Andrea Spada Jiménez
Yolanda De Lucchi López -Tapia
Directors

Rubén López Picó
Coordinator

CROSS-BORDER LITIGATION IN A DIGITAL CONTEXT: FROM CLASSROOMS TO JUDICIARY

Foreword
Sonia Calaza López

Ética Justicia Proceso

Dykinson, S.L.

CROSS-BORDER LITIGATION IN A DIGITAL CONTEXT: FROM CLASSROOMS TO JUDICIARY

CROSS-BORDER LITIGATION IN A DIGITAL CONTEXT: FROM CLASSROOMS TO JUDICIARY

Directors

Andrea Spada Jiménez

Yolanda De Lucchi López -Tapia

Coordinator

Rubén López Picó

Foreword

Sonia Calaza López

Dykinson, S.L.

Este libro ha sido sometido a evaluación por parte de nuestro Consejo Editorial
Para mayor información, véase *www.dykinson.com/quienes_somos*

This work is framed within the following projects:

Proyecto de investigación del Plan Propio de la Universidad de Málaga:
"Trazando un futuro sostenible desde el Derecho (FUTURSOST)". IP Andrea Spada Jiménez.

Proyectos de Investigación: "Ejes de la Justicia en tiempos de cambio", IPs Sonia Calaza y José Carlos Muinelo (PID2020-113083GB-I00), Ayuda PID2020-113083GB-I00 ayuda financiado/a por MCIN/AEI/ 10.13039/501100011033 y "Transición Digital de la Justicia", IPs Sonia Calaza y José Carlos Muinelo (RED 2021-130078B-100), Ayuda Referencia TED2021-130078B-I00 ayuda financiado/a por MCIN/AEI/ 10.13039/501100011033 y por la "Unión Europea NextGenerationEU/PRTR".

Editorial DYKINSON, S.L. Meléndez Valdés, 61 - 28015 Madrid
Teléfono (+34) 91544 28 46 - (+34) 91544 28 69
e-mail: info@dykinson.com
http://www.dykinson.es
http://www.dykinson.com

ISBN: 978-84-1070-231-8
DOI: 10.14679/3186

Preimpresión:
Besing Servicios Gráficos, S.L.
besingsg@gmail.com

TABLE OF CONTENTS

FOREWORD:
Three colors for a new European procedural flag: Teaching, Scientific and Technological Innovation

Dra. Sonia Calaza López

Professor of Procedural Law (UNED)

I am very pleased to present a work of these characteristics, conceived and developed - by dear colleagues –within the framework of three relevant Research Projects: "Ejes de la Justicia en tiempos de cambio", IPs Sonia Calaza y José Carlos Muinelo (PID2020-113083GB-I00), Ayuda PID2020-113083GB-I00 ayuda financiado/a por MCIN/AEI/ 10.13039/501100011033, "Transición Digital de la Justicia", IPs Sonia Calaza y José Carlos Muinelo (RED 2021-130078B-100), Ayuda Referencia TED2021-130078B-I00 ayuda financiado/a por MCIN/AEI/ 10.13039/501100011033 y por la "Unión Europea NextGenerationEU/PRTR" and "Trazando un futuro sostenible desde el Derecho (FUTURSOST). IP Andrea Spada Jiménez–.

The work that I have the pleasure of presenting, therefore, participates in these three extremes (Teaching Innovation, Scientific Innovation and Technological Innovation): (i) Teaching innovation, promoted with the aforementioned Project ("Charting a sustainable future from the Law"), and with the export of essential academic analytics, which favors the recruitment of university talent, while trying to reverse the discouragement and disinterest –in short, the intellectual prostration– that precedes, in many cases, the pitiful abandonment of our classrooms; (ii) Scientific Innovation, endorsed by the MICINN –"Axes of Justice in times of change"– with contributions that go beyond the aforementioned teaching content to delve, in greater depth, into suggestive research topics, essentially championed by the humanization and internationalization; and (iii) Technological Innovation, supported –now by the European Union NextGeneration EU/PRTR– "Digital Transition of Justice" –with detailed studies on the essential digitalization of our judicial processes and procedures.

This monograph –the fruit of the synergy of thirteen young proceduralists, under the careful direction of Yolanda De Lucchy & Andrea Spada; and the faithful coordination of Rubén López Picó– can be defined –in essence– as

relevant, current, original and, of course, different. The global study –or broad stroke– is rooted in our essential procedural law –also procedural– as the only channel to provide timely, both jurisdictional and extra-jurisdictional solutions to cross-border conflicts of a civil and criminal nature.

The specific subjects addressed in the four thematic blocks that make up this work are, among others, and included in its four thematic axes, the following: (i) University education (teaching innovation), teaching Procedural law in a modern key before a new multicultural, globalized and interconnected society; (ii) The humanization of Justice (with and without Judges) –protection of (very diverse assets, rights and interests) of vulnerable groups (also for very heterogeneous reasons)–; (iii) The internationalization of the response to transnational conflicts, international child abduction, European arrest and surrender order or international arbitration; and (iv) Judicial digitization –digital evidence and data encryption–.

The first chapter is closely related to the core object of study of the entire work –also, consequently, with its title– and addresses the issue of teaching procedural law in the face of a new social, cultural, international and digital reality: a democratic, globalized, interconnected, open, plural, diverse society, with multicultural students. And our procedural law –necessarily updated to the reality of the times in which we live and, in its logical consequence, increasingly international and digital– is the subject of constant daily transformation, largely to adapt to the new environment, as I say: (i) international –with the constant transposition of a large number of Directives that will cause, sooner or later, the (essential) procedural homogenization of our Justice–; and (ii) digital –in which practically all natural and legal persons (in the world) live and interact (to a greater or lesser extent)–.

Next, the second part of the work addresses the (also essential) application of procedural law to protect the rights and interests of vulnerable groups, with four chapters: the first, dedicated to the legal regime of class actions in the United Kingdom; the second, with a detailed analysis of the Restorative Justice system established in the criminal process of minors in the Italian legal regime; the third, with the treatment of the rights of victims –and their evolution– in our current legal regime; and finally, the fourth, with the study of the principle of universal jurisdiction.

The third part of the work, titled "Cross-border litigation: procedures and jurisprudence" –is, in turn, made up of four other chapters; the first, addressing the restitution and return process in cases of child abduction in the European Union; the second, with a study of the autonomous concept of trial resulting in the decision in the European Arrest Warrant; the third, with a critical analysis of the obligation of consistent interpretation and the validity of domestic procedural law; and the fourth, with treatment of the execution of the arbitration award in accordance with the European Convention on Human Rights.

The fourth and final part of this present work is, finally, made up of four other chapters, where, under the common theme of the digitalization of procedures, the following topics are addressed: first, the jurisprudence of the European Union in relation to preservation of data in criminal proceedings; second, the data encryption regime and the relationship between security and freedom in the European Union; the third, the production and preservation of the evidence in the process in the European Union; and fourth, the influence of European jurisprudence on the admission of evidence obtained by the employer to control the worker.

I want to congratulate each and every one of the authors of this book, for having carried out such a modern, integrated and different work: Begoña Vidal Fernández, "The teaching of procedural law in international classrooms and forums"; Lucio Morcillo Peñalver, "Evolution of the same interest in the united kingdom representative procedure in the XX century"; Luca Lupoli, "Restorative justice in the Italian juvenile process"; Núria Mallandrich Miret, "The long path to the recognition of victim's rights in Spain: past, present and future"; Andrea Spada Jiménez, "The applicability of universal jurisdiction - have we forgotten to act as a society?"; María González Marimón, "The international child abduction regime in the Brussels II ter regulation and its main modifications"; Patricia Llopis Nadal, "The "trial resulting in the decision" as an autonomous concept of eu law for the purposes of the European arrest warrant"; Pedro Manuel Quesada López, "The obligation of consistent interpretation and the validity of domestic Procedural Law: an unsolved riddle?"; José Caro Catalán, "The right to enforce an arbitral award within the framework of the European convention on human rights"; María Dolores García Sánchez, "Data encryption: the delicate balance of the privacy-security trade-off"; Alessandro Malacarne, "Security, freedom and criminal procedure: data retention, European jurisprudence and the new Italian regulation"; Elisabet Cueto Santa Eugenia, "Production and preservation of electronic evidence within the European Union"; and Paloma Arrabal Platero, "The influence of European jurisprudence in the admission of evidence obtained by the employer to control the worker".

I also want to congratulate –heartily– its Directors and Coordinator because the overall result is excellent. With works like this one, in which a new European procedural flag is raised -by (promising) youth like the one just mentioned- with three colors as essential as Teaching Innovation, Scientific Innovation and Technological Innovation, I am sure that the roadmap of the Spanish University is one of the most advantageous in Europe.

Many thanks to the prestigious Dykinson Editorial for supporting (always!) in the space of our already consecrated collection "Ethics. Justice. Process", the triple Teaching, Scientific and Technological Innovation that colors this new European flag of quality Justice. And of course, our most sincere complicity and gratitude to the readers for choosing us. We hope that reading this work does not leave anyone

indifferent: that we are able to transfer the teaching, scientific and technological objectives with the same strength, impetus and (exciting) determination with which the authors, directors, coordinator and myself have sense committed.

Part I.
The teaching of procedural law in international clasrooms and forums[1]

Dra. Begoña Vidal Fernández

Associated Professor of Procedural Law. University of Valladolid

1. LANDSCAPE OF MULTI-INTERNATIONAL CLASSROOM.

The aim of this paper is to share my experience of teaching this subject in a multi-international classroom with many Erasmus students.

The academic year 21-22 was the first time I taught this subject in English to this kind of target group. I must say that it has been an interesting and enriching

1 Abbreviations used:
CFREU (Charter of Fundamental Rights of the European Union)
CJEU (Court of Justice of the European Union)
CJEU (Court of Justice)
CP (Spanish Criminal Code)
EC (Spanish Constitution)
ECHR (European Convention on Human Rights)
ECtHR (European Court of Human Rights)
GC (General Court)
ICC (International Criminal Court)
LEC (Spanish Civil Procedure Law)
LECRIM (Spanish Law on Criminal Procedure)
LJCA (Spanish Contentious-Administrative Jurisdiction Act)
LJS (Spanish law on social jurisdiction)
LODH (Spanish organic law on the right to honour)
LODR (Spanish organic law on the right to rectification)
LOPJ (Spanish Organic Law on the Judiciary)
LOREG (Spanish Organic Law on the General Electoral System)
LOTC (Spanish Organic Law of the Constitutional Court)
LPM (Spanish military procedural law)
TEU (Treaty on European Union)
TFEU (Treaty on the functioning of the European Union)

experience. The interventions, and the contributions of students from very different countries, and different judicial cultures, were very attractive.

There were students from Eastern Europe: Ukraine, Georgia, Albania, Bosnia-Herzegovina, Montenegro, there was even one student from Kyrgyzstan, as well as students from the European Union from Croatia, France and especially Italy, as well as some from Brazil. This international student body was complemented by a large number of Spanish students who were interested in studying this subject in English and in an international environment.

This variety of nationalities, on the one hand, made it necessary to teach the core of the various systems of jurisdictional protection of fundamental rights, at the domestic, European and world levels, and on the other hand, it invited very interesting activities incorporating data and information from the systems of the students' countries of origin.

The starting point can be none other than the presentation of the system established in the country they have come to study, the Spanish system. And here we come up against the only problem that can arise when approaching this perspective of procedural law in an international context: that it is a territorial law, only applicable in the territory over which it extends its validity.

Indeed, the teaching of procedural law in the international context has two sides: one smiling and the other less accessible.

On the more difficult side, it is a territorial law, the law through which jurisdictional power is exercised, i.e. the courts of States have to apply the procedural law of their own State within the territorial scope of that State. Each State has its own procedural law and its courts are bound by their own national procedural law. This fundamentally national character of procedural law has left very little scope for its teaching beyond national borders. Only the essential and abstract concepts - jurisdiction, action, process - have allowed its internationalisation.

At its most friendly, the globalisation of all aspects of society has dragged Justice along with it. To ensure respect for the Law and to do justice in such an interconnected international context, new tools are needed that act beyond and above States, but with their agreement. Teaching these new tools in an international context is easier than in national law.

Moreover, the demand for the respect and defense of fundamental rights is now also globalised. This is a material area that is the subject of studies and publications in all languages. All this makes the teaching of this subject in English very accessible and, given the fact that English it is now recognised as a *lingua franca*, even absolutely necessary.

2. MAIN CONTENT OF THE SUBJECT JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS SYSTEMS.

Judicial protection of fundamental rights in Spain can be ordinary made by the judiciary through special proceedings called "Amparo", in every jurisdictional order. Once this way is exhausted, it's possible subsidiary protection with the "appeal of constitutional amparo" before the Spanish Constitutional Court.

