>21</sup> Judicial Integrity Group, *supra* note 2, at 52.

Finally, at the international level, the adoption, in 2002, of the *Bangalore Principles of Judicial Conduct* by the Judicial Integrity Group marked an important milestone as they provide in their applications regarding the principle of impartiality that 'A judge shall perform his or her judicial duties without favour, bias or prejudice.'<sup>20</sup> Moreover, the 2007 *Commentary on the Bangalore Principles of Judicial Conduct*<sup>21</sup> proved to be extremely helpful and relevant for the 'reasonable observer' to identify concrete examples of manifestations of judges' biases and prejudices after they emerge. However, once again, both the *Bangalore Principles* and their explanatory memorandum do not foresee any way to prevent those biases and prejudices to rise.

It appears that legal obligations and ethical guidelines currently implemented by national and European judicial authorities as well as international principles do not provide adequate tools to identify judges' personal biases and prevent them. For the most part, they remain blind when it comes to judicial subjectivity.

Therefore, both the theoretical approach of the judicial decision-making process, and its legal and ethical framework, have failed to grasp the full potential of the biases affecting this process.

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However, in the last two decades, social sciences have proposed a rather compelling perspective on this issue. This 'new' analysis of the judicial decision-making process – in light of social and cognitive biases affecting it – was built through a rigorous scientific methodology and an equally conclusive use of statistical tools. This makes it all the more interesting to take these new data into account, which will be the purpose of the following section.

## B. A NEW UNDERSTANDING OF JUDICIAL DECISION-MAKING IN LIGHT OF SOCIAL AND COGNITIVE BIASES

The aim of the following section is to provide an overview of the current state of the scientific literature relating to the biases affecting the judicial decision-making process. This literature review was built mostly on French and European studies. Some studies also refer to American datasets. For the sake of clarity, this section will be divided into social (1) and cognitive biases (2).

### 1. THE INFLUENCE OF SOCIAL BIASES ON THE JUDICIAL DECISION-MAKING PROCESS

The biases that will be discussed in this subsection are considered 'social' in the sense that they rely on the judge's social environment while making a decision. This social environment results from both internal (a) and external (b) constraints, the former being related to political opinions and prejudices of all kinds, which judges, like any individual,

are subjected to, and the latter referring to biases in the judge's professional working environment.

#### a. Internal biases

Like any individual, judges may have political opinions. However, because of their specific position, these opinions can legitimately call their impartiality into question. Impartiality is particularly at stake when discussing the case of judges, for whom the appointment procedure raises issues of independence. In France, this is the case with the Constitutional Council, whose nine members are appointed by the President of the Republic, the President of the National Assembly, and the President of the Senate. Former Presidents of the Republic may also sit on the Council. Owing to the specific conditions of appointment of its members, French researcher Raphaël Franck proposed a quantitative analysis in 2006 of the French Constitutional Council decisions, from 1959 to 2006.<sup>22</sup> Franck showed that during cohabitation periods (when the President belongs to a different political party than the majority of the members of Parliament), the Government was less likely to influence the Council's decisions. He also demonstrated that members appointed by right-wing parties were less likely to censor laws passed by right-wing governments and vice versa. Finally, Franck assessed that members who held political office prior to their appointment were more likely to vote politically. Franck's conclusions thus suggested that political biases significantly affect the decision-making process of the members of the French Constitutional Council.

Similar studies were conducted with regards to the Portuguese Constitutional Court (S. Amaral-Garcia *et al.*, 2009<sup>23</sup>), the Constitutional Court of Spain (N. Garoupa *et al.*, 2011<sup>24</sup>) and the Constitutional Court of Italy (N. Garoupa, V. Grembi, 2013<sup>25</sup>) and showed equivalent results. In Spain for example, the 2009 study indicated that constitutional judges were on average 39% more likely to vote in favor of a motion if proposed by the political party that appointed them.

In contrast, Sweden's peculiar judicial system allowed a similar study to be conducted on lay jurors who are drawn randomly from politically-affiliated appointed officials. This study,<sup>26</sup> carried out by Shamena Anwar *et al.* in 2015 using data from the Gothenburg District Court and published in 2019, revealed a number of systematic biases: convictions of young and Arabic-sounding named defendants increased substantially before jurors from the far-right (nationalist) Swedish Democrat party, while convictions in cases involving a female victim increased markedly before jurors from the far-left (feminist) Vänster party.

Beyond political opinions, judges are also subject to social prejudices. For instance, social science literature has documented the issue of racism among judges and jurors. In a study published in 2012, based on a dataset of felony trials in Florida held between 2000 and 2010,<sup>27</sup> Shamena Anwar *et al.* showed that juries formed from all-white jury pools convicted black defendants significantly more often than white defendants. Furthermore, this gap in conviction rates (16 percentage points) was entirely eliminated when the jury pool included at least one black member.

On the issue of sexism, a study on gender disparities in criminal justice, carried out by Arnaud Philippe in 2017<sup>28</sup> on a French dataset from 2000 to 2003, indicated that, on average, women were given sentences 15 days shorter than men (33% decrease). More interestingly, this gender gap was also observed within pairs of criminals, each consisting of one man and one woman, convicted together, on the same day, by the same panel of judges and for the same crime. These results revealed a sexist bias affecting particularly male judges. A. Philippe thus demonstrated that a one-standard-deviation increase in the number of women in the panel led to a decrease in the gender gap of 10%.

<sup>23</sup> Amaral-Garcia, Garoupa and Grembi, 'Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal', 6(2) *Journal of Empirical Legal Studies* (2009) 381.

<sup>24</sup> Garoupa, Gomez-Pomar and Grembi, 'Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court', 29(3) *Journal of Law, Economics, and Organization* (2011) 513.

<sup>25</sup> Garoupa and Grembi, 'Judicial Review and Political Bias: Moving from Consensual to Majoritarian Voting', *Working Paper* (2013).

<sup>26</sup> Anwar, Bayer and Hjalmarsson, 'Politics in the Courtroom: Political Ideology and Jury Decision Making', 17(3) *Journal of the European Economic Association* (2019) 834.

<sup>27</sup> Anwar, Bayer and Hjalmarsson, 'The Impact of Jury Race in Criminal Trials', 127(2) *The Quarterly Journal of Economics* (2012) 1017.

<sup>28</sup> Philippe, 'Gender disparities in criminal justice', *Toulouse School of Economics (TSE) Working Papers* n°17-762 (2017).

<sup>22</sup> Franck, 'Judicial Independence Under a Divided Polity. A Study of the Rulings of the French Constitutional Court, 1959- 2006', 25 *Journal of Law, Economics and Organization* (2009) 262.

Hence, social sciences have proven that it is possible to measure statistically the influence of internal (political, sexist, racist) biases on the judicial decision-making process. This is also the case for external biases affecting judges' working environments.

#### b. External biases

Beyond internal biases to which everyone may be subject, other biases, referred to here as external, result specifically from the judge's working environment.

In a study published in 2011,<sup>29</sup> Shai Danziger *et al.* analyzed 1,112 decisions rendered by eight experienced Israeli judges to test the common caricature that justice is 'what the judge ate for breakfast.' Danziger *et al.* divided daily deliberations of these judges into three distinct decision sessions, segmented by food breaks, and showed that the percentage of favorable rulings drops gradually from approximately 65% to nearly zero within each decision session and returns abruptly to approximately 65% after a break. This study demonstrated that the length of hearings had a direct impact on the decisions rendered at these hearings.

In his *theory of relative judgments* published in 2015,<sup>30</sup> Adi Leibovitch suggested that judges evaluate individual cases based on how those cases are ranked in comparison to the other cases in their caseloads. On average, judges exposed to a caseload that is one standard deviation lower in gravity, order sentences approximately two months longer than those ordered

by judges exposed to higher levels of criminal behavior. This study, using data from Pennsylvania Courts from 2001-2012, also showed that this effect was not immediate but lasted for approximately 40 court hearing days before decaying.

In a 1976 study,<sup>31</sup> A. Pepitone and M. Di Nubile, showed that the severity of the sentence was directly related to the seriousness of the immediately preceding case, e.g. a homicide was judged more severely when following an assault case rather than another homicide. This observation, related to the judge's working environment, could in fact find psychological explanations in a form of anchoring effect, which brings us to our second subsection.

## 2. THE INFLUENCE OF COGNITIVE BIASES ON THE JUDICIAL DECISION-MAKING PROCESS

While social sciences have studied the social biases and prejudices affecting judicial decision-making at length, cognitive sciences have taken a fresh look at the topic by directly questioning the cognitive processes at work in the act of judging. Rather than enumerating prejudices that affect the judgment, the objective here is to question the psychological process of decision-making itself, and how this process can be altered by certain reasoning biases. With respect to the judicial decision-making process, some biases have been extensively documented: for instance, the heuristic biases of representativeness (a), and one of them in particular, the anchoring effect (b).

#### a. Heuristic biases of representativeness

In their 1974 reference paper, *Judgment under Uncertainty: Heuristics and Biases*,<sup>32</sup> Amos Tversky and Daniel Kahneman demonstrated how three 'heuristics', i.e. mental operations, employed in the judicial decision-making process, led to systematic and predictable errors. These three heuristics (namely 'representativeness', 'availability' and 'adjustment and anchoring') all consist in predicting the probability of uncertain events.

The biases affecting these heuristics led to a tragic miscarriage of justice in 1999 when British citizen Sally Clark was wrongfully convicted of murder following the death of her two newborn children. Clark's two children died a year apart, in December 1996 and January 1998. A month later, Clark was arrested and tried for both deaths. She argued that her children had suffered a sudden infant death syndrome (SIDS). At the trial, a bias of representativeness led both forensic experts and jurors to underestimate the probability of two newborns suffering natural sudden deaths.