In case you don't find protection for your fundamental right inside Spain, it's still possible to ask for it before the European Court of Human Rights in Strasbourg.

And, as a Member State of the European Union, Spain has also the European Chart of Fundamental Rights, whose protection belongs both to national judges and to the European Court of Justice in Luxembourg. Finally, it's important to know how the International Criminal Court works, and how is it organized.

The aim of this academic subject is to study all those proceedings in order to achieve a good knowledge of judicial protection of fundamental rights in Spain and European Union.

2.1. Key concepts

It is necessary to begin the presentation with an explanation of the main key concepts in relation to our own protection system, within the framework of the Spanish legal system[2].

When we speak of the *protection of fundamental rights*, we are referring in a broad sense to all types of protection measures: legal, social, economic, etc. When we use the term "legal" in addition to "protection", we are referring to the protection contemplated in the rules that make up the legal system, that is to say protection enshrined in law.

And by limiting legal protection to *judicial, or rather jurisdictional, protection*, we are focusing attention on the instruments provided for the effective judicial protection of constitutionalised fundamental rights. In this restricted sphere, the intensity of protection is greater than that provided for other rights, and is deployed in a set of special instruments established for this purpose of privileged protection.

In the Spanish system, there are several instruments, depending on the diversity of the fundamental rights protected. In other words, within the constitutionalised fundamental rights, we must distinguish between those of a material nature and those of a procedural nature, since the channels for their protection and defence before the courts are different.

2 Vid. more extensively in my monograph: *Protección Jurisdiccional de los Derechos Fundamentales*, Tecnos, 2015.

All the fundamental rights of a procedural nature are included in Article 24 of the Spanish Constitution: no. 1 enshrines the r*ight to effective judicial protection without any case of defencelessness*, and no. 2 contains a list of rights and principles which can be traced back to the expression *due process or process with all the guarantees*.

The violation of any of these rights can only occur by judicial bodies in the course of a trial. For this reason, the channel for their defence is the process itself, through the various means of challenge, or appeals, provided for by the legislator, including the extraordinary appeal for procedural infringement. It is also possible to file an "incident of nullity of the proceedings" against the final judgment that ends the proceedings, under the conditions and with the legally established requirements. And after the unsatisfactory resolution of this, there remains the possibility of filing an appeal for protection before the Constitutional Court.

When the fundamental rights violated are of a material nature, which are all those enshrined in articles 14 to 19 of the Spanish Constitution except for article 24, the violating act can come both from another private person and from the public authorities, but not only from the judiciary but also from the legislative and, most commonly, from the executive through all its bodies in the various public administrations.

For the protection of these rights, special or specialised proceedings are established before the courts of the various jurisdictional orders: civil, criminal, contentious-administrative and social (or labour).

These are "*special" proceedings* because they are determined by their purpose: the protection of a constitutionalised fundamental right, and these proceedings can only be used for this purpose. This privileged procedural channel cannot be used for the protection of other rights or legal interests that do not consist of the infringement of a constitutionalised fundamental right.

In these cases of special judicial protection, *it is always necessary to file a lawsuit (an application for amparo)*, setting the jurisdictional apparatus in motion, this is initiating a process with this procedural purpose. Once this ordinary channel has been exhausted, in the case of violation by public authorities, there remains the subsidiary possibility of filing an appeal for amparo before the Constitutional Court.

2.2. Main content[3]

Therefore, in the syllabus of this course there are four topics:

1. Spanish Judicial Protection of Fundamental Rights System.

3 The basis for this content can be found in my monograph: *Protección Jurisdiccional de los Derechos Fundamentales*, cit.

2. European Union Judicial Protection of Fundamental Rights System.

3. European Convention of Human Rights Procedural Protection System.

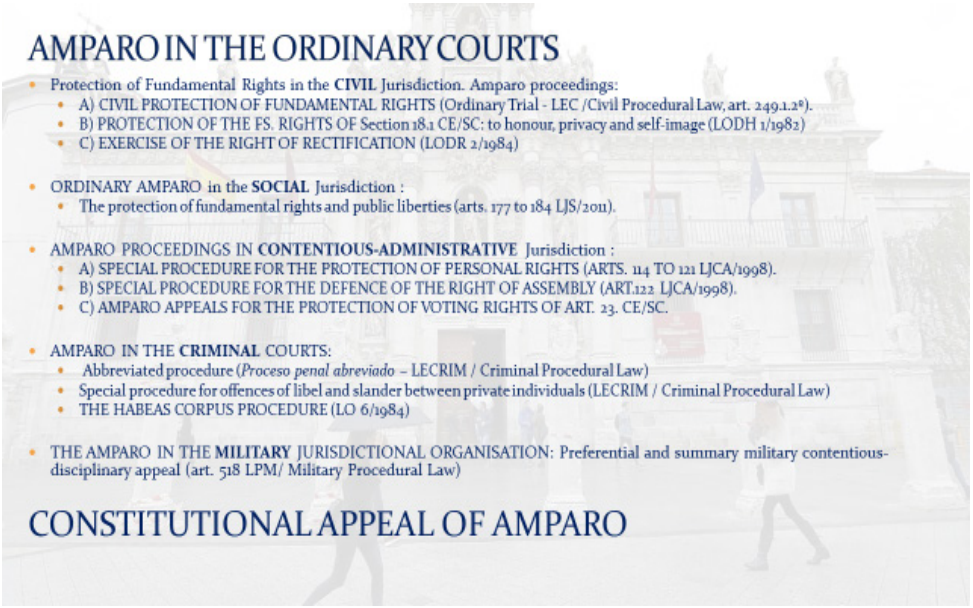
4. International Criminal Court of Justice Procedural Protection System.

2.2.1. Spanish Judicial Protection of Fundamental Rights System

Within this system it is useful to distinguish, for didactic purposes, two aspects or subsystems: the processes (procedural system) and the organic or judicial (judicial system).

a) Procedural system

Protection by the ordinary courts can be found through all those specialized procedures that can be seen in this picture:



(Own production)

With the establishment of these processes, the legislator has fulfilled the mandate of the constituent contained in Article 53.2 EC: Every citizen may seek protection of the rights and freedoms recognised in Articles 14 to 29 and 30.2 EC, before the ordinary courts by means of a procedure based on the principles of preference and summary proceedings.

"Preference": in the framework of this precept is understood as urgency or speed in the processing. These processes do not follow the order of entry of the other cases, but are processed in preference to them, with temporal immediacy.

"Summary": this means that only that part of the conflict which affects the exercise of fundamental rights and constitutionalised public freedoms should be tried through the ordinary amparo process, leaving out any other part which involves an infringement of any other rule of common law. This summary nature implies jurisdictional cognition limited to the facts that involve an infringement of a fundamental right, and the impossibility of reiterating the same claim in a different process. This has been enshrined in the LOTC, Article 41: "Three. In constitutional protection, no other claims may be asserted other than those aimed at restoring or preserving the rights or freedoms for which the appeal was lodged".

This procedural possibility is what is known as the ordinary amparo process. It also allows the "subsidiarity" of the constitutional appeal, so often affirmed by the TC, enshrined in art. 41.1 LOTC, to become a reality: "The rights and freedoms recognised in Articles fourteen to twenty-nine of the Constitution shall be subject to constitutional protection, in the cases and in the forms established by this Act, without prejudice to the general protection entrusted to the Courts of Justice. The same protection shall be applicable to conscientious objection as recognised in Article thirty of the Constitution".

Thus, in our legal system there currently coexist several special preferential and summary proceedings for the ordinary protection of specific rights and freedoms enshrined in the Constitution, together with the protection by means of ordinary proceedings, albeit with special features:

a'. *Special Civil proceedings*: for the jurisdictional protection of the right to honour, personal and family privacy and one's own image (LO 1/1982) and the right to rectification (LO 2/1984), as well as their dialectical counterparts: the right to transmit truthful information, freedom of expression and ideological freedom.

b'. *Criminal proceedings*: There is a specific criminal process for the protection of individual personal freedom and the freedom to roam freely throughout the national territory of article 17[4] EC: the Habeas Corpus proceedings (LO 6/1984).

There are also two special proceedings for the protection of the fundamental rights of art. 18.1[5] of the EC: proceedings for offences of libel and slander against private individuals, and proceedings for offences committed by means of printing,

4 Article 17: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except in accordance with the provisions of this article and in the cases and in the manner prescribed by law. (...)

"4. The law shall regulate a "habeas corpus" procedure for the immediate bringing before the courts of any person unlawfully detained. Likewise, the maximum period of provisional detention shall be determined by law".

5 Article 18: "1. The right to honour, to personal and family privacy and to one's own image shall be guaranteed".

engraving or other mechanical means of publication. The aggrieved or offended party has a *ius electionis* when it comes to requesting the jurisdictional protection of their fundamental rights, between civil and criminal proceedings, by filing a complaint or lawsuit, provided that the interference that violates the right is of criminal relevance.

However, there is a progressive disuse of criminal proceedings in favour of civil proceedings for three reasons:

— These offences are semi-public (prosecutable at the request of the injured party by means of a complaint) or private (prosecutable by means of a complaint by the offended party), and the offended parties prefer to bring their litigation before the civil courts, where it is easier to obtain a decision condemning them to pay compensation, rather than a criminal conviction.

— The elevation to constitutional status of ideological freedom and freedom of expression, and the right to freely communicate and receive truthful information has led to a radical change in case law, which no longer considers the presence of animus injuriandi to be sufficient to convict as they are alleged by the offender as justification for the legality of his conduct.

— When the time comes to base an application for amparo before the Constitutional Court, if the offended party has opted for criminal proceedings, this body will not be able to judge the infringement of the appellant's rights caused by any conduct that could be classified as "unlawful interference" but does not constitute a crime, whereas it could if he had chosen civil proceedings.

c'. *Special Amparo labour proceedings*: for the protection of the rights to freedom of association, strike or other fundamental rights and public freedoms, including the prohibition of discriminatory treatment and harassment at work (Law 36/2011).

d'. *Special Administrative proceedings*: for the protection of the fundamental rights of the individual (arts. 114 to 121 LJCA), the right of assembly (art. 122 LJCA) and contentious-electoral proceedings for the protection of the right to vote (LO 5/1985 Organic Law on the General Electoral System - LOREG).

e'. Transversal nature of the *judicial protection of the fundamental right to equality of women and men* in LO 3/2007 of 22 March, for the effective equality of women and men.

Article 12 of this law provides for effective judicial protection through ordinary amparo proceedings of the fundamental right to equality between women and men, in every jurisdictional order[6].

6 Article 12. Effective judicial protection.

"1. Any person may apply to the courts for protection of the right to equality between women and men, in accordance with the provisions of Article 53.2 of the Constitution, even after the termination of the relationship in which the discrimination is alleged to have occurred.

In the civil order, a modification of legal standing has been made by introducing a new art. 11 bis in the LEC to contemplate the legal standing not only of those affected but also, with their authorisation, of trade unions and legally constituted associations whose primary purpose is the defence of equal treatment with respect to their affiliates. It has also led to changes in the law on contentious-administrative jurisdiction for the same purpose. And the same has happened in the social jurisdictional order, as set out in art. 17.2, III LJS[7].

This fundamental right can also be defended via criminal law, as its violation is classified as a crime against workers in art. 314 CP[8].

b) Judicial system

In order to explain all those procedures in a useful way, it is necessary to provide non-Spanish students with a general knowledge of the Spanish judicial system.

The main problem here is to start from a verified translation of the names of the courts. For this, it is useful to refer to the information sent by the Spanish government to the European Commission, translated into English, where one can find the summary of our judicial system and the whole organization of the courts with their names in English. This is how I have allowed myself to present this bilingual table in the classroom with full confidence of using correct expressions.