First, an expert made a statistical error by stating that the probability for two children from an affluent family to die from SIDS was 1 in 73 million. He obtained this figure considering both deaths as perfectly independent whereas genetic or environmental factors could predispose families to SIDS. Second, this statistical error was reinforced by

a 'prosecutor's fallacy', i.e. a fallacy in statistical reasoning used to exaggerate the likelihood of a defendant's guilt. It was thus stated that 1 in 73 million was the probability that Clark was innocent. However, even if the '1 in 73 million' figure were valid, the jury would have needed, in order to calculate the probability of Clark's innocence, to compare it with the probability of alternative explanations. In other words, although double SIDS is rare, double infant murder is rarer still. In a 2004 article published in *Paediatric and Perinatal Epidemiology*, Professor of Mathematics Ray Hill calculated that the odds ratio of double SIDS to double homicide lies between 4.5 to 1 and 9 to 1.<sup>33</sup>

Beyond this bias of representativeness, other biases affect the judicial decision-making process. In a 2001 paper,<sup>34</sup> Chris Guthrie *et al.* referenced and measured various biases among 167 U.S. Federal judges. 'Framing' is one of them and consists in categorizing decision options as potential gains or losses from a salient reference point, the *status quo*. Guthrie *et al.* showed that, against all rationality, judges – evaluating fictitious civil cases from the plaintiff's perspective – tended to make risk-averse decisions when choosing between options representing a gain; and risk-seeking decisions when choosing between options representing a loss. Secondly, Guthrie *et al.* also measured an 'egocentric' bias consisting in overvaluing one's capabilities relative to the average. For example, the authors showed that, among the interviewed judges, 56% thought they were in the

<sup>29</sup> Danziger, Levav and Avnaim-Pesso, 'Extraneous factors in judicial decisions', 108(17) *Proceedings of the National Academy of Sciences of the United States of America* (2011) 6889.

<sup>30</sup> Leibovitch, 'Relative judgments', 45(2) *The Journal of Legal Studies* (2016) 281.

<sup>31</sup> Pepitone and Di Nubile, 'Contrast effects in judgments of crime severity and the punishment of criminal violators', 33(4) *Journal of Personality and Social Psychology* (1976) 448.

<sup>32</sup> Tversky and Kahneman, 'Judgment under uncertainty: Heuristics and biases', 185(4157) *Science* (1974) 1124.

<sup>33</sup> Hill, 'Multiple sudden infant deaths – coincidence or beyond coincidence?' 18 *Paediatric and Perinatal Epidemiology* (2004) 320.

<sup>34</sup> Guthrie, Rachlinski and Wistrich, 'Inside the Judicial Mind', 86(4) *Cornell Law Review* (2001) 777.



lowest quarter of judges overturned on appeal, and 88% thought they were in the top half, which is mathematically impossible. Finally, Guthrie *et al.* found a 'hindsight' bias in the panel of judges, leading them to overestimate the predictability of a result, once known. The authors showed that judges informed of a particular outcome in a fictitious case – e.g. that a given decision was later overturned in appeal – overestimated their ability to predict this outcome, compared to the percentage of non-informed judges that effectively predicted it.

Among the heuristic biases of representativeness, one, the anchoring effect, has particularly strong implications with regards to the judicial decision-making process.

#### **b. The anchoring effect**

The anchoring effect was already evoked in Tversky and Kahneman's 1974 *Judgment under Uncertainty* and was also measured by Guthrie *et al.* in their 2001 study. It consists of the difficulty of detaching oneself from an initial piece of information, a hypothesis first formulated – the anchor, when making decisions. In Guthrie *et al.*'s study, in a hypothetical civil case, judges awarded an average of \$1.4 million more in damages (\$2.2 million versus \$800,000) when an accident victim sought \$10 million in compensation rather 'substantial damages'. In criminal cases, this anchoring effect has particularly strong implications, since procedural guarantees tend to systematically give the defendant the final say. As a result, the sentence sought by the prosecutor

constitutes an anchor from which judges struggle to detach themselves, regardless of the quality of the defence.

The anchoring effect attached to the prosecutor's arguments was specifically measured by a triple study conducted by Birte Englich and Thomas Mussweiler in 2001.<sup>35</sup> They submitted the same fictitious criminal case to newly appointed judges, exposing them to arguments ranging from two months' imprisonment for half of them to 34 months for the other half. Those who had been exposed to the low anchor (two months) opted for an average sentence of 18.78 months, compared to 28.70 months for those exposed to the high anchor (34 months). To isolate the anchoring effect from other factors, such as the possible influence of an experienced prosecutor over inexperienced judges, they conducted two other studies. In the first, the proposed sentence came from a computer-science student and not from a prosecutor. While most participants considered the proposed sentence to be irrelevant, a similar anchoring effect was still measured as participants gave higher sentences after evaluating a high sentencing demand of 34 months (24.41 months on average) than after evaluating a low demand of 12 months (17.64 months on average). The second study was conducted among particularly experienced judges (15.40 years of experience, on average). As in the two first studies, the given sentences were higher when participants evaluated the high demand of 34 months (35.75 months on average) than when they evaluated the low demand of 12 months (28 months on average).

Finally, in a well-documented study published in 2015,<sup>36</sup> Julien Goldszlagier, a French magistrate, compared the contributions of cognitive sciences on biases with French procedural guarantees and showed that, due to the anchoring effect, the latter – especially the emphasis on the last word given to the defendant – constituted a disadvantage for the defendant.

### **3. ADDRESSING BIASES IN JUDICIAL DECISION-MAKING: PROCEDURAL, INSTITUTIONAL AND INDIVIDUAL REMEDIES**

Thus, social and cognitive sciences have largely addressed and measured the influence of social and psychological biases on judicial decision-making. The statistically significant evidence found above should therefore be taken into account in the formulation of enhanced judicial ethics. Moreover, the concrete and tangible nature of these biases should lead to the formulation of proposals, both intellectual and practical. This is what we propose to do in this second part.

On this matter, we acknowledge that it is not, and never will be, possible to fathom the human psyche. It is perfectly understandable that the European Court of Human Rights, as well as the French *Conseil Supérieur de la Magistrature* (High Judicial Council), have particularly insisted on the notion of objective impartiality to the detriment of subjective impartiality. It is of course easier to adjudicate on the concrete manifestations of a possible bias or prejudice, and therefore to focus on the appearance of justice, rather than to demonstrate this bias alone. The ECHR itself justifies recourse to the objective approach by the difficulty of proving subjective biases: in the *Kyprianou v. Cyprus* case,<sup>37</sup> the Court stated: '*the Court has recognized the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has in the vast majority of cases raising impartiality issues focused on the objective test.*' This argument already appeared in the *Pullar v. the United Kingdom* case (1996)<sup>38</sup> and was reiterated in the 2015 *Morice v. France* case.<sup>39</sup>

Consequently, the core of this paper is to formulate proposals which will aim at directly reducing these biases, or mitigating their effects, without waiting for them to emerge. We believe that just because these biases are not easily demonstrable, they should not be ignored. This is why the next section will focus on legal, professional and ethical remedies to the biases that affect judicial decision-making.

<sup>36</sup> Goldszlagier, 'L'effet d'ancrage ou l'apport de la psychologie cognitive à l'étude de la décision judiciaire', 4 *Les Cahiers de la Justice* (2015) 507.

<sup>37</sup> ECHR, *Kyprianou v. Cyprus* [GC], Appl. no. 73797/01, Judgement of 15 December 2005, at § 119.

<sup>38</sup> ECHR, *Pullar v. the United Kingdom*, Appl. no. 22399/93, Judgement of 10 June 1996, at § 32.

<sup>39</sup> ECHR, *Morice v. France* [GC], Appl. no. 29369/10, Judgement of 23 April 2015, at § 75.

<sup>35</sup> Englich and Mussweiler, 'Sentencing under uncertainty: Anchoring effects in the courtroom', 31(7) *Journal of Applied Social Psychology* (2001) 1535.



## a. Strengthening Procedural Guarantees

Social and cognitive biases could be minimized by strengthening procedural guarantees such as the judicial duty to give reasons (1) and a greater reliance on collegiality in courts (2).

### 1. REINFORCE THE JUDICIAL OBLIGATION TO GIVE REASONS FOR DECISIONS

It has long been acknowledged that by giving reasons for their decisions, judges have demonstrated the rational and intellectual effort they put in to solving the legal issue they are facing. From a Weberian perspective,<sup>40</sup> the judicial duty to give reasons ensures the rational-legal authority of judicial decisions, as it logically derives judgments from society's laws. In this way, it contributes to building up trust in the justice system. According to the French *Cour de cassation*,<sup>41</sup> it also ensures that the appropriate law has been applied to the case. Besides, as first instance judges put the reasons for their judgments in writing, judges sitting on the bench in courts of appeals as well as in the *Cour de cassation* can check not only the effectiveness and existence of the reasons mentioned in the decision but also the relevance of the arguments developed.<sup>42</sup>

Finally, it is a way of showing that the principle of equality of arms was effective during trial, as arguments presented by each party were examined. The risk of partiality is then minimized. By mentioning the reasons for the decision, judges not only fulfill a formal duty, but are also forced to thoroughly question their reasoning in order to fight against their own subjectivity.

The necessity for judicial, administrative and constitutional judges to give reasons for their decisions is a common shared standard among Member States. For instance, in France, the Constitutional Council established in 1977 that judicial decisions must be reasoned as it considers this is a fundamental principle directly stemming from the law.<sup>43</sup> Other Member States like Belgium, Italy or Spain provide for this duty in their own constitutions.<sup>44</sup> Similarly, the European Court of Human Rights has developed a vast range of precedents guiding national judges in order to effectively implement this particular aspect of the right to a fair trial required under Article 6(1) of the Convention. Indeed, 'Art. 6 § 1 obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument'.<sup>45</sup> Rationality in the reasoning is as important for professional judges as it is for jurors, since all human beings are subject to biases.<sup>46</sup>

As a consequence, the duty to give reasons for both the culpability of the defendant and the sentence handed down was extended in 2011 and 2019 in France to the Assize Court.<sup>47</sup>

Proposals 1 and 2 below reinforce a judge's duty to give reasons for his/her decisions: such intellectual exercise is at the cornerstone of fighting personal and cognitive bias because it forces the judge to justify his or her legal reasoning through a more elaborated rational process.

- **Proposal n° 1** would elaborate, in accordance with the European Commission for the Efficiency of Justice,<sup>48</sup> 'step by step decision-making models'. In order to avoid new biases, such models would not consist of ready-to-be-rendered decisions. On the contrary, this new methodology would provide for a vast range of options among which the judge could choose to freely draft a decision.<sup>49</sup> Moreover, these models would establish a number of points that judges must necessarily go through in order to justify their final decision, thus strengthening the defendant's guarantees.

- **Proposal n° 2** would invite judicial authorities throughout Europe to extend the judicial duty to give reasons. As the European Convention system allows a national margin of appreciation, it is up to national judges not only to improve the reasoning behind their decisions formally but also to improve it substantially. For instance, the French *Cour de cassation* has recently committed to reforming itself and to modernizing the reasoning in its decisions.<sup>50</sup> Not only did the Highest Court adopt an 'enriched reasoning' but it also reformed the style of its judgments in order to comply with European standards of accessibility and intelligibility.

### 2. MAKE GREATER USE OF COLLEGIALLY

'*Juge unique, juge inique*', as the (French) saying goes: single judge, unjust judge. Collegiality could be defined as 'a process that helps to create the conditions for principled agreement, by allowing all points of views to be aired and considered'.<sup>51</sup> Indeed, as the American Judge Harry T. Edwards stated, it provides judges the opportunity to 'listen, persuade, be persuaded' in order to reach better decisions.

<sup>40</sup> T. and D. Waters, *Weber's Rationalism and Modern Society* (2015), at 137-138.

<sup>41</sup> *Cour de cassation*, 'L'obligation de motivation' in *Rapport annuel 2010* (2010), at 222.

<sup>42</sup> Kozinski, 'What I Ate for Breakfast and Other Mysteries of Judicial Decision Making', 26 *Loyola of Los Angeles Law Review* (1993) 993.

<sup>43</sup> Constitutional Council (France), 3 November 1977, decision no. 77-101 L.

<sup>44</sup> Art. 120.3 of the Spanish Constitution; Art. 149 of the Belgian Constitution; Art. 21 of the Italian Constitution.

<sup>45</sup> See for instance: ECHR, *Higgins et al. v. France*, Appl. no. 20124/92, Judgement of 19 February 1998.

<sup>46</sup> Philippe, 'Vous jurez de n'écouter ni la haine ou la méchanceté... - Les biais affectant les décisions de justice', 4 *Les Cahiers de la Justice* (2015) 563.

<sup>47</sup> *Loi n° 2011-939 du 10 août 2011 sur la participation des citoyens au fonctionnement de la justice pénale et le jugement des mineurs* (Law of 10 August 2011) for culpability and *Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice* (Law of 23 March 2019) for sentence.

<sup>48</sup> European Commission for the Efficiency of Justice (CEPEJ), 'Breaking up judges' isolation - Guidelines to improve the judge's skills and competences, strengthen knowledge sharing and collaboration, and move beyond a culture of judicial isolation' (2019) at 18.

<sup>49</sup> See for instance: École Nationale de la Magistrature, 'Extrait trame de jugement correctionnel - Mars 2020, Partie 3.2 : sur la peine'.

<sup>50</sup> *Cour de cassation*, *Rapport de la commission de réflexion sur la réforme de la Cour de cassation*, April 2017.

<sup>51</sup> Edwards, 'The Effects Of Collegiality On Judicial Decision Making', 151(5) *University of Pennsylvania Law Review* (2003) 1645.

A classical approach to collegiality underlines its part played 'in mitigating the role of partisan politics and personal ideology'.<sup>52</sup> As a result, by fostering objective rationality through discussion, collegiality is considered as a procedural guarantee against judges' partiality and arbitrariness.

However, as pointed out by the European Commission for the Efficiency of Justice 'in several countries, first instance courts rule as a single judge, collegiality existing only as from second instance'.<sup>53</sup> These organizational and procedural choices are mainly driven by cost priorities, not necessarily by decision-making quality. For example, considering justice management costs, the most recent justice reform in France<sup>54</sup> expanded upon single-judge formation at appellate level whereas collegiality had always been a rule in courts of appeals.

We should also consider collegiality in a wider sense: not only as a principle guiding judges during deliberations but also earlier during the hearing. Indeed, as the French Judge at the European Court of Human Rights André Potocki suggested,<sup>55</sup> lawyers should be 'the coproducers of judges' decisions by means of their oral arguments'. Here, collegiality meets the adversarial principle guaranteed under Article 6 of the Convention: judges should open up to lawyers about the grey areas they encounter in their cases in order to have them argued more efficiently.

<sup>52</sup> *Ibid.*

<sup>53</sup> European Commission for the Efficiency of Justice (CEPEJ), 'European judicial systems – Efficiency and quality of justice', *CEPEJ Studies n°26* (2018) at 113.

<sup>54</sup> *Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice* (Law of 23 March 2019).

<sup>55</sup> 'La plaidoirie, pour quoi faire?', Colloquium at the Sorbonne organized by the Paris Bar and the Paris Court (10 March 2017)

<sup>56</sup> Goldszlagier, *supra* note 36.

With regards to judicial investigations, where biases and prejudices are just as dangerous, a new law providing for the systematic collegiality of three investigative judges was passed in France in 2007, following a major miscarriage of justice, known as 'The *Outreau* case'. It was designed to avoid the numerous biases that affected judicial stakeholders in the case. However, despite three attempts to implement this legal reform, it always failed, mainly due to a lack of organization and difficulty in adapting an investigative procedure that always involved a single judge.

A renewed approach to collegiality would look at tackling subjective biases by improving the quality of the discussion among judges during the decision-making process. This leads us to make the following proposals:

- **Proposal n° 3** would expand the examination of cases by a collegiality of judges, while single-judge panels would remain minimal. Such decision would necessarily result in a raise of the cost of the judiciary, as a higher number of judges would be needed for each trial. However, it would contribute to improve the quality of the decisions. As argued by J. Golzlagier in his previously quoted 2015 paper,<sup>56</sup> 'the group, on average, reaches a more adequate judgment than the individual alone because more skills, knowledge and approaches are available for the decision.'

- **Proposal n° 4** would implement collaborative hearings, in which judges and lawyers collaborate to specifically address the grey areas in cases and thus improve the court's legal reasoning. Such collaborative hearings would provide for a more inclusive definition of collegiality, with judges allowing lawyers to participate at a deeper level in their decision-making process.

However, as pointed out by Glen Whyte and James Sebenius in their 1997 paper 'The Effect of Multiple Anchors on Anchoring in Individual and Group Judgment',<sup>57</sup> the effectiveness of collegiality alone has not been demonstrated. At most, and this conclusion is in line with a study conducted by Jean-Marie Baudouin at the *École Nationale de la Magistrature* (ENM) in 1992,<sup>58</sup> it provides enriched, longer and more explicit decisions which, as seen above, tends to reduce the influence of bias and prejudice on the judicial decision-making process. To be fully effective, these legal and procedural solutions must therefore be accompanied by intellectual and ethical work carried out within the judicial institution. This argument will be developed in the following subsection.

### **Controlling Judicial Biases on Institutional and Individual Levels**

Legal remedies offer a satisfactory and concrete outcome to biases affecting the judicial decision-making process. However, professional and ethical remedies should not be neglected. Firstly, we argue that the judiciary should

be able to reform its management and professional training in order to take these biases into consideration (1). Secondly, we believe that judges themselves should learn how to cultivate self-awareness and a critical mind as ethical solutions to biases (2).

### **1. INSTITUTIONAL OVERSIGHT: REFORM JUDICIAL MANAGEMENT AND JUDICIAL TRAINING**

As some biases are induced by a judge's professional environment, the judicial institution needs to reform itself in order to deal with biases adequately. Indeed, excessive workloads are a crucial issue to be addressed by enhanced human resources. Moreover, rethinking professional training on national and European levels also appears to be a conclusive way of improving judicial reasoning.

French judicial human resources have had to face contradictory issues: a historical lack of financial resources, as well as an increasing demand for qualitative public service. According to a 2018 CEPEJ report,<sup>59</sup> France spends less than 66 euros per year and per inhabitant on its judicial system whereas similar countries spend significantly more: Germany spends 122 Euros for instance. France has almost 4 times fewer prosecutors per 100 000 inhabitants than the European average, while French prosecutors have the highest number of missions identified. As the 2011 Shai Danziger *et al.* study found (cf. I. B. 1. External biases), the amount judges rest has a direct influence on their decisions. This is not

<sup>57</sup> Whyte and Sebenius, 'The effect of multiple anchors on anchoring in individual and group judgment', 69(1) *Organizational Behavior and Human Decision Processes* (1997) 75.

<sup>58</sup> Baudouin, 'La collégialité est-elle une garantie de la sûreté des jugements?', *Revue trimestrielle de droit civil (RTD civ.)* (1992) 532.

<sup>59</sup> European Commission for the Efficiency of Justice (CEPEJ), *supra* note 53.

only a theoretical issue. As the European Court of Human Rights ruled in the 2004 *Makhfi v. France* case,<sup>60</sup> according to Article 6(1) and 6(3) of the European Convention 'it is crucial that judges and jurors should be in full control of their faculties of concentration and attention in order to follow the proceedings and to be able to give an informed judgment'. In this case, examination of the defendant before an Assize Court went on until 5am and lasted, on that day alone, 17 hours and 15 minutes. As highlighted by magistrates' unions,<sup>61</sup> late hearings are unfortunately not uncommon. This is not only a subjective issue but also an objective one: justice cannot reasonably be done late in the day, but can be seen to be done even less at the end of the night.

Regarding judicial management, proposals 5 and 6 below focus on improving court working conditions. The French budget for its judicial system had been planned to increase by 24 % between 2017 and 2022. However, the 2020 budget law reduced the annual increase originally planned by almost half (2.8 % instead of 4.9%)<sup>62</sup> Additionally, the rise has mostly benefitted the penitentiary program, while court budgets have only increased by 0.13 %, which does not even cover erosion due to inflation. As the number of vacant posts drops for magistrates (42 were vacant in 2019 versus 417 in 2017),

the number of vacant posts remains high for clerks (697 in 2019).

- **Proposal n° 5** would therefore maintain the budget effort in favor of the judicial system in order to reach the announced goal of 24 % over 5 years.

- **Proposal n° 6** would allocate funds mostly to the employment of clerks, legal assistants and administrative secretaries, who work with magistrates as a 'judicial team'. As a result, judges could focus on performing the tasks at the core of their mission and for which their expertise is specifically needed.