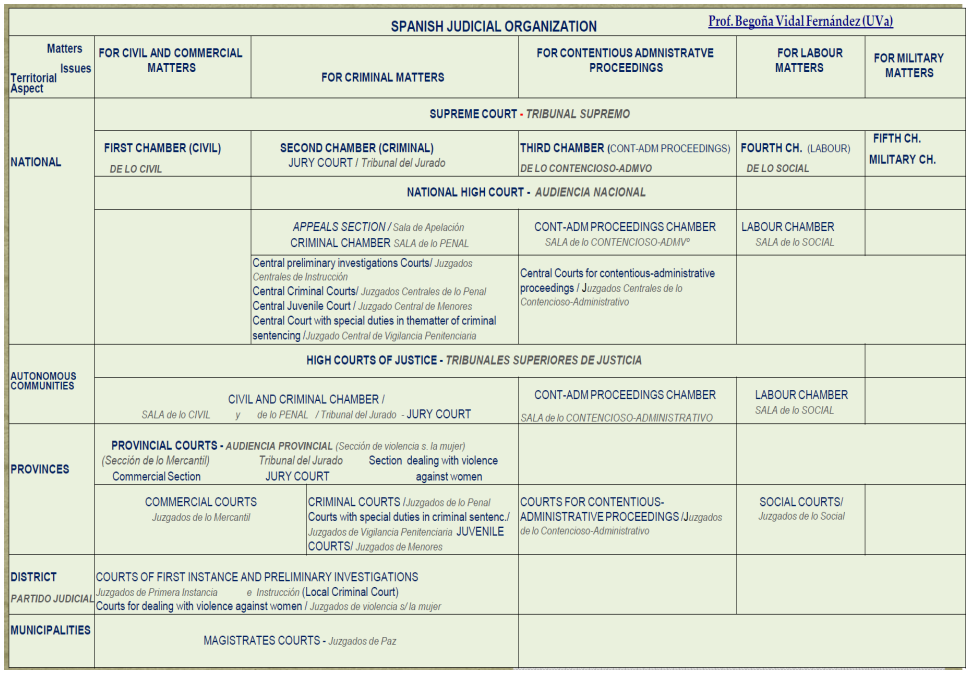
2. The capacity and standing to intervene in civil, social and contentious-administrative proceedings concerning the defence of this right correspond to natural and legal persons with a legitimate interest, as determined in the laws regulating these proceedings.

3. The harassed person shall be the sole legitimate party in litigation on sexual harassment and harassment on grounds of sex."

7 Article 17.2. "Workers' trade unions and employers' associations shall have legal standing to defend their economic and social interests.

(...third paragraph:) In particular, under the terms established in this Law, they may act, through the process of collective conflict, in defence of the rights and interests of an undetermined or difficult to determine plurality of workers; and, in particular, through this channel they may act in defence of the right to equal treatment between women and men in all matters attributed to the social order."

8 Article 314: "Those who cause serious discrimination in public or private employment against any person on the grounds of their ideology, religion or beliefs, their family situation, their membership of an ethnic group, race or nation, their national origin, their sex, age, sexual or gender orientation or identity, reasons of gender, aporophobia or social exclusion, the illness they suffer or their disability, because they hold the legal or trade union representation of the workers, because they are related to other workers in the company or because they use one of the official languages of the Spanish State, and they do not re-establish the situation of equality before the law following a summons or administrative sanction, repairing the economic damage that has resulted, shall be punished with a prison sentence of six months to two years or a fine of twelve to twenty-four months".



SPANISH JUDICIAL ORGANIZATION — Prof. Begoña Vidal Fernández (UVa)					
Matters / Territorial Issues Aspect	FOR CIVIL AND COMMERCIAL MATTERS	FOR CRIMINAL MATTERS	FOR CONTENTIOUS ADMNISTRATVE PROCEEDINGS	FOR LABOUR MATTERS	FOR MILITARY MATTERS
NATIONAL	SUPREME COURT - *TRIBUNAL SUPREMO*				
	FIRST CHAMBER (CIVIL) *DE LO CIVIL*	SECOND CHAMBER (CRIMINAL) JURY COURT / *Tribunal del Jurado*	THIRD CHAMBER (CONT-ADM PROCEEDINGS) *DE LO CONTENCIOSO-ADMVO*	FOURTH CH. (LABOUR) *DE LO SOCIAL*	FIFTH CH. MILITARY CH.
		NATIONAL HIGH COURT - *AUDIENCIA NACIONAL*			
		APPEALS SECTION / *Sala de Apelación* CRIMINAL CHAMBER *SALA de lo PENAL*	CONT-ADM PROCEEDINGS CHAMBER *SALA de lo CONTENCIOSO-ADMVº*	LABOUR CHAMBER *SALA de lo SOCIAL*	
		Central preliminary investigations Courts/ *Juzgados Centrales de Instrucción* Central Criminal Courts/ *Juzgados Centrales de lo Penal* Central Juvenile Court / *Juzgado Central de Menores* Central Court with special duties in thematter of criminal sentencing /*Juzgado Central de Vigilancia Penitenciaria*	Central Courts for contentious-administrative proceedings / *Juzgados Centrales de lo Contencioso-Administrativo*		
AUTONOMOUS COMMUNITIES	HIGH COURTS OF JUSTICE - *TRIBUNALES SUPERIORES DE JUSTICIA*				
	CIVIL AND CRIMINAL CHAMBER / *SALA de lo CIVIL y de lo PENAL / Tribunal del Jurado* - JURY COURT		CONT-ADM PROCEEDINGS CHAMBER *SALA de lo CONTENCIOSO-ADMINISTRATIVO*	LABOUR CHAMBER *SALA de lo SOCIAL*	
PROVINCES	PROVINCIAL COURTS - *AUDIENCIA PROVINCIAL* *(Sección de violencia s. la mujer)* *(Sección de lo Mercantil)* Commercial Section	*Tribunal del Jurado* JURY COURT Section dealing with violence against women			
	COMMERCIAL COURTS *Juzgados de lo Mercantil*	CRIMINAL COURTS /*Juzgados de lo Penal* Courts with special duties in criminal sentenc./ *Juzgados de Vigilancia Penitenciaria* JUVENILE COURTS/ *Juzgados de Menores*	COURTS FOR CONTENTIOUS-ADMINISTRATIVE PROCEEDINGS /*Juzgados de lo Contencioso-Administrativo*	SOCIAL COURTS/ *Juzgados de lo Social*	
DISTRICT *PARTIDO JUDICIAL*	COURTS OF FIRST INSTANCE AND PRELIMINARY INVESTIGATIONS *Juzgados de Primera Instancia e Instrucción* (Local Criminal Court) Courts for dealing with violence against women / *Juzgados de violencia s/ la mujer*				
MUNICIPALITIES	MAGISTRATES COURTS - *Juzgados de Paz*				

(Own production)

2.2.2. European Union Judicial Protection of Fundamental Rights System[9]

2.2.2.1. General Introduction

If an individual considers that a fundamental right has been infringed by an EU law, he or she can take the matter to court. The Treaty of Lisbon enshrines, together with the right to effective judicial protection of European citizens, the obligation of the Member States to establish the necessary means of redress to guarantee this protection in the areas covered by Union law (Article 19(1)(II) TEU).

The Treaty of Lisbon represents a very important stage in the evolution of the protection of fundamental rights in Europe. On the one hand, the Charter of Fundamental Rights of the European Union has attained the status of a legally

9 There are also non-judicial means available to individuals to seek protection of their EU fundamental rights, but they are out of our field of interest now:

- Where breaches of fundamental rights are committed by EU institutions, bodies, offices and agencies: Complaint to the European Ombudsman; Complaint to the European Data Protection Supervisor.

- Where breaches of fundamental rights are committed by a Member State: Complaint to the European Commission; Petition to the European Parliament.

binding instrument, giving the Court of Justice and the national courts a binding instrument to fulfil their role of ensuring respect for fundamental rights in the interpretation and application of Union law. Moreover, the Treaty of Lisbon provided for the accession of the Union to the European Convention on Human Rights.

Even before attaining constitutional status, the Charter was applicable to the European institutions, in accordance with the principle of subsidiarity. To give effect to the application of the Charter, the Commission presented in 2010 a Communication with the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, reinforcing the assessment of the impact of its proposals on fundamental rights and encouraging the other institutions to ensure full respect of the Charter in their legislative work.

The Charter also applies to the authorities of EU countries when they implement EU law. And in its role as guardian of the Treaties, the Commission also has to ensure that Member States respect the Charter in these cases, both by taking preventive action (reminding the authorities responsible for transposing European Union law of the obligation to respect it) and by means of infringement procedures when they have failed to respect the Charter when implementing Union law.

Instead, where the infringement of the fundamental right has no connection with Union law, it is not the Charter that applies, but the State's own system of protection of fundamental rights. In such situations the Commission has no power to intervene.

From the point of view of European citizens, the effectiveness of the Charter depends on the response of the courts, which are responsible for ensuring its observance and effective application by all public authorities: European Union and national, each in its own sphere.

The infringement of any of the rights of the CFREU can be the result of an act of any of the EU institutions, including the CJEU institution, and once this infringement has been established, it is the doctrine of the CJEU itself that it must be sanctioned and repaired by means of an action for compensation to be brought before the General Court of the EU (GC).

Finally, Europeans can also claim liability from the State for damage caused by infringement (infringement of fundamental rights) of European Union law.

2.2.2.2. Procedural instruments:

A) Actions for annulment. Art. 263 TFEU.

This article allows the European Union institutions, the ECB and the Member States to apply to the CJ (or the GC) for the annulment in whole or in part of European Union provisions that are contrary to European Union law.

Individuals may also bring actions for annulment before the GC against acts of the institutions to which they are addressees or which are of direct and individual concern to them.

B) Question referred for a preliminary ruling. Art. 267 TFEU.

In the course of proceedings before a national court, the parties to the proceedings may request that court to refer a question to the CJ for a preliminary ruling if they consider that the rule applicable to resolve the dispute infringes European Union law. All national courts have the power to do so. In the case of courts against whose decisions there is no right of appeal, this power becomes an obligation.

The question may concern either the interpretation of all the rules and provisions making up the European Union legal order (including judgments of the CJ and the GC) or the assessment of the validity of secondary European Union law.

C) Actions for failure to fulfil obligations. Arts. 258, 259 and 260 TFEU.

A Member State commits an infringement punishable both by:

— enacting or maintaining in force national legislation which is incompatible with European Union law,

— and for failure to implement, or late and incomplete implementation, of the obligations imposed by the Treaty on the Member States.

And there are two cases of particularly serious non-compliance, which merit a special procedure and are known as "recalcitrant non-compliance": (art. 260.2 and .3):

— For failure to comply with a judgment of the CJEU.

— For failure to inform of measures implementing a Directive in due time.

This procedure is divided into two phases: pre-litigation and litigation.

D) Action for compensation for non-contractual liability of the Communities (Art.268 and 340 TFEU):

Every European citizen has the right to bring an action for damages before the General Court of the EU for non-contractual liability of the European Union (Art.268 and 340 TFEU) for damage suffered as a result of a breach of a fundamental right committed by the public authorities of the EU.

The Court of Justice has held that individuals who have suffered damage are entitled to compensation where three conditions are satisfied:

— the rule of European Union law infringed is intended to confer rights on them,

— the infringement of that rule must be sufficiently serious

— and there is a direct causal link between that breach and the damage suffered by individuals.

Without prejudice to the right to compensation, which is based directly on European Union law once these three conditions are met, it is for the State (principle of autonomy), within the framework of national law on liability, to make good the consequences of the damage caused, it being understood that the conditions laid down by national legislation on compensation for damage cannot be less favourable than those applicable to similar claims of a domestic nature (principle of equivalence): the set of rules applicable to remedies, including the time-limits laid down, must apply without distinction to remedies based on a breach of EU law and to those based on a breach of domestic law) and may not be so framed as to make it in practice impossible or excessively difficult to obtain compensation (principle of effectiveness).

2.2.3. European Convention of Human Rights Procedural Protection System

Acording to article 1 ECHR:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

And according to article 19 ECHR:

> "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

Today, 46 member states of the Council of Europe, all of them High Contracting Parties to this Convention, participate in this system of judicial protection of human rights[10].

Both States Parties (Art. 33 ECHR: State application) and individuals (natural persons), non-governmental organisations or groups of individuals (individual application) who consider themselves to be victims of a violation of the rights recognised in the Convention or its Protocols (Art. 34 ECHR) have standing to bring an action.

The States Parties to the Convention have passive standing to intervene in the proceedings.

The application may be lodged by a State Party against another State Party or by a person against a State Party, within 4 months of the last judicial decision exhausting the national human rights protection system. The content and requirements are set out in Art. 47 of the Rules of Procedure of the ECtHR, and in Art. 35 ECHR, which regulates the grounds of inadmissibility. The form provided for this purpose must be completed in full and has to be accompanied by all

10 The Russian Federation denounced this Treaty on 16/03/2022, and this Denunciation entered into force on 16/09/2022.

the documents referred to. Otherwise the claim will not be admissible and the incomplete claim does not interrupt the 4-month limitation period.

Once the application is admitted, the Court applies "prioritisation" criteria, adopted in June 2009, to determine the order in which they are to be considered, rather than following the traditional chronological criterion. The overload of work suffered by this body had led to very urgent cases not being heard until after too many months, sometimes even years. Article 41 of the Rules of Procedure takes up this modification by establishing as criteria for determining the order in which cases are heard the importance and urgency of the issues raised. The Court has thus distinguished 7 categories of cases:

I - Urgent cases (risk to the life or health of the appellant, welfare of minors...).