Judicial training is a decisive way of tackling judicial biases, as judges might learn how to recognize and avoid them. The French *École Nationale de la Magistrature* (ENM) has put emphasis on addressing biases recently, especially regarding sentence determination. Indeed, a one-day seminar took place in January 2019 on this very subject as part of initial training. Its bibliography referred to recent studies on cognitive<sup>63</sup> and racist<sup>64</sup> biases. A comparative approach would also prove useful in the matter of judicial biases, as it appears that external points of view might highlight biases that would have remained unseen otherwise. Vito Breda's 2016 study<sup>65</sup> illustrates how enlightening such a comparative approach may be by reviewing the concept of judicial

impartiality and cases of alleged judicial biases in seven European countries. According to Breda, prejudices are 'the cultural aspects that are embedded in the process of professional socialization of each legal system'. For instance, France does not permit collecting ethnic-related data and hence may not be able to deal with racial prejudices as its well-informed neighbors. Thus, judges from different countries would benefit from exchanges with their European colleagues in order to question their own practices.

Organizations like the European Judicial Training Network (EJTN) and the Global Judicial Integrity Network (GJIN) have addressed the issue of biases by proposing specific events and training on the matter. Following the 2015 Doha Declaration, the Global Judicial Integrity Network was launched by the United Nations Office on Drugs and Crime in 2018 'to assist judiciaries across the globe in strengthening judicial integrity and preventing corruption in the justice sector'.<sup>66</sup> It has developed E-Learning Modules on biases as part of the 'Judicial Conduct and Ethics Training Package' and it organized a webinar about 'Eliminating Gender Biases and Stereotypes During Adjudicatory Processes' on May 28<sup>th</sup> 2020. The EJTN has also run a course for the past 5 years on European Judgecraft that included work on biases.

Regarding judicial training, proposals 7 and 8 encourage the development of specific teaching material covering biases in the light of contemporary research in this field.

- **Proposal n° 7** would increase the amount of training hours dedicated on a national level to the issue of judicial biases, both in initial and in-service training, especially as old habits die hard when it comes to experienced judges.

- **Proposal n° 8** would invite judges from different nationalities to exchange their views on their legal culture and judicial systems, as well as how their systems have addressed biases. In addition to existing trainings on this issue, the European Judicial Training Network and the Global Judicial Integrity Network could organize peer reviewing programs at European and international level.

## 2. INDIVIDUAL ETHICS: STRENGTHENING SELF-AWARENESS AND CRITICAL THINKING

As biases affect subjectivity, ethics might be one of the most effective ways of dealing with them. Philosophers have long thought about judicial virtues, and two concepts have played a decisive role in enabling judges to fight their prejudices: self-awareness and critical thinking.

Self-awareness might be defined as the ability for someone to understand him or herself and might limit biases that rely on judges' subjectivity. Indeed, just as cultural biases are not to be seen from within the given culture's perspective, biases coming from judges' individual backgrounds might remain unseen from their individual perspectives. Such personal biases are mainly those related to judges' social and psychological backgrounds.

<sup>60</sup> ECHR, *Makhfi v. France*, Appl. no. 59335/00, Judgment of 19 October 2004, at § 40.

<sup>61</sup> Union syndicale des magistrats, *Souffrance au travail des magistrats. État des lieux, état d'alerte* (2018).

<sup>62</sup> Y. Détraigne, *Avis n°146, Projet de loi de finances pour 2020 : Justice judiciaire et accès au droit* (21 November 2019).

<sup>63</sup> Goldszlagier, *supra* note 36.

<sup>64</sup> Roché, Gordon and Depuiset, 'Case study: Sentencing Violent Juvenile Offenders in A Color Blind Country: does ethnicity matter in France?', *The Handbook of Ethnicity, Crime, and Immigration (HECI)* (2013) 1.

<sup>65</sup> Breda, 'The Grammar of Bias: Judicial Impartiality in European Legal Systems', 4(3) *International Journal for the Semiotics of Law* (2016).

<sup>66</sup> See [www.unodc.org/ji/ji/index.html](http://www.unodc.org/ji/ji/index.html).

From the point of view of social background, a recent sociological study into the French judicial body highlighted how it remains unrepresentative of the French population: only 11.2 % of magistrates' fathers were employees or working-class, while these classes represent half of the general population.<sup>67</sup>

On a psychological level, various issues might interfere with one's judgment: from personal trauma to depression. In addition, as magistrates' unions have reported,<sup>68</sup> excessive workload interferes with magistrates' personal lives (according to 93.24 % of respondents) and is one of the main causes of suffering at work in the French judicial system (57.43 %). Social and psychological self-awareness is not the solution to social gap and psychological suffering, but it is the first step towards addressing these complex and multifactorial issues on an individual level.

Although institutional answers are needed to solve these problems, for instance by encouraging social diversity in judicial recruitment or providing psychological sensibilization in the workplace, proposals 9 and 10 focus on individual ethics to address these issues. As Martha Nussbaum argues, literature is a way for judges to broaden their social horizons by empathizing with characters and understanding social worlds distant from their own.<sup>69</sup>

Nussbaum refers to books like Charles Dickens' *Hard Times* and Richard Wright's *Native Son*.

- **Proposal n° 9** would therefore invite judges to read more about sociology and generally consciousness-raising literature in order to work on their social prejudices. They need to cultivate self-awareness to be able to listen to themselves.

- **Proposal n° 10** would encourage judges to speak about their psychological suffering and seek psychological assistance if need be. Since psychological suffering remains taboo in judicial culture, human resources have a role to play in making magistrates comfortable with seeking advice or even just talking to a relevant person. Training programs on this matter might prove useful, as the one organized by the French judicial authorities in 2019.<sup>70</sup>

Critical thinking is the ability for someone to think adequately in order to make a rational decision based on facts. It is a way for judges to depart from cognitive and social biases, as critical thinking enables them to keep their own views and habits at a distance by using their ability to doubt and to reconsider their opinions. While learning to doubt and how to doubt is a key component in developing a critical mind, the contemporary issue of efficiency in the judicial system challenges the extent to which doubt is actually available to judges.

For instance, the past decades have shown increasing forms of judicial specialization on national and European levels. In France, this has included the creation of the Financial Prosecution Office, and the Anti-terrorist Prosecution Office, in Spain, the creation of the Environmental and Urbanism Prosecution Office, and more significantly the recent creation of the European Public Prosecutor for the investigation and prosecution of fraud against the European Union's financial interests. French jurist Jean Carbonnier explained that '*jurisdiction tends to become administration*' as '*the judge, too specialized, too organized, too overloaded, loses the ability and the time to doubt*'.<sup>71</sup> According to Carbonnier, doubt is what distinguishes jurisdictions from administrations. Although judicial specialization is obviously needed, due to the increasing complexity of criminal actions, magistrates should also learn how to call professional habits into question to avoid becoming mere administrators. In their philosophical considerations about the virtues of the judge, French researchers Antoine Garapon, Julie Allard and Frédéric Gros develop the idea that self-awareness and critical thinking converge into the virtue of 'distance', which allows judges '*to take a step back regarding their interests and their prejudices, and to think not against the world and the others but above all against themselves*'.<sup>72</sup>

These researchers were inspired by the Russian-born French philosopher Alexandre Kojève,<sup>73</sup> according to whom, for judges to be impartial is not to be disinterested, which is only possible for divine beings, but it is to try to act as if they were. Even if judicial specialization and efficiency requirements are totally understandable from an institutional point of view, they might induce a whole new set of biases and, more importantly, radically change the very nature of judicial work in the 21st century. Proposals 11 and 12 therefore focus on preserving a judge's ability to doubt on an individual level, as it becomes clearer that the time available for this is increasingly constrained.

- **Proposal n° 11**, based on the 2015 Goldszlagier study,<sup>74</sup> would urge judges to take the time to mentally force themselves to reconsider, in a given case, the facts and the law from the defendant's, the victim's, the prosecutor's and eventually their own point of view. This would allow them to limit the impact of the anchoring effect and quite certainly of other's subjective biases as well, by cultivating the virtue of doubt.

<sup>67</sup> Demoli and Willemez, 'L'âme du corps. La magistrature française dans les années 2010 : morphologie, mobilité et conditions de travail', *Mission de recherche Droit & Justice* (2019), at 25.

<sup>68</sup> Syndicat de la magistrature, *L'envers du décor. Enquête sur la charge de travail dans la magistrature* (2019).

<sup>69</sup> M. C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (1995).

<sup>70</sup> École nationale de la magistrature, 'Santé et qualité de vie : une priorité pour le collectif de travail', *Rapport d'activité 2019* (2019), at 11.

<sup>71</sup> J. Carbonnier, *Sociologie juridique. Le procès et le jugement* (1961-1962), at 165.

<sup>72</sup> A. Garapon, J. Allard, F. Gros, *Les vertus du juge* (2008), at 42.

<sup>73</sup> A. Kojève, *Esquisse d'une phénoménologie du droit* (1981), at 77-78.

<sup>74</sup> Goldszlagier, *supra* note 36.



• Finally, **proposal n° 12** would invite judges to resist internal and external pressure when it leads to significantly degrading the quality of their work: indeed, performance assessment and career advancement should never be a judge's prime concern when ruling on people's lives. To some extent, judging requires courage.<sup>75</sup>

## 4. CONCLUSION

French philosopher René Descartes stated that all thoughts '*excited this way in the soul without the intervention of the will (...) by the sole sensations which are in the brain*' are passions.<sup>76</sup> Naturally, judges also suffer from the passions entrenched in their psyche, as analyzed in the first part of this paper. However, according to the modern philosopher, every human being should be able to '*tame his or her passion and to channel it towards*' achieving noble goals such as rendering justice.<sup>77</sup> For this purpose, the second part of this paper aimed at supporting judges, as '*co-authors of the law*',<sup>78</sup> in driving their passion away, by making a vast range of proposals to prevent prejudices and personal bias.

Such proposals vary in their nature as well as in their objectives. Indeed, the holistic approach of our analysis suggests strengthening legal and procedural guarantees, reforming management of the judiciary and professional training, and providing the judge with resources in order to cultivate self-awareness and a critical mind as ethical solutions to biases.

In France, the *Compendium of the Judiciary's Ethical Obligations* has been updated recently and completed by an appendix that addresses concrete issues like the use of social networks or commitment to unions by members of the judiciary.

This highlights the will to modernize judicial ethics by dealing with contemporary challenges and overcoming a formalistic approach to judicial duties. However, while this attempt heads in the right direction, it fails to delve deeper into judges' subjectivity by tackling the concern of biases and prejudices: there is nothing in this compendium about them, save general statements on impartiality.

Although subjective biases are everywhere in judicial work and judges' preferences, hesitations and choices, judicial ethics remain astonishingly silent. As we have seen, impartiality is still conceived objectively by courts and judicial institutions. In this context, the issue of biases and prejudices appears to constitute the new emergence of judges' subjectivity in the ethical debate, which will need to be addressed by judicial authorities in the future. Our proposals have humbly aimed to provide guidelines for further reflection.

The issues of judicial ethics and judges' subjectivity share a common European origin, as Robert Jacob demonstrated in his work at the crossroads of history and anthropology.<sup>79</sup> Indeed, according to him, civil law and common law systems have differentiated from each other by evolving from the same root: the judgment of God (*iudicium dei*), which was best illustrated by the procedural use of ordeal and decisive oaths in the judiciary during Europe's Early Middle Ages.

However, the ideology of God's judgment has left a certain spirituality in western legal tradition that is still attached to the contemporary judiciary, as seen in the idea of Rule of Law, in judges' sacredness or in their rigorous ethics. When judgment was no longer up to God, but to judges, judges became god-like humans and judicial ethics described their ideal virtues. Today, judicial ethics have to demystify judges to address their biases, and this paper has been our modest contribution to this worthwhile task.

<sup>75</sup> D. Salas, *Le courage de juger* (2014).

<sup>76</sup> R. Descartes, 'Lettre à Elisabeth – 6 octobre 1645' in *Œuvres et Lettres* (ed. 1953).

<sup>77</sup> R. Descartes, 'Les passions de l'âme, 1<sup>ère</sup> partie, article 50' in *Œuvres et Lettres* (ed. 1953).

<sup>78</sup> J. Carbonnier, *Droit et passion du droit sous la Vème République* (1996), at 75.

<sup>79</sup> R. Jacob, *La grâce des juges. L'institution judiciaire et le sacré en Occident* (2015).



BRANKICA TODOROVIĆ  
KATARINA SIMIN  
MILICA MIHIĆ



Team SERBIA

TUTOR: MIRJANA ILIĆ

# BALANCING FREEDOM OF SPEECH AND IMPARTIALITY

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Freedom of expression and the restriction of that freedom is always a present and universal topic. However, it acquires special significance if the question of the scope of that freedom and restrictions held by judicial office holders is raised. In this sense, the European Court of Human Rights has tried to set legal standards and guidelines when it comes to enabling freedom of expression to protect the public interest, but also to restrict this freedom of expression when necessary to protect the most important values in a democratic society. One of those values is the impartiality of the judiciary and all judges are required to uphold the principle of impartiality. If a judge undermines this principle through his public appearances, the majority of citizens could, consequently, distrust the entire judicial system. Freedom of expression of judges and protection of judicial impartiality are very important. In our paper, we compare these two values and review the circumstances of a case while simulating the disciplinary proceeding, as it would look in our country. Finally, we provide an answer to the question, which one of the two outweighs the other in this particular case? The case we present in our paper is not a real case and any similarity with real people and events is purely coincidental.

## KEY WORDS

Freedom of speech  
Judicial impartiality  
Public interest  
Disciplinary proceeding  
Public confidence in the judiciary  
Chilling effect

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## INTRODUCTION

A number of brutal crimes against children and minors were committed in Serbia in the past few years, and those with the greatest media coverage included the case of T.J., a juvenile who was run over and then raped and killed, and, most recently, the case of N.J., a.k.a. the Barber of Malča, who was given this nickname by the media and the public after multiple convictions for the rape of juveniles whose hair he had cut off before committing the crime. A search for N.J. lasted for months after he had kidnapped a 12-year-old girl, believed to be another victim of his crimes. As a result of these and other cases which attracted a lot of media attention and caused great concern among the public, a foundation established for the purpose of improving child safety in Serbia filed to the National Assembly of the Republic of Serbia a popular initiative, i.e. proposal, supported by about 160,000 citizens (voters), for amending the existing Criminal Code. The National Assembly of the Republic of Serbia adopted the amendments to the Criminal Code in December 2019. Under the amendments, life sentence was introduced to replace the prison sentence of between 30 and 40 years for the most serious and specifically listed criminal offenses, although this penalty may not be imposed on a person who has not turned 21 at the time of commission of the criminal offense.

In addition to this, under the amended Criminal Code, there is no possibility of parole for some criminal offenses if a person is sentenced to life (the crime of aggravated murder of a child or a pregnant woman, rape resulting in death, or rape of a child, etc.).

Once the amendments had taken effect, N.N., who is a judge at the criminal department of the Higher Court in Novi Sad, appeared in a prime-time TV broadcast, where he was asked to comment on the amendments to the Code. Judge N.N. introduced himself as a judge and said he believed that the amendments were unconstitutional and unharmonized with ratified international treaties, primarily Article 3 of the Convention on Human Rights, which prohibits torture and inhumane treatment. Judge N.N. also stressed that the right to parole was an international standard which had become a part of the Serbian legal tradition. also said that the constitutionality of a law was a matter of public interest which had to be reviewed in a democratic society. Moreover, judge N.N said that a life sentence without the possibility of parole was inhumane since the individual was not given the opportunity to change and resocialize, and that, therefore, the convicted person remained in prison without hope.

Judge N.N. mentioned a number of European resolutions and recommendations pointing to the necessity of existence of appropriate mechanisms that would make it possible to review the sentence, and stressed that in its decisions, the European Court of Human Rights (ECtHR) had taken the position that the national legislations of all Council of Europe member states had to have a mechanism for reviewing decisions on life sentence, while each member state had the discretion and an array of possibilities for drafting and establishing this mechanism in its respective legal system.

As a result of this public appearance in the media and the fact that judge N.N. handles trials in those and similar cases, the issue of his impartiality has been raised, especially since judge had other mechanisms at his disposal for reviewing the constitutionality of a law.

The case of judge N.N. is not a real case. It was created solely for the purpose of this paper and any similarity with real people and events is purely coincidental. We will analyze this case through disciplinary proceedings, as they would look in the Republic of Serbia, in order to point to the topical issue of judges' freedom of expression and the limits of this freedom.

## 1. PROCEEDINGS BEFORE THE DISCIPLINARY BOARD

The disciplinary prosecutor received a disciplinary complaint pertaining to this event, and after reviewing and determining the facts referred to in the complaint, decided to open disciplinary proceedings against judge N.N. by filing a motion to the disciplinary board. The prosecutor found that the judge had largely violated ethical principles and rules of behavior referred to in the Code of Ethics, which he should have complied with as a member of the judiciary for the purpose of preserving and improving dignity and reputation of judges and the judiciary. Specifically, item 2.5. says that judges are required to refrain from public statements or comments which might create an impression of bias and undermine the fairness of trials in cases they handle, while item 2.2 says that while discharging their duties both inside and outside the courtroom, judges are required to act so as to preserve and reinforce the confidence of the public and the parties to the proceedings in judicial impartiality, where the described appearance has caused legal uncertainty among citizens.<sup>1</sup>

<sup>1</sup> Code of Ethics of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 96/2010, section 2

In the prosecutor's opinion, this is a violation of the principle of impartiality, i.e. there are elements of a disciplinary violation reflected in a major breach of the Code of Ethics, and the judge is responsible for this disciplinary violation.<sup>2</sup>

The disciplinary board had the task to conduct proceedings and determine whether a disciplinary violation had been committed and, upon doing so, either reject the motion of the disciplinary prosecutor or uphold the motion and impose a disciplinary sanction proportionate to the gravity of the disciplinary violation.

During the disciplinary proceedings, the disciplinary prosecutor and the judge presented arguments supporting their positions.

### 1.1. ARGUMENTS PRESENTED BY THE DISCIPLINARY PROSECUTOR

In order to corroborate the claims contained in the motion to hold disciplinary proceedings for a disciplinary violation committed by judge N.N., the disciplinary prosecutor presented the following arguments that may be divided into four groups.

#### 1.1.1. Appearance of an Individual in the Capacity of a Member of the Judiciary

First of all, the prosecutor stated that an individual acting as a private person could freely undertake all activities that are not prohibited by law and could be guided by any interest, including a selfish one.

However, when an individual appears as a representative of a state authority or a member of the judiciary, i.e. as a judge like in this specific case, he/she may undertake only those activities that are permitted by law and are required to promote the interests that are defined by law. Judges must apply such standards of behavior outside the courtroom that will preserve and improve the confidence of the public and parties to the proceedings in the impartiality of judges and the judiciary in general, and minimize the number of cases in which he/she would have to be recused. When proceedings are being or might be held before him/her, a judge will not deliberately make comments that might realistically be expected to affect the outcome of such proceedings or breach the appearance of fairness of the proceedings. In addition to this, a judge should not make any comments in the public or elsewhere that might affect the fairness of a trial against any person or in any case. Opinions voiced by members of the judiciary as private persons, i.e. in the capacity of jurists or ordinary citizens, when they present their private views on different matters, including the public ones, indicate that these are the personal opinions of particular judges, and that, therefore, they do not necessarily have to be the positions of a particular institution or even a particular profession.