II - Cases likely to have an impact on the efficiency of the Convention system (a structural problem or an endemic situation on which the Court has not yet had occasion to rule); or cases raising an important question of general interest (inter-State cases...).

III - Cases concerning the rights and freedoms of Articles 2, 3, 4 and 5(1) of the Convention ("core rights"), which have posed a direct threat to the physical integrity and dignity of the individual.

IV - Potentially well-founded cases.

V - "Repetitive cases", which raise issues already resolved in a "pilot judgment".

VI - Cases presenting a problem of admissibility.

VII - Manifestly inadmissible claims.

Under this system, a case belonging to a higher category of importance takes precedence over a case in a lower category. The aim is to deal first with urgent, serious cases and those that may generate a large number of supplementary claims.

The Convention appears to be based on voluntary compliance by States with ECtHR judgments. When such voluntary compliance does not take place, the enforcement procedure foreseen in Art. 46 ECHR comes into play, which contains a general proclamation of the States' commitment followed by a coercive enforcement procedure entrusted to the Committee of Ministers of the European Council.

Article 46(1) of the Convention provides that *the High Contracting Parties undertake to comply with the final judgments of the Court in cases to which they are parties.* According to paragraph (2) of this Article, the Committee of Ministers is entrusted with the task of ensuring the enforcement of judgments.

Such enforcement covers not only the payment of any sums to which the defendant State may have been ordered to pay, but also the adoption of measures, of an individual or general nature, designed to restore, if possible, the integrity of the right infringed and to prevent the effects of the infringement from continuing.

The measures to be taken can thus be of two types: measures of an individual nature (aimed at erasing the consequences of the violations found and allowing *restitutio in integrum* as far as possible); and measures of a general nature aimed at preventing similar violations in the future.

In carrying out this task, the Committee of Ministers is assisted to accomplish this task by the Department for the Enforcement of Judgments. The enforcement of judgments phase involves the examination of the measures taken by States to enforce judgments finding a violation of the Convention.

2.2.4. International Criminal Court of Justice Procedural Protection System

The International Criminal Court (ICC) was established on 17 July 1998, when its Statute was adopted in Rome. It has been in force since July 2002. Currently, 123 countries are States Parties to the Rome Statute of the ICC. Out of them 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.

The ICC began its work in March 2003, and the first conviction was handed down in July 2012 (Lubanga Case[11]).

2.2.4.1. Core legal texts

There are 4 fundamental documents:

- Rome Statute 1998.
- The Rules of Procedure and Evidence.
- The ICC Regulations (where we find "rules" rather than articles).
- The Elements of Crimes.

But there are more key texts, all of which can be found on the ICC website[12].

2.2.4.2. Organs that make up the ICC

a) The Assembly of States Parties.

The Assembly is the Court's management oversight and legislative body and is composed of representatives of the States which have ratified or acceded to the Rome Statute. The Assembly is tasked with election, inter alia, the judges (16), the

11 Found guilty, on 14 March 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities (child soldiers). Sentenced, on 10 July 2012, to a total of 14 years of imprisonment. Verdict and sentence confirmed by Appeals Chamber on 1 December 2014. On 19 December 2015, Mr Lubanga was transferred to a prison facility in the DRC to serve his sentence of imprisonment. On 15 March 2020, Thomas Lubanga was released after having served 14 years of imprisonment. The reparations proceedings for victims started on 7 August 2012.

12 https://www.icc-cpi.int/resource-library/core-legal-texts

Prosecutor and Deputy Prosecutors. In addition, the Assembly adopts the Rules of Procedure and Evidence and the Elements of crimes.

b) Presidency.

It is a complex body composed of the President and 2 Vice-Presidents (elected for 3 years, eligible for re-election once).

The Rome Statute mandates it to work in 3 areas:

— Judicial: sets up the Chambers within the Section of first instance and assigns cases to them, it resolves appeals against the Registry and gives it powers in the enforcement phase of the Court's judgments.

— Administrative: it is responsible for the "proper administration of the Court" (except for the Office of the Prosecutor).

— External relations: it concludes cooperation agreements with States.

c) Judicial Divisions. There are 3: Pre-Trial, Trial and Appeals.

— Pre-Trial Judges. It is fundamental the role of this section as a collaborating body, and above all as a supervisor of the Prosecutor's actions:

It authorises the Prosecutor to investigate in the territory of a State Party when it has not been possible to obtain its cooperation; it reviews the Prosecutor's decision whether or not to open an investigation or to abandon an investigation already opened.

It is responsible for the investigation of cases that fall within the Court's jurisdiction, albeit conditioned by the Prosecutor's actions, the true leader of the investigation, since the Chamber almost always acts at the Prosecutor's request, except when it considers that the adoption of a certain act is essential for the protection of the rights of the defence, which, in the absence of the Prosecutor's initiative, it will act *ex officio*.

— Trial Judges:

The Presidency constitutes the Trial Chamber with 3 judges once the charges (indictments) have been confirmed by the Pre-Trial Chamber before which the investigation of the case has been conducted. It is the body functionally competent to hear the criminal acts defined in the Statute, and to resolve incidental questions that arise at this stage of the trial.

It also plays a procedural management role, ensuring that the trial is fair and conducted with full respect for the rights of the accused and with due regard for the protection of victims and witnesses.

It decides whether the accused is guilty or not guilty. Where appropriate, it fixes the sentence.

— Appeals Judges:

The Appeals Division is composed of the President of the Court and 4 Judges, who constitute the Appeals Chamber, a judicial body competent to hear appeals against decisions rendered by Chambers of the First Instance Division and the Pre-Trial Division, as well as the review trial.

The grounds of appeal are: procedural defects, error of fact and error of law. The Appeals Chamber's decision may consist of: quashing the decision or conviction, modifying the decision or conviction, ordering a new trial before a different Trial Chamber.

The Appeals Chamber also reviews sentences after two-thirds of the sentence has been served, or 25 years if the sentence was life imprisonment.

c) Office of the Prosecutor:

This body is composed of the ICC Prosecutor, which is assisted by Deputy Prosecutors, elected by the Assembly of States Parties. It acts as a separate organ of the Court. It is functionally independent.

Functions: The Office of the Prosecutor receives complaints and information, investigates, prosecutes criminal cases. In order to fulfil its functions it is organised into 3 operational divisions:

- Investigation Division.
- Prosecution Division (brings cases before judges).
- Competence, Complementarity and Cooperation Division (CCCD): weaves the network of cooperation with states and international bodies to ensure a police force and authorities to rely on.

d) Registry.

The Registry is a neutral organ of the Court that provides services to all other organs so the ICC can function and conduct fair and effective public proceedings. The Registry is responsible for three main categories of services[13]:

— judicial support, including general court management and court records, translation and interpretation, counsel support (including lists of counsel and assistants to counsel, experts, investigators and offices to support the Defence and victims), the detention centre, legal aid, library services, support for victims to participate in proceedings and apply for reparations, for witnesses to receive support and protection;

— external affairs, including external relations, public information and Outreach, field office support, and victims and witness support;

— and management, including security, budget, finance, human resources and general services.

13 https://www.icc-cpi.int/about/registry/default

2.2.4.3. Jurisdiction

It is basically limited to the investigation and prosecution of acts defined in the Court's own Statute as crimes of genocide, crimes against humanity, war crimes, as well as the crime of aggression, attributable to natural persons. This jurisdiction extends to judging and also to "enforcing the judgement" (a function attributed to the Presidency).

The exercise of this jurisdiction is limited by its subsidiary, temporal and territorial nature:

1) Subsidiary jurisdiction: The ICC is complementary to the national criminal courts. It only acts in the absence of the signatory States, when they are unable or unwilling to prosecute acts that are attributed to this supra-state body: *Principle of complementarity*. In application of this principle, the Court does not hear cases which are in any of the following situations:

a) That are being investigated or prosecuted by the courts of the State competent to do so;

b) When the case has been dismissed, or when the body responsible for the prosecution has declined to prosecute the case;

(c) On the ground of res judicata, where the conduct in question has already been prosecuted and is *res judicata*.

Exceptions: However, the ICC has the power to assess the situations described above, and may reaffirm its jurisdiction - even if the case is pending before a national court, or is *res judicata* if: if the lack of real will or the material impossibility of carrying out the investigation or prosecution is accredited, or it is evident that the proceedings were conducted for the purpose of shielding the accused from criminal responsibility.

2) Time limit. It only deals with acts defined in the Statute committed after its entry into force in the State where they occurred.

3) Territorial limit. It only acts in respect of acts committed in the territory of the States Parties, or in the territory of a State that is not a Party and has accepted the jurisdiction of the Court.

— Exceptions: the territorial scope of this court has an expansive vocation, and can hear the case:

— When the accused is a national of one of the States Parties (the Court is indifferent to the place where the facts occurred).

— When it is the UN Security Council that calls for its action in a case of: threat to the peace, breach of the peace, or acts of aggression.

In those cases, the Court is also indifferent to whether or not the State involved is a party.

3. USEFUL TOOLS AND TEACHING METHODS

In terms of teaching methods, practical exercises related to current affairs or to the students' country of origin were particularly attractive. Starting with an initial presentation of the subject, supported by power points, students were asked to carry out different practical activities, the results of which they themselves explained in dynamic sessions of presentation and debate.

In relation to the instruments or tools, both for preparation and presentation and for use in lessons, there are currently a wide variety of sources of information for preparing explanations in English. In addition to the possibility of buying manuals and books directly in English, the websites of official bodies offer contrasted and translated information, which gives security in the presentation of the subject.

Out of the four topics in the syllabus, three of them have an international dimension which makes it particularly easy to prepare and teach the subject in English. I am referring to the systems of jurisdictional protection of fundamental rights in the European Union, the Council of Europe system with the ECtHR, and the International Criminal Court. In all of them at least one of the working languages is English, so it is possible to find absolutely everything in English.

The only topic that may pose problems is the first, which is dedicated to the study of the Spanish system of jurisdictional protection of fundamental rights, through the so-called "amparos", both before the ordinary courts and before the Constitutional Court.

3.1. Sources

For the section dedicated to the Spanish judicial protection system, it is possible to find help from different sources:

— There are, of course, translations of works and monographs by Spanish authors.

— The information provided by the European Commission through the website of the European Judicial Networks in criminal, civil and commercial matters is also of great help. On these pages we find a description of the procedures and all the characteristics of the Spanish procedural system, both criminal and civil (see below for the link to the website).

— It is also useful the report on Spain of the Venice Commission: *EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) Human Rights Protection by Ordinary Courts.* Report by Mr José de la Mata Amaya (Magistrate, Spain) Conference on "Human Rights Protection Systems" (Bishkek, 21-22 November 2002).

— Finally, I would like to highlight the usefulness of the website of the Constitutional Court, which has a tab with information in English on the Court itself, constitutional proceedings, and especially on the constitutional "amparo" process (see below for the link to the website). In addition, the section with particularly relevant case law translated into English is especially useful, as it makes it easier for students to carry out the practical activities.

3.2. Most useful links:

3.2.1. Spanish Judicial Protection of Fundamental Rights system

GENERAL COUNCIL OF THE JUDICIARY (CGPJ - Madrid):

https://www.poderjudicial.es/portal/site/cgpj/menuitem.7f36112237f0e77203f08712dc432ea0/?vgnextoid=5070f20408619210VgnVCM100000cb34e20aRCRD&vgnextfmt=default&vgnextlocale=en&lang_choosen=en

SPANISH CONSTITUTIONAL COURT (Madrid): https://www.tribunalconstitucional.es/en/tribunal/historia/Paginas/Tribunal-Constitucional-de-Espania.aspx

EUROPEAN E-JUSTICE PORTAL: https://e-justice.europa.eu/16/EN/national_justice_systems?SPAIN&member=1

3.2.2. European Union Judicial Protection of Fundamental Rights system

TUTORIAL ON THE EU CHARTER OF FUNDAMENTAL RIGHTS:

https://e-justice.europa.eu/563/EN/part_i__protecting_fundamental_rights_within_the_european_union

COURT OF JUSTICE OF THE EUROPEAN UNION (EUCJ): https://curia.europa.eu/jcms/jcms/j_6/en/ (Luxembourg)

3.2.3. European Convention of Human Rights Procedural Protection system

EUROPEAN COURT OF HUMAN RIGHTS (ECtHR): https://www.echr.coe.int/Pages/home.aspx?p=home (Strasbourg - France)

General presentation of the European Court of Human Rights - ECHR - ECHR / CEDH (coe.int)

How the Court works - ECHR - ECHR / CEDH (coe.int)

EXECUTION OF JUDGEMENTS ECtHR: Department for the Execution of Judgments of the European Court of Human Rights - Department for the Execution of Judgments
of the European Court of Human Rights (coe.int)

3.2.4. International Criminal Court of Justice Procedural Protection system

INTERNATIONAL CRIMINAL COURT (ICC): https://www.icc-cpi.int/ (The Hague, the Netherlands)

https://www.icc-cpi.int/about/how-the-court-works

ASSEMBLY OF STATE PARTIES: Home | International Criminal Court (icc-cpi.int)

4. LESSONS LEARNED AND CONCLUSION

I end this paper with the following global consideration, by way of a final conclusion.

The demand for the respect and defense of fundamental rights is now also globalised.

In a multi-international classroom, with students coming from countries with very diverse legal traditions, it is necessary to teach the core of the various systems of jurisdictional protection of fundamental rights at the domestic, European and world levels. But, on the other hand, it is an invitation to carry out very interesting activities incorporating data and information from the systems of the students' countries of origin.

This is a material area that is the subject of studies and publications in all languages. All this, makes the teaching of this subject in English very accessible.

In summary, my overall conclusion is that, as the respect and defense of fundamental rights has also become globalised, the teaching of this subject in English is necessary, especially as English is nowadays considered a *lingua franca*. And that teaching this subject in an international classroom not only does not oblige us to simplify the content, but also broadens it with the contribution of the characteristics and sensitivities expressed by students from other legal cultures.

PART II
CROSS-BORDER LITIGATION: PROCEDURAL LAW TO GUARANTEE THE RIGHTS OF VULNERABLE GROUPS

Evolution of the same interest in the United Kingdom representative procedure in the XX century

Lucio Morcillo Peñalver

Lawyer. PhD Candidate. Universidad Complutense de Madrid

1. INTRODUCTION

1.1. The importance of Law for modification of society´s conduct

The study of class actions has revealed two consequences in the area of changing society's behaviour. The first one is that class actions have historically served to exert a certain amount of pressure on the part of the plaintiffs to reach a certain agreement, as the consequences of collective proceedings for the defendant can in some cases be disastrous. This has been widely discussed in European doctrine when referring to American class actions.[1]

The second consequence is that the exercise of class actions has enabled many plaintiffs to bring actions that would otherwise have been unavailable to them because of economic, social or psychological barriers, which has undoubtedly also meant that there has been a deterrent for the employer to engage in unlawful behaviour.

It therefore seems reasonable to say that the function of a legal system is not limited to its role of providing individuals with a mechanism for resolving disputes, but that the law also serves as a standard of conduct that society expects of its members and, similarly, the judicial system must provide sanctions that the community can invoke to enforce obedience to its values and standards of conduct.

1 We refer to authors such as Hodge or Mulheron in the United Kingdom. In Spain there have been loads of authors such as Armenta Deu or Gascón Inchausti who have addressed some issues concerning both American and Spanish collective systems.

It is precisely the conduct of a society and obedience to its values that will be the main characters in two judicial decisions that will be addressed in this paper, which marked the configuration of collective actions in the United Kingdom at the beginning of the twentieth century, and which are still relevant today as an object of study in the interpretation of commonality.

Before breaking down the two rulings we shall define what we really mean by precedent and why it is important for English law.[2]

1.2. A whole system based on precedent

The UK system is essentially jurisprudential, relying on previously decided cases to create precedent. Therefore, precedent is defined as the obligation of the courts to decide similarly on previously decided cases, or at least to take them into account in order to inform their decision.

This is the case in many legal systems worldwide, but in the case of the United Kingdom it is particularly acute in that the English system is based on case law, the arguments on which they rely to resolve matters are set out in Law Reports. These Law Reports have played an extremely important role for hundreds of years in influencing both the laws that are enacted by Parliament and their interpretation.[3]

In the field of class actions, it may seem that the system of precedent has given us some solid rules on how to interpret the interest of the multiple affected parties in a collective problem, but the reality is that this has not been the case at all.

We will begin by stating that Rule 9 (R.S.C., Ord. 16, r. 9) of the Judicature Act, known as RSC (old Rules of Supreme Court) established the representative action as follows:

> "Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the court to defend in such action on behalf or for the benefit of all parties so interested."

Rule 12 (R.S.C., Ord. 15, r. 12), through successive editions of the Supreme Court's Annual Practice, provided a much broader and more extended version of the rule, stating:

---

2 In this chapter, the scope of the study will cover the jurisprudential interpretation of the "same interest" since 1901 through two fundamental decisions of 1901 and 1910 that marked the evolution of the interpretation of the representative action during the following decades.

Please also note that given the two decisions that we will analyse in this chapter date from the beginning of the 20th century. Therefore, some bibliographical references to Australian authors will be found as both have been part of the British Empire until Australia's independence in 1986. Therefore, the decisions that we will detail below actually still have a great influence on Australian law today.

3 For a further study, we refer to CROSS RUPERT y HARRIS J.W., *El precedente en Derecho Inglés*, Colección Proceso y Derecho, Marcial Pons, 2012, page 24.

> "Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13[4] , the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

Two essential requirements can be deduced from the above two statements; The first one refers to numerosity. It seems clear that this requirement will be met if one of the parties to the action has more than two interested parties, or at least enough of them to make an individual action for the defence of all those affected impracticable.

It is the second of these two requirements (commonality or same interest) which has been the most controversial because the case law of the House of Lords and the Supreme Court itself have maintained a truly different approach on what is considered to be the same interest of all those affected, thus interrupting the lines of case law towards the adoption of a unanimous criterion.

In this regard, authors as SEYMOUR suggests that the uniform interpretation of the same interest by jurisprudence has been the reason why a coherent approach to the rule has been prevented, even undermining the purposes of procedural law.[5]

In any case, in the following pages we will delve into the variability that the term same interest has undergone by the courts through two very important rulings in the collective history of the United Kingdom, which we will break down in detail in the following pages.

---

4 Rule 13 refers to those cases in which one person can represent another. The rule stated as follows: *"In any proceedings concerning—(a)the estate of a deceased person; or (b)property subject to a trust; or (c)the construction of a written instrument, including a statute, the Court, if satisfied that it is expedient so to do, and that one or more of the conditions specified in paragraph (2) are satisfied, may appoint one or more persons to represent any person (including an unborn person) or class who is or may be interested (whether presently or for any future, contingent or unascertained interest) in or affected by the proceedings.*

(2) The conditions for the exercise of the power conferred by paragraph (1) are as follows:—(a)that the person, the class or some member of the class, cannot be ascertained or cannot readily be ascertained; (b)that the person, class or some member of the class, though ascertained, cannot be found; (c)that, though the person or the class and the members thereof can be ascertained and found, it appears to the Court expedient (regard being had to all the circumstances, including the amount at stake and the degree of difficulty of the point to be determined) to exercise the power for the purposes of saving expense.

(3) Where, in any proceedings to which paragraph (1) applies, the Court exercises the power conferred by that paragraph, a judgment or order of the Court given or made when the person or persons appointed in exercise of that power are before the Court shall be binding on the person or class represented by the person or persons so appointed.

(4) Where, in any such proceedings, a compromise is proposed and some of the persons who are interested in, or who may be affected by, the compromise are not parties to the proceedings (including unborn or unascertained persons) but—(a)there is some other person in the same interest before the Court who assents to the compromise or on whose behalf the Court sanctions the compromise, or (b)the absent persons are represented by a person appointed under paragraph (1) who so assents, the Court, if satisfied that the compromise will be for the benefit of the absent persons and that it is expedient to exercise this power, may approve the compromise and order that it shall be binding on the absent persons, and they shall be bound accordingly except where the order has been obtained by fraud or non—disclosure of material facts."

5 SEYMOUR, JILLAINE., «Who can be Harassed? Claims Against Animal Rights Protestors Under Section 3 of the Protection from Harassment Act 1997», in *Cambidge Law Journal,* nº 64, March 2005, page 62.

2. DUKE OF BEDFORD V. ELIS

2.1. A common interest born in Covent Garden

In 1901, the House of Lords resolved a dispute that would later be repeatedly cited in English and Australian doctrine and jurisprudence, especially with regard to the definition of the common interest.[6]

This was a case in which six stallholders in London's Covent Garden market brought a joint action against the Duke of Bedford, -owner of the market-, on behalf of the other fruit, flower and vegetable growers and owners of the other stalls, to assert certain preferential rights claimed in view of the new reorganisation of the stalls offered by the new Covent Garden Market Act of 1828.[7]

They also seek for an account and reimbursement of the sums they were charged for selling in the market in excess of what they would have paid if they had been granted the alleged pre-emptive rights. There is no evidence in any document that indicates that an association was formed or that all the claimants had joined any list or group.[8]

One of the judges of the resolution, Lord Macnaghten, offered a fairly complete definition of the same interest from the point of view that it included a series of instrumental requirements for the same interest to be understood to exist. The judgment expressed it as follows:

> "(…) The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice', to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed.
>
> "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent"

In agreement with MULHERON, this decision provides the clearest and most repeated reference to what we have come to understand by *same interest*, even

6 It is interesting to note that at first instance the Duke was upheld on the grounds that the stallholders represented different interests, while at the Court of Appeal the judgment was reversed, with dissenting opinions from the Lord Justices Lord Brampton and Halsbury.

7 The Act introduced different rights for different users; those who came to the market to buy would not have to pay anything, while those who came to sell would have to pay rent and tolls. They argued that the duke had ignored these rights and had stipulated an excessive toll for the cultivators.

8 KAZANJIAN, JOHN: «Class Action in Canada», in *Osgoode Hall Law Journal*, Volume 11, nº 3, December 1973. Page 413.

giving it a similarity to a mathematical formula that other subsequent decisions have been giving shape to.[9]

What Macnaghten refers to is that if the requirement for admissibility of the representative action is the same interest, then what will have to be determined is what elements the class has in common, and not the differences of each of the claimants; that is, the objective benefit that any of the claimants would have obtained if they had opted for the individual action, and which does not therefore have to be identical to those of the rest, but sufficiently similar for the claimant's claims to have been satisfied regardless of the action brought.

Having said the above, the question we have to ask ourselves is: What do we have to understand by same interest? Can we accept the Duke of Bedford's interpretation as valid? Is only a common tort sufficient? Let us pause for a moment to analyse the expression *"(…) common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."*

The same interest requirement requires further clarification, as it does not have a fixed meaning, but has been perfectly malleable over the years, as mentioned above. The meaning of same "interest in the proceedings" also requires further clarification, as some may have an interest in the proceedings from a financial point of view, and others may have an interest in the proceedings from the point of view of any citizen who wants to make a case against a large corporation.

Moreover, the term "same" does not tell us much either. "Same" refers to identical, but with "identical" we are excluding "similar" or "like" interests that may meet this requirement, as it will depend on the subjective judgement of the person who has an interest in the outcome of the litigation.

Duke of Bedford´s definition *"Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent"offers three key elements: a)"Common interest", b) "Common grievance", and c) "in its nature beneficial to all whom the plaintiff proposed"*

And that definition clearly deserves further consideration.

These elements, according to SEYMOUR, do not offer us much clarification either, because firstly, they cannot have the same relevance for actions that are brought by a representative plaintiff. Secondly, because the term "common interest" and "same interest" or "community of interest" are just synonyms, and we have seen how the term "same interest" does not offer us much clarity as to what type of actions can be valid to defend the interests of a group.[10]

---

9 MULHERON, RACHAEL., *The class action in Common Law Legal Systems, a comparative perspective.* 2004, Hart Publishing, Page 77.

10 SEYMOUR, JILLAINE., «Representative Procedures and the Future of Multi Party-Actions», in *The Modern Law Review*, Vol 62, nº 4, 1999, page 570.

In light of the above, and following KAZANJIAN, we shall check whether, by breaking down the three key elements of Lord Macnaghten's expression, they are sufficient to establish a mouldable criterion for future collective conflicts, and whether we can answer all these questions.[11]

2.1.1. A common interest

Duke of Bedford´s success consisted in moving from the same interest to a sort of common or communal interest, that is, in the result of the resolution sought and satisfactory as a whole, and whether it can satisfy the interest of the majority of them.

This was also evident when referred to finding the similarities between the claimants, not the differences that each of them might have:

> "(…) The principal ground is that the plaintiffs are not entitled to sue in a representative character in defence of their alleged statutory rights. The other ground, which is a matter of very slight moment, is that they cannot join as co-plaintiffs in respect of their several grievances. The whole difficulty in the present case has arisen from confusing these two matters. they have really nothing to do with each other. If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity. They are none the better for that and none the worse. They would be competent representatives if they had never been near the Duke; they are not incompetent because they may have been turned out of the market. In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the class of individual member".

2.1.2. A common grievance

It seems obvious that the interest should be a common one, as everyone will have a need for restitution of that right. What seems less clear is in what proportion and to what extent, which makes it really complex.