Official speech involves appearance in the official capacity, reflects the official position of a state authority, and, therefore, the opinions presented

by the speaker may be attributed to the institution he/she represents. The prosecutor particularly referred to the ECtHR case law in the case of *Baka v. Hungary*, where a dissenting opinion laid a stress on this particular distinction between public officials' official and private speeches<sup>3</sup>. Therefore, it is very important to distinguish among situations in which an official or a member of the judiciary is using his/her freedom of expression to present his/her private views on public issues in his/her private capacity, those in which an official is using his/her office and position in a state authority to speak on behalf of the public authority, as well as those in which he/she is using this office and this capacity to speak about his/her views on issues of public interest, like judge N.N. did in this specific case. Therefore, official speech is not so much the issue of freedom as the issue of discretion in the discharge of public services. A judge's official speech is not a matter of individual freedom; it is, rather, very strictly restricted and committed to the promotion of specific public interests, particularly in view of the fact that a judicial position is not a panel for exercising one's freedom of speech. For that reason, whenever a judge appears in public in this capacity (i.e., whenever he/she appears in public as a judge), he/she must exercise caution while expressing his/her opinion, because this is not a presentation only of his/her own opinion and himself/herself, but also of the state authority to which he/she belongs, which may result in a valid perception

of the public that these are not just the positions of the judge voicing this opinion, but also the positions of the relevant state authority. The prosecutor noted that in this particular case judge N.N. presented himself as a judge on a TV broadcast and that this could cause confusion in the public about whether the opinions he presented are his own personal beliefs or the opinion of the relevant state authority. On the other hand, it would be harder to attribute his opinions to the institution he belongs to if he didn't present himself as a judge.

#### 1.1.2. Other Statutory Mechanisms for Expressing Criticism

The prosecutor then said that the Constitutional Court had been established in the Serbian legal system as an autonomous and independent state authority that protected constitutionality and legality, and human and minority rights and freedoms, and that its decisions were final, enforceable and binding. Hence, this was an autonomous institution that reviewed whether laws were harmonized with the state's highest acts, such as the Constitution, generally accepted rules of international law and ratified international treaties<sup>4</sup>. Referring to the fact that the judge had analyzed whether the amendments were harmonized with the Constitution while he was speaking in the TV broadcast, the prosecutor described public criticism as an inappropriate mechanism for reviewing the constitutionality of a law and said that there were other mechanisms in the national legislation

<sup>2</sup> Law on Judges, Official Gazette of the Republic of Serbia, No. 116/2008, 58/2009 – CC decision, 104/2009, 101/2010, 8/2012 – CC decision, 121/2012, 124/2012 – CC decision, 101/2013, 111/2014 – CC decision, 117/2014, 40/2015, 63/2015 – CC decision, 106/2015, 63/2016 – CC decision, 47/2017, Article 90 paragraph 18

<sup>3</sup> ECtHR, *Baka v Hungary*, Appl. no. 20261/12, Judgement of 23 June 2016, Dissenting opinion of judge Wojtyczek, Decision available at <https://hudoc.echr.coe.int/>

<sup>4</sup> Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006, Article 166.

which could be more far-reaching and would, therefore, be more efficient for reviewing the constitutionality and legality of a law, without bringing into question the judge's impartiality to such an extent. In connection with this, under the Serbian Constitution, any legal or natural person had the right to take an initiative to institute proceedings of assessing the constitutionality and legality.<sup>5</sup> Moreover, he wondered if the protection of public interest in this specific case outweighed the principle of impartiality which a judge had to protect through his actions, if he/she had other mechanisms at his/her disposal for protecting the legal order and constitutionality, without bringing into question his/her impartiality to such an extent.

### 1.1.3. Exceeding Competences and Interference in the Legislative Branch by a Judge

To corroborate his arguments, the prosecutor stressed that the role of the judicial branch was to adjudicate and to implement laws which had been issued and adopted by the legislative branch in proceedings regulated by law.<sup>6</sup> In connection with this, he said that under the principle of separation of powers, referred to in Article 4 of the Constitution, authority was divided into the legislative, executive and judicial powers, which meant that the checks and balances of each of the branches had to be observed and that care had to be taken not to allow any of the branches to exceed its competences.

For that very reason, he raised the question of the role of a judge as an individual in the system of checks and balances of the other two branches, i.e. whether a judge was permitted to apply this system under the legal framework and whether an attempt to apply checks and balances on another branch in a public appearance could bring into question his impartiality and exceed the limits of his competences, primarily in view of the Constitutional mechanisms and the position and competences of the Constitutional Court in this context<sup>7</sup>. The prosecutor particularly noted that a judge, if he or she is a member of High Court Council, could comment only on a law governing the position of judges, their independency and the independency of judiciary in general, which is not the situation in this case.

The prosecutor also mentioned that it is necessary for each branch of government and its employees to promote the interests of the institution to which they belong, in order to achieve the goals for which that institution was founded. This principle was developed within the concept of institutional loyalty, which implies that the individual working within a particular institution should behave in a way that promotes the interest of the institution. In this particular case, the prosecutor noted that Judge N.N. did not take into account the interests of the institution in which he belongs, and whose goal is to preserve the impartiality and the independence of the judiciary, but expressed personal views on the law

he is obliged to apply, without taking into account the consequences of his actions. In prosecutor's opinion, the individual must promote the interests of the institution, regardless of whether he personally agrees with them or not. Also, he or she must not act in a manner that could bring the fulfillment of the institution's interest into question.

### 1.1.4. Undermining of the Right to a Fair Trial Through the Judge's Public Appearance

Through his public appearance, the judge might also violate Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms which guarantees the right to a fair trial, and, in this context, the European Court of Human Rights in the case of *Buschemi v. Italy* said the following: „The Court stresses, above all, that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty.”<sup>8</sup>

Therefore, the European Court of Human Rights also recommends that judges restrain from addressing the media regarding specific cases. This recommendation can be interpreted even more widely, though: this restraint must not refer only to ongoing cases but to others as well, because one can easily imagine a situation in which a judge might publicly present his/her possibly unfavorable opinion and position on

a particular issue and then might later need to apply this issue in practice in a case. In this specific case, the judge spoke negatively about the amendments to a law he himself would have to apply in all future court proceedings. For that very reason, judges must exercise caution in the case of public debates, bearing in mind the values they must protect, which they might undermine by speaking in public.

## 1.2. ARGUMENTS PRESENTED BY THE JUDGE

Responding to the prosecutor's claims, the judge referred to the relevant regulations within the national legislation as well as the case law of the European Court of Human Rights which he regarded as relevant in this specific case.

### 1.2.1. Freedom of Thought and Expression

First of all, the judge pointed out that freedom of speech was one of the fundamental human rights and freedoms and a pillar of a democratic society, and that judges, like all other citizens, had the right to freedom of expression. In this context, he mentioned a provision of the Serbian Constitution that guaranteed the freedom of thought and expression, as well as the freedom to seek, receive and impart information and ideas through speech, writing, art or in some other manner, and said that this freedom might be restricted by law if necessary to “protect rights and reputation of others, to uphold the authority and objectivity of the court and to protect public health, morals of a democratic society and national security of the Republic of Serbia.”<sup>9</sup> Freedom of expression is also

<sup>5</sup> Constitution of the Republic of Serbia, supra note 4, Article 168

<sup>6</sup> Law on Judges, supra note 2, Article 1 and 2

<sup>7</sup> “The Constitutional Court shall decide on compliance of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties.” Constitution of the Republic of Serbia, supra note 4, Article 167 paragraph 1 item 1

<sup>8</sup> ECtHR, *Buschemi v Italy*, Appl. no. 29569/95, Judgement of 16 September 1999, at paragraph 67, Decision available at <https://hudoc.echr.coe.int/>

<sup>9</sup> Constitution of the Republic of Serbia, supra note 4, Article 46 paragraph 2

guaranteed by the European Convention for the Protection of Human Rights and Freedoms. Specifically, Article 10 paragraph 1 of the Convention says the following: „Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.“<sup>10</sup> The judge referred to the restrictions on freedom of expression referred to in Article 10 paragraph 2 of the Convention, which said: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and judicial impartiality.”<sup>11</sup> He believed, however, that paragraph 2 of the above-mentioned article of the Convention could not be applied in his case, because his public speech actually protected the interests of the public, without undermining judicial impartiality and independence.

He also referred to the Bangalore Principles of Judicial Conduct, which contained standards for the ethical conduct of judges and provided guidelines on how the judiciary should regulate the conduct of judges. He particularly stressed that in item 4.6 the Bangalore Principles said the following: „A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary“<sup>12</sup>, and that he believed that he had acted with dignity while he was expressing his professional opinion during his public appearance in the above-mentioned broadcast, and that he had not undermined the reputation of the judiciary or citizens’ confidence in judicial independence and impartiality. Moreover, item 4.11.1 of the Bangalore Principles said the following: „Subject to the proper performance of judicial duties, a judge may: write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters“<sup>13</sup>, and he, therefore, believed that he had the right to present his position on a topical issue that concerned the legal system from a professional point of view, including doing it verbally.

### 1.2.2. Judges are Objective Regardless of Their Personal Opinion

The judge said that everyone, including judges, had some personal beliefs, system of values and understanding of different issues. He said that he was aware that he had to make objective decisions, and that he had to keep his personal opinion for himself. In this context, he said that the very fact that he had an opinion on a legal or social issue which might be in connection with a case did not make him unfit to decide in such a case. The fact that he had strongly criticized the law, did not mean that he would not implement it and that he would not impose life sentences in cases provided by law, after taking into account all extenuating and aggravating circumstances<sup>14</sup>.

In addition to this, he referred to the provisions of the Criminal Procedure Code that regulated the composition of first-instance judicial panels in proceedings in which there was justified suspicion that one of the crimes for which life sentence could be imposed had been committed. Namely, under Article 21 paragraph 1 item 2 of the Code, a court adjudicates in a five-member panel made up of two professional and three lay judges.<sup>15</sup> According to him, this meant that the court decision on the appropriate sanction did not depend on any individual position,

but that it was reached by the majority of panel members, and that this meant that his personal opinion on the amendments to the criminal code pertaining to the criminal sanction and the nature of this sanction could not have a decisive effect on the final decision.

### 1.2.3. Speaking in the Name of Public Interest

In his defense, judge N.N. referred to ECtHR judgements and decisions concerning freedom of expression, specifically the ones where the applicant was speaking on a matter of public interest. It is very hard to define public or general interest, but it should encompass anything that concerns the rights, finances or health of the public at large. The ECtHR has never given a clear interpretation of what exactly constitutes a matter of public interest, since it depends on the context of the situation and the subject of the expression, but it does show a tendency to stretch the notion of what constitutes a public interest debate.<sup>16</sup> Also, the Court mentioned that there is no warrant in its case-law for distinguishing between political discussion and discussion of other matters of public concern.<sup>17</sup> From this stem the following questions that judge NN raised in front of the disciplinary board: Should a judge be prevented from speaking on matters of public interest?