To take a practical example; if a law is enacted prohibiting the sale of alcohol in the morning, it will undoubtedly affect any supermarket, but it will not affect a business selling related products in the same proportion as a pub. In Duke of Bedford, the result was distated based on the common interest of the action, and not on the particular characteristics of the individual claimants.

Although common grievance forms part of one of the three requirements set out in Duke of Bedford, the truth is that the case law in both the UK and Australia

11 KAZANJIAN, JOHN A., «Class Actions»…,cit, page 418.

over the following decades has not given much consideration to this requirement, except in cases where a validity of an act is at issue.[12]

In *Smith v. Cardiff Corporation* (1954), for example, four plaintiffs represented 13,000 tenants in the face of a legislative enactment of a rent increase - specifically, the Housing Act of 1936 - that would establish rent hikes based on the economic status of the inhabitants. Despite the fact that such an increase would affect 8,000 tenants, the action was dismissed for failure to meet the common harm requirement, since the increase will not affect the wealthiest tenants in the same way as those who are clearly disadvantaged because of their lack of resources.

The judgment even divided the class between subsidizers and the subsidized sub-clasees depending on the affluent of the members, as some of the affected members of the class had not only identical interest but also others that are in conflict. The judgment expressed it this way:

> (…) the main characteristic of this scheme is that the more affluent will, so to say, subsidize the less affluent, it is at once apparent that there are two classes whose interest are not only identical but are in conflict, namely, the subsidizers and the subsidized."

Therefore, Sir Raymon Evershed ended the judgment by stating that must be shown that all the members of the alleged class have a common interest, that all have a common grievance, and that the relief is in its nature beneficial to them all.

Another example is *Delong v. Teachers Federation* (1970), despite being another Canadian case, it is reiterated in British case law as an example of this. This is a case in which an action brought by an organisation representing 6,000 teachers seeking the annulment of a union certification was dismissed on the grounds that the decision did not amount to the same injury in its entirety to all the plaintiffs.

2.1.3. In its nature beneficial to all whom the plaintiff proposed to represent

What is clear is that the Duke of Bedford v. Ellis was able to strike the right balance between classical principles of procedural law and the spirit of the representative rule: an interest common to all the members, and that the solution should be objectively beneficial to all of them.

In my view, commonality in a case like Duke of Bedford does not lie in the identity of the claim that each of the claimants had at the beginning of the litigation, nor in the identity of their right, as the one who sold flowers presumably did not have the same interest as the one who sold vegetables.

12 Other Canadian judgments, such as *Alden v. Gaglardi* (1973) have omitted the reference to common grievance and focused on the consideration of the other two requirements.

From this expression of Lord Macnaghten it is quite logical to conclude that there was a will to extend the boundaries of representative action by bringing into focus the interests which were common to the majority of the claimants.[13]

This interpretation has also been used in subsequent jurisprudence in favour of shaping a rule to be used in modern life as the occasion demands. The same interpretation was embraced by *Taff Vale Railway Co v. Amalgamated Society of Railway Servants* (1901), on the understanding that the principle offered by the Supreme Court rule was perfectly valid for both ancient and modern cases.

Judgments such as *Preston v. Hilton* (1920) and later ones such as *John v. Rees* (1970)[14] and even *Irish Shipping v. Commercial Union Assurance Co* (1991) also followed this interpretation and considered the Duke of Bedford's three-test rule to be valid.

With the above Duke of Bedford´s definition in the application of the three-elements test, at least we would have had a more or less unanimous approach by the courts as to what was to be understood by the same interest and what requirements had to be satisfied if a class action was to be successful.

The radical change in the test came only a few years later. A judgment overturned the previous test imposed by Duke of Bedford and led the way in jurisprudential uncertainty for the next few decades.

3. MARKT & CO LTD V. KNIGHT STEAMSHIP CO LTD, SALE & FRAZAR V KNIGHT STEAMSHIP CO LTD

3.1. From the result of the action to "common wrong but different right"

Only ten years later, the trend of this and other decisions that had been unifying the interpretative criterion of Rule 9 towards flexibility[15] was suddenly interrupted by *Markt & Co Ltd v. Knight Steamship Co Ltd*, leading to the limitation of the possibilities of application of the Representative Rule and, therefore, of class actions in the United Kingdom and Australia.[16]

13 GILLESPIE COLIN., «The Scope of Class Action in Canada», in *Manitoba Law Journal*, Vol 11 nº 3, 1981. Page 220.

14 This judgment understands the correct interpretation of the rule to be a "flexible tool of convenience in the administration of justice".

15 It is important to mention that although the evolution towards flexibility was interrupted, there were also later decisions such as *Aberconway v Whetnall (1918), John v Rees and Others; Martin and Another v Davis and Others (1969), CBS Songs Ltd v Amstrad Consumer Electronics Plc (1987),* in addition to those mentioned above, which continued to apply the Duke of Bedford doctrine.

16 M. EIZENGA y E. DAVIS., «A History of Class Actions: Modern Lessons from Deep Roots», *The Canadian Class Action Review*, Volume 7, nº 1. October 2011. Page 11.

Let´s explain the background of the case a little; The defendants were the owners of the steamship Knight Commander, which, in 1904, during the Russo-Japanese war, made a voyage from New York to Japan.

The plaintiffs were merchants operating in the United States, and had shipped goods to Japan on board the Knight Commander with separate bills of lading. The ship was stopped and searched on the high seas as it approached Japan by a Russian cruiser and the Knight Commander was fired upon and sunk by the cruiser's guns on the grounds that it was carrying contraband of war. Both ship and cargo were completely lost.

The Court of Appeal concluded that both the plaintiffs and the persons they sought to represent under Order XVI, rule 9 did not have the same interest because the application of the representative rule that was obtained in Duke of Bedford could not be analogous to this case for the following three fundamental reasons:

3.1.1. Different Bills of Lading

The identity of the contracts was the point on which most emphasis was placed, given that it was understood that the contracts, although having elements in common, corresponded to an individual interest and, therefore, did not satisfy the requirement of a common interest. Their interest, therefore, was purely personal. This is how the judgment refers to it:

> (…) The defendants have made separate contracts which may or may not be identical in form with different persons. And that is all. To my mind, it is impossible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language. It is entirely contrary to the spirit of our judicial procedure to allow one person to interfere with another man's contract where he has no common interest. And to hold that by any procedure a third person can create an estoppel in respect of a contract to which he is not a party merely because he is desirous of litigating his own rights under a contract similar in form but having no relation whatever to the subject-matter of the other contract is, in my opinion at variance with the whole system of procedure and is certainly not within the language of r. 9."

Moreover, it is the bill of lading in each of the cases that can determine the shipowner's responsibilities, which is what was intended in this case.

This reflection was reflected in the judgement in this way:

> "(...) The bill of lading in each case might qualify the liabilities of the shipowner as a carrier by sea. I do not see anything in the indorsement to differentiate the class on whose behalf the plaintiff claims to sue as a representative from a class constituted by those who shipped goods on board the Knight Commander when she started on this voyage."

3.1.2. There were common elements in the damages, but a difference in the right arising from such damages

The fact that the damage may be common does not mean that the right arising from that damage is the same for each and every one of those affected. Of course there are elements that will be identical to those of the rest of the class because everyone has lost goods in the sinking of the Knight Commander, but not all the goods were on the way to the same destination, which makes their value different.

3.1.3. Common wrong, but different right. The purpose of the destination was different

The goods were destined for different points of arrival, but precisely for that reason they had a different "purpose". Some of the goods may be destinated for a lawful destination where the damage arising from such a sinking gives rise to a legitimate claim, however, it may turn out that other shippers knew for certain that the goods had a smuggling purpose.

This point was developed in Markt as follows:

> "These shippers no doubt have a common wrong in that their goods were lost by the sinking of the Knight Commander by the Russian warship; but I see no common right, or common purpose, in the case of these shippers who are not alleged to have shipped to the same destinations. Moreover, it may be that there were contraband goods on board which justified the Russian action - it may be that some of the shippers knowingly shipped goods which were contraband of war. It may be that some of the shippers were innocent of such shipping of contraband goods."

It is certainly no surprise that the barriers that class members have to overcome if they want to establish a common right seem to be insurmountable. Of course there are differences between contracts, any adhesion contract is issued unilaterally to those who wish to purchase the product, but that does not mean that the product itself or the damage suffered is identical for all class members.

In this regard, and in agreement with KELL, two essential restrictions were imposed in Markt for the representative action to succeed in this case. Firstly, the representative action could not be used if the relief sought was damages, as the damages were personal, required separate proof and did not benefit the class as a whole.

Secondly, beyond shareholder derivative actions or where the superior element at issue is common property, the action will be inapplicable in cases involving separate and individual contracts between the plaintiffs and the defendant, because the court will always tend to assume that the defences are separately presented.[17]

17 KELL, DAVID., «Representative Actions: Continued Evolution or a Classless Society? », in *Sidney Law Review*, Vol 15, 527, 1993, Page 528.

The judgment did not have the common view of all the judges who pass it, but there was a wave of thought that this assessment had to be modified towards a much more flexible approach because the shippers of the vessel had, even with their own characteristics, a common interest in their claims.

This was expressed by Buckley L.J. in his dissenting opinion when expressed his disagreement with his fellow judges' assessment of the common interest:

> "(…) In this case the purpose or object of each and all of the shippers was to consign their goods by a vessel which should observe the duty of not shipping also goods which were contraband of war - a duty which her owners owed to all shippers alike. Cargo owners on a general ship are not partners, but they have a common interest in the ship on which their goods are carried. In respect of that interest they are in a position to claim relief which is common to all of them. They can claim a declaration that the defendants are liable to the plaintiffs to enable the represented firms to recover the damages which upon the footing of the declaration may be recoverable by them requires, no doubt, further steps, such as are always necessary in a representative action to give to the represented parties the particular relief to which each is entitled in respect of the common relief which is for the benefit of all."

For the dissenting judge, the class action should have succeeded if an analogous application of the representative action had been adopted in previous cases dealing with credit contracts, as was the case in *Beeching v. Lloyd* (1855) or *The Commissioners of Sewers of the City of London v. Gellatly* (1876) where, although banking contracts were involved, the interests and rights of the class as a unit were taken into consideration, omitting the individual discrepancies that existed between the contracts and not assuming *ab initio* that they would have separate defences.[18]

However, although it was not expressly detailed in the judgement, Markt included that classic case law doctrine that was widely applied at the time, whereby it was understood that the requirement of the same interest was satisfied if there was a common end or a higher entity in which, although the differences that existed between those affected might be notorious (different contracts), that end or higher entity of obligatory compliance affected all the litigants (a common company, common local legislation, for example).

In other words, the common interest requirement can only be fulfilled if the litigants are under the umbrella of a law (Act) and the common elements between them could only derive from its breach by one of the parties.

Unquestionably, the common interest in the unfairness of a law will be very acute if all those affected by that law who come from a certain niche have suffered a more or less common harm (common grievance) by being affected in the same

18 KAZANJIAN, JOHN., «Class Actions in Canada»…,cit. Page 416. Also in SEYMOUR, JILLAINE., «Justice and the representative parties rule: an overriding interest?», in *Legal Studies en Cambridge University Press*. Page 678.

way. However, it is important to note that common interest could also be found in other scenarios because the proportion of the damage and the subjective element of those affected is always going to be different, and that needs to be carefully considered.

The above was also understood in *Beeching v. Lloyd* (1855), where it was held that there was a common interest despite the fact that the banking contracts between the parties involved were different.[19]

In the end, when Markt says that the purpose of those affected in *Beehing v. Lloyd* "(...) *was to enter into a partnership*", it refers to exactly the same thing as some decisions such as *Mercer v. Denne* (1905) when it considered that there is also a sufficient common interest when property rights are in dispute, because there is an invariable common element which is property (proprietary rights). Other much later ones, such as *Amos Removals & Storage Pty Ltd v. Small* (1981) have even referred to the ambiguous expression "community of interest", thus raising the community interest and giving it it´s own identity when it comes to cases in which property is disputed.

In my opinion, Markt's doctrine was nothing more than that there must be something superior that justifies your interest in the process and that is common to the rest; a law that affects a community, a company that violates the rights of its workers or that has a conflict with its shares, but not in a case in which, despite sharing the same space (in this case, a boat), its purpose is displacement, where the "different purpose" requirement has a much broader spectrum of inapplicability.

In any case, the truth is that the strong jurisprudential influence following *Markt & Co Ltd v. Knight Steamship Co Ltd* meant that the admittedly rigid and inflexible interpretation was maintained over the following decades, with post-Markt decisions applying a practically identical interpretation and preventing many other cases in which it seemed logical to determine that there could be a common interest between those affected, from being dismissed.