<sup>10</sup> Article 10 (1) ECHR

<sup>11</sup> Article 10(1) ECHR

<sup>12</sup> Judicial Group on Strengthening the Integrity of the Judiciary, The Bangalore Principles of Judicial Conduct (2002), available at [https://www.un.org/ruleoflaw/files/Bangalore\\_principles.pdf](https://www.un.org/ruleoflaw/files/Bangalore_principles.pdf)

<sup>13</sup> The Bangalore Principles of Judicial Conduct, supra note 13

<sup>14</sup> Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019, Article 54

<sup>15</sup> Criminal Procedure Code of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019, Article 21

<sup>16</sup> Jean-François Flauss, 'The European Court of Human Rights and the freedom of expression', 83 Indiana Law Journal (IndLJ) (2009) 809, at 815

<sup>17</sup> ECtHR, Thorgeirson v Iceland, Appl. no. 13778/88, Judgment of 25 June 1992, at paragraph 64.



Moreover, can he be subject to limitations and sanctions for participating in a debate on a matter of public interest? Would that infringe on his right protected under Article 10 of the Convention? In addition to this, if a disciplinary board for the judiciary imposes a sanction on a judge, is that kind of a reaction necessary in a democratic society for maintaining the authority and the integrity of the judiciary?

The judge thought it is important that his case is examined in the light of this question by reviewing the following case law. In *Morice v. France*, the Court found that there was little scope under Article 10 p 2 of the Convention for restrictions on political speech or on debate on matters of public interest. Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest and the potential of seriousness of certain remarks do not obviate the right to a high level of protection, given the existence of a matter of public interest.<sup>18</sup> Likewise, in *Kudeshkina v. Russia* the Court stated that issues concerning the functioning of a justice system constituted questions of public interest, the debate which enjoyed the protection of Article 10 of the Convention<sup>19</sup>.

In *Feldek v. Slovakia* the Court stated that the promotion of free political debate was a very important feature of a democratic society. It attached the highest importance to the freedom of expression in the context of political debate and considered that very strong reasons were required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned.<sup>20</sup> In *Wille v. Liechtenstein* the Court found that even if an issue under debate had political implications, this was not in itself sufficient to prevent a judge from making a statement on the matter.<sup>21</sup> With regards to the level of protection a person enjoyed under the Article 10, in *Kudeshkina v. Russia*, the Court also found it important to analyze the speaker's motive and concluded that an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection<sup>22</sup>. Keeping this in mind, the judge stated that it was important to take into account that he had nothing to gain personally, either implicitly or explicitly, and thus it was entirely possible to view his statements as a mere criticism of a system from a strictly professional perspective on a matter that could be of great public interest, which would call for a high degree of protection under Article 10 and, as such, it would leave the state a narrow margin of appreciation.

## 2. DELIBERATION OF THE BOARD

After implementing the proceedings and reviewing all claims, the disciplinary board realized that it was facing a difficult task and that it had to make the final decision observing the relevant domestic regulations, primarily the principle of impartiality referred to in the Code of Ethics, as well as that it had to review the entire case from the aspect of the ECtHR decisions to which the parties to the proceedings had referred in their arguments.

In order to make a decision in this specific case, the board started from two key questions. Did the judge commit a disciplinary violation by largely breaching the provisions of the Code of Ethics (specifically, the provisions on impartiality)? If so, which sanction would be appropriate for this violation?

### 2.1. WAS A DISCIPLINARY VIOLATION COMMITTED?

The principle of impartiality in the Serbian Code of Ethics refers to a restricted freedom of speech for judges, for the purpose of protecting judicial impartiality and reaffirming the public confidence in the judiciary. In addition to this, the Law on Judges in Article 3 paragraph 1 says that judges are required to preserve confidence in their independence and impartiality at all times.<sup>23</sup>

In addition to this, the UN Basic Principles on the Independence of the Judiciary, adopted at the 7<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, refer to the freedom of expression and association of judges and say that in accordance with the Universal Declaration of Human Rights, members of the judiciary, like other citizens, are entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.<sup>24</sup>

In this context, the board wondered if, through his public speech, the judge had violated the Code of Ethics in the part that protected judicial impartiality. In order to respond to this question, the board first focused on the importance of the judicial office and found that this office, like any other official duty and public office in the state, was in the service of the community and society, and that the principles of judicial independence and impartiality were within the scope of objective rights and obligations. Through these important principles, constitutional democracies grant certain power and autonomy to the judiciary and protect it from interferences of the legislative and executive branches. Therefore, one can clearly conclude that these two important principles of judicial authority are not there to protect judges' individual interests, but to protect the interests of the public and to establish the principal guarantees for fair court proceedings and regular

<sup>18</sup> ECtHR, *Morice v France*, Appl. no. 29369/10, Judgment of 23 April 2015, at paragraph 125, All ECtHR decisions are available at <http://hudoc.echr.coe.int/>

<sup>19</sup> ECtHR, *Kudeshkina v Russia*, Appl. no. 29492/05, Judgment of 26 February 2009, at paragraph 86

<sup>20</sup> ECtHR, *Feldek v Slovakia*, Appl. no. 29032/95, Judgment of 12 July 2001, at paragraph 83

<sup>21</sup> ECtHR, *Wille v Liechtenstein*, Appl. no. 28396/95, Judgment of 28 October 1999, at paragraph 67

<sup>22</sup> *Kudeshkina v Russia*, supra note 21, at paragraph 95

<sup>23</sup> Law on Judges, supra note 2, Article 3 paragraph 1

<sup>24</sup> GA Res. 40/32, 29 November 1985; GA Res. 40/146, 30 December 1985

functioning of the judicial system, which means that these principles protect citizens who seek justice, rather than individuals holding judicial functions. For that reason, although they define the legal status of a judge, these guarantees cannot even be analyzed like individual or subjective rights of a judge, which means that, in this context, an individual may decide how to use his/her rights and to which extent, while a judge is not free to decide himself/herself on the limits of his/her impartiality and independence, and is, rather, required to protect these values and principles through his/her behavior both inside and outside the courtroom. In addition to this, the principle of dignity requires from a judge, as someone who is constantly under public scrutiny, to freely and voluntarily accept personal restrictions imposed on him by the judicial function.<sup>25</sup>

Whenever a judge's impartiality is likely to be brought into question as a result of his/her public appearance, the judge should refrain from using his/her right to freedom of expression; it is also very important to see which values he/she wants to protect through his/her appearance and whether these values outweigh or are more important than the preservation of judicial independence in a democratic society.<sup>26</sup> The key is in striking the right balance between a judge's right to freedom of expression, and national authorities' legitimate interest to restrict this freedom whenever necessary in order to protect the independence, impartiality and authority of their institutions.

### 2.1.1. Violation of Item 2.2. of the Code of Ethics

In view of the above, and primarily the relevant regulations and arguments presented by parties to the disciplinary proceedings, the board found that the judge had violated the principle of impartiality and rules of behavior referred to in item 2.2 of this principle in the Code of Ethics. While discharging judicial duties both inside and outside the courtroom, a judge is required to behave in such a way as to preserve and strengthen the confidence of the public and parties to the proceedings in the impartiality of the judge and the judiciary. This provision is formulated in such a way in order to impose greater restrictions on the behavior of judges. Judge N.N. actively performs the duties of a judge (he is not retired). This means that he will have these duties as long as he is a judge, including when he appears in TV broadcasts. Also, the board specifically stresses that not everybody has the same impact, and that, consequently, the words of a judge, like judge N.N., who has a lot of experience in criminal matters and whose daily task is to apply such law and possibly impose such a sanction, will not have the same impact on the public like the words of any other jurist (for example, an attorney or a professor). So, when a law is publicly criticized by a judge who applies it on a daily basis, his impartiality can always be brought into question. In this specific case, by voicing his criticism in the TV broadcast and saying that the new sanction was inhumane, judge NN publicly prejudiced decisions on criminal sanctions in his future cases and thus undermined public confidence in the impartiality of the judge and the judiciary.

### 2.1.2. Violation of Item 2.5. of the Code of Ethics

Under the Code of Ethics, a judge is required to refrain from public statements or comments that might create an impression of partiality in the cases he is handling and undermine the fairness of trials.<sup>27</sup> In determining the issue, the board took into account the fact that the introduction of life sentence for perpetrators of the most brutal criminal offenses was a topical social issue with respect to which the public had already expressed its view, and that judges should dedicate special attention and exercise special caution in the case of such issues during their public appearances. For that reason, the board interpreted this provision extensively, i.e. that judges are required to refrain from any public statements or comments that might create an impression of partiality if there is reason to believe that they might decide on such an issue in future. In our case, it is certain that judge N.N. will have the opportunity to apply the very amendments to the law he described as inhumane and unconstitutional because he is a judge of the Criminal Department of the Higher Court and the imposition of life sentence is in his competence.

### 2.1.3. Overview of Arguments Presented During the Proceedings

The board agreed with the argument that the issue of constitutionality of a law was an issue of public interest. Speech on matters of public interest enjoys special protection and the state therefore does not have great leeway to restrict it. The European Court of Human Rights has not defined the public interest in its case law and there is a tendency to stretch this notion. Therefore, there is a danger that

such a wide interpretation of the notion of public interest might result in abuse, because, as an individual, every judge could refer to a public interest debate to avoid the restrictions on freedom of expression at the expense of the principle of impartiality. The board believes that in this case we have a member of the judiciary who, as such, has to observe special and additional restrictions on his freedom of expression although he is talking about a matter of public interest, particularly because the board has found that judicial impartiality is the prevailing interest in this specific case.

The board agreed with the prosecutor's position that the Constitution of the Republic of Serbia envisions the appropriate mechanisms for checking the constitutionality of laws, and that if the judge had wanted to initiate a debate on the validity of provisions of the newly adopted law, he could have done it in other ways and certainly not after the law that he would have to apply as a judge had already taken effect.

The board also reviewed the judge's argument that his publicly presented position on the amendments to the law would not affect his trials and decisions in relevant future cases, as well as that he was deciding as a member of a panel, rather than as a single judge. However, it found that his description of the newly imposed sanction as inhumane made every average citizen doubt that judge N.N. would impose the life sentence in all cases in which the necessary conditions were met. In fact, an average citizen appearing as a victim of one of those criminal offenses, or even a person close to him/her, could be completely justified

<sup>25</sup> Code of Ethics of the Republic of Serbia, supra note 1, item 4.3

<sup>26</sup> Wille v. Lichtenstein, supra note 23, at paragraph 64

<sup>27</sup> Code of Ethics of the Republic of Serbia, supra note 1, item 2.5.

in opposing that the judge who had publicly presented such a view decide on the guilt of the perpetrator and the relevant sanction.

#### 2.1.4. Overview of the ECtHR Position

The board analyzed the fulfilment of three requirements referred to in Article 10 of the European Convention which the ECtHR had reviewed in similar cases. If the judge were sanctioned in this specific case and if he then filed an application to the European Court of Human Rights, the ECtHR would review whether such interference fulfilled the three requirements referred to in Article 10 paragraph 2 of the Convention, on the basis of the linguistic interpretation thereof. These requirements are, first of all:

1) whether the interference („formalities, conditions, restrictions, penalties“) is *prescribed by law*,

2) whether the *interference is aimed at protecting* the following values individually or cumulatively: national security, territorial integrity, public safety, preventing disorder or crime, protection of health or morals, reputation or rights of others, preventing the disclosure of information received in confidence and maintaining the authority and judicial impartiality

3) whether such interference is *necessary in a democratic society*, i.e. whether the goals (of the above-mentioned values) are proportionate with the means (interference in the freedom of expression)

Only once all three requirements for restricting the freedom of expression have been fulfilled, the interference would be regarded as justified, and the above-mentioned freedom referred to in Article 10 of the European Convention would not be violated.

First of all, under Article 46 paragraph 2 of the Constitution of the Republic of Serbia, freedom of expression may be restricted by law if necessary to protect the rights and reputation of others, to preserve the authority and objectivity of the court and to protect public health, morals of a democratic society and national security of the Republic of Serbia.<sup>28</sup> The Law on Judges refers to the preservation of confidence in the independence and impartiality and says that judges are required to preserve confidence in their independence and impartiality at all times, as well as that judges are required to comply with the Code of Ethics adopted by the High Court Council at all times.<sup>29</sup> The Law also envisions penalties if someone is held responsible for a disciplinary violation (and disciplinary violations include the violation of the principle of impartiality and major breach of provisions of the Code of Ethics).

On the basis of everything said above, it is evident that the Serbian legislation envisions the possibility of state interference in the freedom of speech of an individual, which means that the first condition has been fulfilled, while the fulfilment of the second condition stems from the quoted provision of the Constitution of the Republic of Serbia.

The board believes that the third condition has also been fulfilled, because in this specific case the judge's freedom of speech had to be restricted for the purpose of protecting the principle of judicial impartiality. Moreover, within the third condition, the European Court also reviews whether the punishment is proportionate to the judge's violation, which the board had in mind when deciding on the disciplinary sanction.

#### 2.2. WHAT IS THE APPROPRIATE SANCTION?

Once the board determined that a disciplinary violation had been committed, a decision on the disciplinary sanction had to be made. The available sanctions were public admonition, salary reduction of up to 50% for up to a year and prohibition of promotion for up to three years, and the appropriate one would be proportionate to the gravity of the disciplinary violation.<sup>30</sup> Deciding on the type and severity of the disciplinary sanction, the board took as extenuating circumstances the facts that the judge had not had previous disciplinary punishments and that he had acted properly<sup>31</sup> before the board. Since there were no aggravating circumstances and since the judge appeared before a disciplinary body for the first time,<sup>32</sup> the disciplinary board publicly admonished the judge, stating in the reasoning that this punishment was proportionate to the gravity and type of the disciplinary violation, that it would achieve the purpose of prescription and imposition of a disciplinary sanction, and that it

would have a sufficient effect on the judge, i.e. it would ensure the correction of his behavior in future and worthy discharge of his duties as a judge.

An important issue for the board in deciding was also the ECtHR position on the proportionality of the sanction to the violation, i.e. the so-called chilling effect. When a state imposes a sanction on a judge because of a certain statement he made, it is important to strike the right balance between the interests protected by such sanction and the interest of that individual. Otherwise, if the sanction is disproportionate, the “chilling effect” would be created. The “chilling effect” is a phenomenon where an individual refrains from expressing himself due to fear of reprisal. When it comes to freedom of expression, while it is legitimate to impose restrictions on an individual, including a member of the judiciary, they must be proportionate and appropriate to meet the aim pursued by them, which is “the protection of the reputation or rights of other” and “maintaining the authority and judicial impartiality” without crippling the freedom guaranteed by Article 10. The ECtHR has addressed this issue in almost all cases regarding freedom of expression and it shows a tendency towards identifying and limiting this effect.

In *Kudeshkina v Russia*, the Court stated that the chilling effect works to the detriment of society as a whole, and it is a factor that concerns the

<sup>28</sup> Constitution of the Republic of Serbia, supra note 4, Article 46

<sup>29</sup> Law on Judges, supra note 2, Article 3

<sup>30</sup> Law on Judges, supra note 2, Article 91

<sup>31</sup> In other words, the commission believes that the judge complied with the commission's summons during the proceedings regularly

<sup>32</sup> Public admonition may be imposed only in the case when a judge is held responsible for a disciplinary violation for the first time

proportionality and the justification for sanctions imposed on an individual.<sup>33</sup> When imposing a sanction on a member of the judiciary, it is extremely important that domestic authorities find the right balance between the need to protect the authority of the judiciary, on one hand, and the need to protect an individual's right to freedom of expression on the other.<sup>34</sup> In *Kudeshkina v Russia*, the Court found that the loss of the judicial office judge Kudeshkina held was a severe penalty, as a matter of fact, the strictest available penalty that could be imposed in the disciplinary proceedings and, the Court found that it did not correspond to the gravity of the offence. Moreover, it found that it could undoubtedly discourage other judges in the future from making statements critical of public institutions or policies, for fear of the loss of the judicial office.<sup>35</sup> Also, in *Baka v Hungary*, the Court found that the applicant's removal from the position of President of the Supreme Court had a "chilling effect" on the expression of professional opinions by other judges, the independence of the judiciary and the rule of law in Hungary.<sup>36</sup> Evidently, the nature and the severity of the sanction is an important factor that needs to be taken into account when assessing the proportionality of the state's interference. It is also of great significance to note that disciplinary proceedings and procedural guarantees towards members of the judiciary are also a huge factor that the Court takes into account when measuring whether the state's interference was proportionate to the aim pursued.<sup>37</sup>

Taking all before mentioned into consideration, the disciplinary board found that any sanctions imposed on judges' freedom of speech could discourage other members of the judiciary from making critical remarks about public institutions and policies and for this reason carefully considered all aspects of the case in question and imposed a reasonable punishment mindful of the two contrasting interests. Undoubtedly, any critique of legislative policy that comes from judges bears a lot of weight since they have a special role in society, among which is to protect the rights of others and ensure that the law they administer is fair.

## CONCLUSION

Freedom of expression is one of the most important freedoms in a democratic society. Without this freedom, the progress of the society as a whole or of a man or a woman as an individual would be challenging. Freedom of speech is not an absolute right and, as such, is subject to restrictions as long as they are justified for the purpose of preserving the basic interests of a democratic society, as described in our hypothetical case. When it comes to the freedom of expression of judges, it is important to note that judges, as the holders of one of the most important functions in a society have greater responsibility in this respect. While performing his/her duties, a judge decides on individuals' rights and freedoms; therefore, to make

sure that individuals feel that their rights and freedoms are protected in the best possible way, the judiciary has to enjoy great public confidence. This is one of the most important duties and responsibilities of a judge and all judges have agreed to it when they decided to become members of the judiciary. For that reason, there are some ethical principles and rules of behavior the judges have to comply with for the sake of preservation and improvement of dignity and reputation of judges and the judiciary. One of those ethical principles is impartiality, as a basic value required from a judge and one of the most important values of the judiciary.

If a judge undermined this principle through his public appearances, a majority of citizens could distrust the entire judicial system. In case of a conflict between freedom of expression of judges and impartiality, one should thoroughly review all circumstances that would give an answer to the question which one of the two outweighs the other. This is exactly what we did in our case - we confronted these two values and concluded that giving advantage to impartiality had been justified.

Although we interpreted the judge's freedom of speech restrictively in our case, we believe that freedom of speech must not be restricted hastily, without an exhaustive analysis of all circumstances of the relevant case. If judges' freedom of speech were hastily restricted at all the times, judges would, as a result, exercise restraint even in the cases in which their statements reinforced public confidence in the judiciary.

In order to provide judges with clearer guidelines for public appearances, particularly in cases useful for reinforcing public confidence in the judiciary, an independent body will have to be established with the principal task of interpreting rather abstract provisions of the Code of Ethics, which leave a lot of room for restricting judges' freedom of expression. The High Court Council of the Republic of Serbia has recognized the importance of interpretation and adaptation of the provisions of the Code of Ethics to current changes and circumstances in the society. To this end, in 2016 it established the Ethics Committee as an occasional working body, while the strategic documents within Chapter 23 envision its establishment as a permanent working body following the forthcoming legislative changes. The Ethics Committee consists of five judges who are members of The High Court Council. These judges are elected by the High Court Council for a period of four years, which speaks of the independence of this body.

We believe that encouraging more intensive cooperation between the Ethics Committee and judges through training and mutual interaction would be of vital importance, since this would result in the establishment of more detailed standards of behavior (freedom, rights and duties of judges) for judges, prevent violations of the Code of Ethics, and therefore reinforce the integrity of judges and confidence in the judiciary as a whole, as the fundamental values which courts both in Serbia and in the world have to try to achieve.

<sup>33</sup> *Kudeshkina v Russia*, supra note 21, paragraph 99

<sup>34</sup> *Ibid.* paragraph 101

<sup>35</sup> *Ibid.* paragraph 98

<sup>36</sup> *Baka v Hungary*, supra note 3, paragraph 21

<sup>37</sup> *Baka v Hungary*, supra note 3, p 161



**European Judicial Training Network (EJTN)**

123, rue du Commerce

B-1000 Brussels

Phone: +32 2 280 22 42

Fax: +32 2 280 22 36

[www.ejtn.eu](http://www.ejtn.eu)