In spite of the jurisprudential ups and downs, there was no major reform that would lead us to believe that the requirement of the same interest would not be maintained. The current CPR (Civil Procedure Rules), approved in 1998, define the current representative action as follows:

> "(1) Where more than one person has the same interest in a claim –
>
> (a) the claim may be begun; or
>
> (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

19 In Markt it was compared the two scenarios in the following way: *"(…) The common purpose in Beehing v. Lloyd of those who took shares was to enter into a partnership. I find no such common purpose between the shippers".*

(2) The court may direct that a person may not act as a representative.

(3) Any party may apply to the court for an order under paragraph (2).

(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule – (a) is binding on all persons represented in the claim; but (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.

(5) This rule does not apply to a claim to which rule 19.9 applies."

As can be seen, the same interest requirement remains intact, giving rise to similar jurisprudential interpretations, many of them following the broad criterion of Duke of Bedford, or the restrictive criterion of Markt, depending on the case.

This undoubtedly means that the distrust of the representative rule in current British society has worsened and that other mechanisms have become necessary in order to satisfy the problem of representativeness and the interest itself.

For that reason, in 2000, the Group Litigation Order (G.L.O) was enacted, in which the spectrum of the same interest was extended to "same issues of fact or law", giving rise to much broader interpretations and other problems of this figure.

Currently, in the English system, the two systems of the representative rule and the G.L.O. coexist, with the G.L.O. being overwhelmingly used.

4. CONCLUSIONS

The foregoing pages were intended only to highlight two widely divergent rulings to shape the courts' consideration of the same interest in a particular period, dragging with it a restrictive and severe interpretation in which the problems of identical contracts, separate defences, and the clash of classic principles of procedural law were the keynote of discussion for decades to come.

This is not to say that the courts' interpretation of the same interest in the current representative rule of CPR 19.6 has not been to some extent successful, as there have been decisions which have followed the expansive interpretation of Duke of Bedford, being applied, for example, by cases such as *John v. Rees* (1970) and in the later *Prudential Assurance v Newman Industries* (1982), where "the same interest" was interpreted as requiring not a common contract but "(...) some element common to the claims of all the members whom it purports to represent". More or less similar interpretations have followed in judgments such as *Independent Ltd v. Music Trading On-Line Ltd (*2003), *The Jesus Christ of Latter Day Saints v. Price*

(2004), *Master and Scholars of the University of Oxford v. Broughton* (2004), or more recently, *Emerald Supplies Ltd and Another v British Airways Plc* (2009).

Nevertheless, in the case of the United Kingdom, the uncertainty of judicial interpretation of the same interest has not ceased. Neither the Protection of Harassment Act of 1997 has developed a clear principle of the development of the rule because it deals only with a narrowly defined scope, nor has the new configuration of the same interest through the "same issues of fact or law" of the Group Litigation Orders (2000) provided a clear legal definition of what is to be understood by the same interest, leaving it to judicial discretion.

It seems, therefore, that everything surrounding the interpretation of "same interest" remains uncertain in the UK since Markt. Despite the continuous citations of Duke of Bedford and Markt as strong currents for interpreting it one way or the other, and the fact that the use of test claims in the Group litigation Order have helped to limit its interpretation, it continues to be the subject of study by British doctrine and it seems that it will never cease to be a curiosity of modern procedural law.

Restorative justice in the italian juvenile process

Luca Lupoli

PhD student at the Universidad Autónoma de Madrid

1. RESTORATIVE JUSTICE

1.1. Features of restorative justice

Restorative justice is a paradigm of criminal justice that, in the way it responds to criminal conduct, stands as an alternative to the classical model of retributive justice, although without excluding it.[1] In contrast to the latter, which focuses on the just punishment of the offenders as a response to their violation of the established order, the restorative model focuses, above all, on the needs of all of the parties involved in the crime, taking into consideration not only the victim and the offender, but also widening the circle of stakeholders to their parental, environmental and social entourage.

According to a famous definition by the British jurist Tony F. Marshall,

> Restorative Justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future. [2]

From a normative perspective, definitions of restorative justice are provided by supranational documents, such as the Directive 2012/29/UE,[3] according to which it consists of

1 According to the philosopher of law Conrad G. Brunk, retribution and restoration are not placed on opposite poles, but have several elements in common: the claim through reciprocity; the basic intuition, of a moral nature, that the transgression has caused an imbalance; the idea that the victim must receive something, and the offender must give something; the need for a proportional relationship between act and response. On this subject, see: Brunk, C. G. (2001), «Restorative Justice and the Philosophical Theories of Criminal Punishment». In Hadley, M. L. (Ed.), *The Spiritual Roots of Restorative Justice* (pp. 31-56). Albany: State University of New York Press.

2 Marshall, T. F. (1999). *Restorative Justice: An Overview*. London, UK: Home Office. Research Development and Statistics Directorate, p. 5.

3 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.

> any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party.[4]

This definition, in turn, is inspired by the UN Basic principles on the use of restorative justice programmes in criminal matters:[5]

> *"Restorative process" means any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing and sentencing circles.*[6]

Crime is understood as a violation of interpersonal relationships, rather than of state rules: in this sense, the task of justice is to restore the balance between victim, offender and society, broken by criminal conduct, involving «*to the extent possible, those who have a stakenin a specific offense to collectivelynidentify and address harms, needsnand obligations in order to heal and put things as right as possible*».[7]

Its main objectives, therefore, are: the assumption of active responsibility by the offenders, so that they understand the unacceptability and the seriousness of their actions and their consequences, rather than passively suffering punishment; their involvement in remedying the impact of the crime on the victim and society; their reintegration into the community to prevent reoffending, also avoiding stigmatisation; and the search for the psychological and environmental causes that led them to commit the crime.

At the same time, the victims are given the opportunity to be listened to, to re-elaborate the damage suffered, to externalise their needs, to describe the unresolved traumas resulting from the crime and to express their suffering before those who caused it. This is a voluntary and cathartic process that is generally neglected by ordinary proceedings, in which the victim, placed on the margins of the process and ignored by the justice system with regard to his/her emotional sphere, may even suffer secondary victimisation.[8] Victims' participation in restorative justice processes, on the contrary, makes it possible to determine the most satisfactory ways to obtain reparation from offenders.

The involvement of the community is made necessary by its dual nature: that of victim of the crime, since it suffers its repercussions, but also that of responsible party, since the origins of the criminal conduct are to be found in the social

4 Art. 2, clause 1(d) of the Directive 2012/29/EU.

5 ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).

6 Annex I(3).

7 Zehr, H. and Gohar, A. (2003). *The Little Book of Restorative Justice*. Peshawar: Uni-Graphics, p. 40.

8 As defined by the Recommendation CM/Rec(2023)2 of the Committee of Ministers to member States on rights, services and support for victims of crime of the Council of Europe, *«"secondary victimisation" is victimisation that occurs not as a direct result of the criminal offence but as a result of the response of public or private institutions and other individuals to the victim»* (art. 1, clause 3).

conditions and relationships within the community, which must be addressed and resolved with its contribution.

Restorative justice cannot be completely identified with a single dispute resolution instrument, but presents a range of different programmes, flexible, innovative or already established over time, often inspired by community methods from the legal traditions of non-Western societies.[9] These include among others victim-offender mediation (VOM), community and family group conferencing and sentencing circle programmes.[10]

1.2. Restorative justice in the Italian legal system

Restorative elements in favour of victims are present in the Italian legal system also in rules that came into force not so recently.

The current penitentiary system, in force since 1975,[11] provides that in the report of the probation in community service of the convicted persons, it may also be stipulated that they shall act in favour of the victims of their crime (Art. 47.7 of Law 354/1975).

The discipline of the *Giudice di pace* (justice of the peace), pursuant to Article 29, clause 4, of Law 274/2000,[12] states that he/she shall promote conciliation between the parties if the offence is prosecutable on complaint. In no way may statements made by the parties in the course of the conciliatory procedure be used for the purposes of the deliberation, thus guaranteeing voluntariness and free dialogue between the parties, indispensable factors for the successful outcome of the proceedings. If useful for conciliation purposes, the hearing may be postponed by the judge for a period not exceeding two months. The original rule provided that mediation could take place before the justice of the peace or, if necessary, he/she could also avail himself/herself of the mediation activity of public or private centres and structures present on the territory; with the entry into force of Legislative Decree 150/2022,[13] which will be discussed in greater depth shortly, this provision is maintained, but instead of referring to these

9 Among these methods may be mentioned: the Māori community justice practices, the Rwandan *gacaca*, the *jirga* of the so-called Pashtun belt, the circles of various North American First Nations, the Samoan *ifoga* or the Arab *sulha*.

10 Dandurand, Y., Vogt, A. and Lee, J. (2020). *Handbook on Restorative Justice Programmes Second Edition*. Vienna: United Nations, pp. 12-25.

11 L. 26 luglio 1975, n. 354, "Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà" (G.U. 9 agosto 1975, n. 212 - Suppl. Ordinario).

12 D.lgs. 28 agosto 2000, n. 274, "Disposizioni sulla competenza penale del giudice di pace, a norma dell'articolo 14 della legge 24 novembre 1999, n. 468" (G.U. 6 ottobre 2000, n. 234 - Suppl. Ordinario n. 166).

13 D.lgs. 10 ottobre 2022, n. 150, "Attuazione della legge 27 settembre 2021, n. 134, recante delega al Governo per l'efficienza del processo penale, nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari" (G.U. Serie Generale 17 ottobre 2022, n. 243 - Suppl. Ordinario n. 38).

entities, it refers specifically to *Centri per la giustizia riparativa* (Restorative Justice Centres).[14]

Article 5 of Law 67/2014[15] introduced Chapter X-bis of Title I of the implementing, coordinating and transitional provisions of the Code of Criminal Procedure.[16] In it, the third paragraph of Article 141-ter, concerning the activities of social services towards adults admitted to probation, provides for the possibility to carry out restorative activities as well as mediation, also availing for this purpose of public or private centres or facilities in the territory.

In March 2021, with the presentation of the programmatic lines of the Draghi government's action on justice, the then Minister of Justice Marta Cartabia underlined how the time was ripe for the development and organization of the experiences, still experimental and unsystematic, of restorative justice already present in the Italian system.

Taking also into account the European and international sources that urge individual States to develop restorative justice paradigms through common reference principles and concrete indications,[17] the government proposed to reform the field of restorative justice, to make its programmes accessible at every stage and level of criminal proceedings, including the pre-trial phase.[18]

In September of the same year, Law 134/2021 was passed to promote the reform of the criminal process.[19] With it, the Italian Parliament delegated to the Government the adoption, within a year of its entry into force, of one or more legislative decrees aimed at making the criminal trial simpler, faster and more rational, while respecting the defence guarantees, by amending the Code of Criminal Procedure, its implementing rules, the Criminal Code and related special legislation, the provisions of the judicial system on the organisational projects of the Public Prosecutor's Offices, the revision of the sanctions regime of offences and the introduction of an organic discipline of the Criminal Trial Office. In addition to the above-mentioned, another objective was the establishment

14 As amended by Art. 72.1 of the aforementioned decree.

15 L. 28 aprile 2014, n. 67, "Deleghe al Governo in materia di pene detentive non carcerarie e di riforma del sistema sanzionatorio. Disposizioni in materia di sospensione del procedimento con messa alla prova e nei confronti degli irreperibili" (G.U. 2 maggio 2014, n. 100).

16 D.lgs. 28 luglio 1989, n. 271, "Norme di attuazione, di coordinamento e transitorie del codice di procedura penale" (G.U. 5 agosto 1989, n. 182 - Suppl. Ordinario n. 57).

17 These include: Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters; the Council of Europe Recommendation No. R. (99)19 concerning mediation in penal matters; Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules; Vienna Declaration on Crime and Justice; the already mentioned Directive 2012/29/EU.

18 Arcorace, A., Belcastro, V., Donato Iacopino, F., Mantelli, S., Nobile, E. and Scarfò, G. (Eds.), (2022). *Il nuovo processo penale secondo la Riforma Cartabia*. Milano: Key Editore, p. 343.

19 L. 27 settembre 2021, n. 134, "Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari" (G.U. 4 ottobre 2021, n. 237).

of a finally organic discipline of restorative justice,[20] in terms of notion, main programmes, access criteria, guarantees, persons entitled to participate, modalities of carrying out the programmes and evaluation of its outcomes, in the interest of the victim and the offender and in compliance with EU legislation and principles sanctioned at international level.

The delegation was implemented through the promulgation of Legislative Decree 150/2022; its Title IV is entirely dedicated to the organic regulation of restorative justice.

Given the innovative - and revolutionary - scope of the provision, the legislator has outlined a defining framework, contained in Article 42, clearly inspired by the principles contained in international documents.

2. THE ITALIAN JUVENILE JUSTICE SYSTEM

2.1. Principles of the Italian juvenile justice system

The re-educational purposes and pedagogical purposes beyond the mere ascertainment of the truth, the regeneration of social and personal ties, the use of alternative measures to detention and the entry of children into the penal system as a last choice are typical features of restorative justice that make it particularly suitable to be applied to juvenile justice.

It is no coincidence, therefore, that its experimentation in Italy has developed precisely within this area, with the interventions of the juvenile services of the administration and the juvenile judiciary supported by the territorial services and the third sector.

The vehicle for the introduction of restorative justice into the Italian legal system was the adoption of the so-called "Juvenile Criminal Procedure Code" (*Codice del processo penale minorile*, c.p.p.m.), which adapted the sector's legislation to the international documents on the subject, in particular the "Beijing Rules" of 1985.[21]

The current Code, contained in Presidential Decree 448/1988,[22] is based on six principles:

1) adequacy: in proceedings against juvenile defendants, the provisions of the Code and, for matters not covered by them, those of the Code of

20 Art. 1, clauses 1 and 18, of Law 134/2021.

21 United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly resolution 40/33 of 29 November 1985.

22 D.P.R. 22 settembre 1988, n. 448, "Disposizioni sul processo penale a carico di imputati minorenni" (G.U. 24 ottobre 1988, n. 250 – Suppl. Ordinario).

Criminal Procedure shall be observed; they shall be applied in a manner appropriate to the personality and educational needs of the minor;[23]

2) minimum offensiveness: the discomfort and material and psychological suffering caused to the minor by the trial are alleviated by certain rules that favour the early removal of the defendant from the criminal justice system, such as the decision not to proceed due to the minor nature of the offence (*irrilevanza del fatto*) and the extinction of the offence due to the positive outcome of the probation, which will be discussed below;[24]
3) de-stigmatisation: the Code lays down a series of rules to avoid traumatic social stigma of the minor, also through certain provisions such as the not publicity of the trials, which is waived only in the interest of the young defendant,[25] the prohibition of publication and dissemination, by any means, of news or images that could allow the identification of the minor involved in the proceedings[26] or restrictive provisions concerning entries in the criminal record;[27]
4) self-selectivity: in juvenile criminal proceedings, there is a greater presence of measures to avoid litigation;
5) unavailability of the trial and its outcome: the judge may order the forced appearance of the non-appearing defendant;[28] furthermore, there is no option of *patteggiamento* (a form of plea bargaining), so that the minor does not consider the trial as an instrument that can be adjusted to his/her liking;[29]
6) residual nature of detention: the juvenile sanctioning regime generally provides for measures in lieu of imprisonment, which are resorted to only as a last resort, within the framework of the pre-eminence of the juvenile's rehabilitation over the State's punitive claim.

The abovementioned recent reforms in the field of restorative justice have obviously also affected the juvenile field.

Article 43 of Legislative Decree 150/2022 states that in the conduct of restorative justice programmes involving, in any way, minors, the provisions of the decree shall be applied in a manner appropriate to their personalities and needs, taking into account their best interests as provided for by the 1989

23 Art. 1 c.p.p.m.
24 Art. 1 c.p.p.m.
25 Art. 33 c.p.p.m.
26 Art. 1 c.p.p.m.
27 Art. 5, clause 4, of D.P.R. 14 novembre 2002, n. 313, "Testo unico delle disposizioni legislative e regolamentari in materia di casellario giudiziale, di anagrafe delle sanzioni amministrative dipendenti da reato e dei relativi carichi pendenti. (Testo A)" (G.U. Serie Generale 13 febbraio 2003, n. 36 - Suppl. Ordinario n. 22).
28 Art. 31 c.p.p.m.
29 Scivoletto, C. (2001). *Sistema penale e minori*. Roma: Carocci, p. 44.

Convention on the Rights of the Child.[30] Mediators with specific skills, acquired by virtue of their training and acquired competences, must be assigned to these programmes.

Restorative justice programmes must be fostered by the execution of custodial sentences and community-based criminal measures. It must also favour the resposabilisation, education and full psycho-physical development of the juvenile, the preparation for a free life and social inclusion, preventing recidivism, also through the use of paths of education, vocational training, education to active and responsible citizenship, and socially useful, cultural, sporting and leisure activities.[31]

2.2. Juvenile penal mediation in Italy

2.2.1. Pre-trial phase

The main restorative tool in the Italian juvenile process is the penal mediation, which was experimented for the first time by the Court of Turin in 1995.

Art. 9, clause 2, of the Code establishes that the public prosecutor and the judge may always promote investigations against juvenile defendants, taking information from persons who have had relationships with them and hearing the opinion of experts, even informally, about their conditions and personal, family, social and environmental resources. The investigations have a variety of purposes: to ascertain the imputability and the degree of responsibility of the minor, to assess the social relevance of the offence, to order the appropriate criminal measures and to adopt possible civil measures.

Under this rule, such investigations may be ordered at any stage of criminal proceedings; however, the most appropriate time to do so is the preliminary investigation stage (*indagini preliminari*), so that the minor can immediately become aware of the consequences deriving from the crime he committed and assume responsibility towards the victim. The assessment also serves to evaluate his/her ability to understand and take action (*capacità di intendere e di volere*) at the time of the commission of the crime and his/her degree of imputability. Since the personality of the minor is always in rapid and constant evolution, an assessment carried out some time after the *notitia criminis* often makes the judge's

30 Art. 3, paragraph 1, of the United Nations Convention on the Rights of the Child (UNCRC), adopted on November 20th, 1989, ratified in Italy with L. 27 maggio 1991, n. 176, "Ratifica ed esecuzione della convenzione sui diritti del fanciullo, fatta a New York il 20 novembre 1989" (G.U. Serie Generale 11 giugno 1991, n. 135 - Suppl. Ordinario n. 35).

31 Art. 1, clause 2, of the D.lgs. 2 ottobre 2018, n. 121, "Disciplina dell'esecuzione delle pene nei confronti dei condannati minorenni, in attuazione della delega di cui all'art. 1, commi 82, 83 e 85, lettera p), della legge 23 giugno 2017, n. 103" (G.U. 26 ottobre 2018, n. 250 - Suppl. Ordinario n. 50).

assessment inaccurate and unsatisfactory, forcing the expert to go backwards in reconstructing the personality development.[32]

During this phase, the information can be taken, at the request of the public prosecutor, also by the Mediation Office staff, so as to evaluate the opportunity to experiment the mediation between the juvenile offender and the victim. It follows that juvenile criminal mediation can therefore be proposed already in the pre-trial phase, thus representing the only real diversion provided for by the current normative context.[33]

In the case of an offense that can be prosecuted on complaint (*querela*), the success of the mediation, however, may result in a withdrawal of the complaint by the plaintiff; in this case, since a condition of admissibility is no longer fulfilled, the court may issue a dismissal order.

Since participation in the mediation activity presupposes an admission of guilt on the part of the minor or, in any case, an ascertainment of it, the information that emerged during the mediation could undermine the principle of the presumption of innocence, when carried out in the pre-trial phase. In order to avoid this *vulnus*, an agreement has been reached between the Judicial Authority and the Mediation Offices, under which the latter transmit to the magistrate only a summary report containing the outcome of the mediation, without entering into the merits of the case, thus guaranteeing the juvenile and the victim's full confidentiality on the information that emerged during the mediation.

An additional guarantee is provided by the extension to juvenile mediation of the rules on the criminal jurisdiction of the Justice of the Peace (*Giudice di Pace*), which establish that, in any case, the statements made by the parties during the conciliation activity cannot be used in any way for the purposes of deliberation.[34]

2.2.2. Trial phase

At the trial stage, recourse to juvenile criminal mediation is governed by Article 28 of the Code. After hearing the parties, the judge may order the suspension of the trial by order,[35] if he/she considers it convenient to set up a

32 Pinna, M. G. (1998), «La vittima del reato e le prospettive di mediazione nella vigente legislazione processuale penale». In Molinari, F. and Amoroso, A. (Eds.), *Criminalità minorile e mediazione. Riflessioni pluridisciplinari, esperienze di mediazione e ricerche criminologiche sui minori*. Milano: Franco Angeli, p. 117.

33 Pavarini, M. (1998), «Decarcerizzazione e mediazione nel sistema penale minorile». In Picotti, L. (Ed.), *La mediazione nel sistema penale minorile*. Padova: Cedam, p. 16.

34 Art. 29, clause 4, of D.lgs. 28 agosto 2000, n. 274, "Disposizioni sulla competenza penale del giudice di pace, a norma dell'articolo 14 della legge 24 novembre 1999, n. 468" (G.U. 10 ottobre 2000, n. 234 – Suppl. ordinario n. 166).

35 As a rule, the suspension of the trial cannot exceed a period of one year; if proceedings are brought for offences for which the penalty is life imprisonment or imprisonment of a maximum period of at least twelve years, it cannot exceed three years. During this period, the limitation period is suspended. This order is appealable to the Supreme Court of Cassation by the prosecutor, the defendant and his/her defence counsel.

"*messa alla prova*" of the minor:[36] this is a type of probation in which the defendant is entrusted to the juvenile services of the administration of justice to carry out observation, treatment and support activities, also in cooperation with the local services.

After the suspension period has expired, the judge sets a new hearing, proceeding to assess the juvenile's behaviour and the evolution of his/her personality. If the instructions contained in the probation project have been fulfilled and the outcome is therefore considered positive, the judge declares the extinction of the offence, pursuant to Article 29.

In the same suspension order, the judge may also issue instructions aimed at remedying the consequences of the offence and promoting the conciliation of the juvenile with the person offended by the crime; furthemore, may invite to participate in a restorative justice programme, if the conditions are met.[37]

Thus, the Code regulates an express hypothesis of procedural juvenile mediation that can only be ordered at the preliminary hearing and at the trial, therefore after the criminal action has been brought.

For the purpose of declaring the extinction of the offence, the judge may take into account not only the successful outcome of the probation but also that of the penal mediation. Failure to reconcile may affect the judge's decision but does not necessarily affect the possibility of extinguishing the offence, since the success of mediation depends on the meeting of the wills of both parties, so that any failure could be attributable to the victim's non-participation.

There are three hypotheses for the implementation of mediation in the context of probation: the first consists in the provision of full or partial compensation for damages from the earnings resulting from the work activity established by the probation project; the second, in the provision of activities directly in favour of the victim or of the third sector; and the last, in making a formal apology to the offended party.

2.3. Other causes of extinction of the offence

The re-educational purposes of restorative justice are also manifested in Article 27 of the Code, under which the minor nature of the offence and the occasional nature of the juvenile's behaviour, if proven, may induce the public prosecutor, during the preliminary investigations, to request the judge to dismiss the case due to the irrelevance of the offence, when the minor's educational needs

---

The rule provides for the impossibility of suspension if the defendant requests a summary judgment (*giudizio abbreviato*) or immediate judgment (*giudizio immediato*); however, in 1995 the Constitutional Court declared this provision unlawful.

36 It also applies to adults and is governed by Article 168-bis et seq. of the Penal Code.

37 The explicit reference to restorative justice was introduced by the Article 83 of Legislative Decree 150/2022.

may be jeopardised by the continuation of the trial. If the request is granted,[38] the judge hears the minor and the person who has parental responsibility, but also the person offended by the crime, and then decides in council chamber.

Until 2003, acquittals due to irrelevance of the offense could only be pronounced at the preliminary hearing, in a summary judgment or an immediate judgment, excluding the trial stage. This was dictated by the fact that the Lawgiver, in protecting the best interests of the child, favoured the celerity of the process and the accused person's rapid exit from the trial, no later than the first contact with the judge after the prosecution, in order to limit the damage resulting from the minor's contact with the judicial apparatus.

However, the Constitutional Court declared this limitation inadmissible.[39] In the grounds of the judgment, the Court emphasised that this would be contrary to the underlying *ratio legis*, namely the education of the minor. In fact, if the defendant could not be acquitted in this way because he/she was absent at the preliminary hearing or because the substantive nature of the cause of non-punishment emerged only during the trial, it would lead to an unjustified less favourable treatment of the defendant. In such cases, the only alternative to a conviction would be an acquittal at trial, the resulting protection of which is undoubtedly less beneficial than that guaranteed by an acquittal due to the irrelevance of the offence. On the contrary, a ruling of non-suit, even if placed at an advanced stage of the trial, could in any case have positive effects for the juvenile's educational needs, guaranteeing «that attention and protection towards youth» established by Article 31 of the Italian Constitution.

The Article 27-bis, recently introduced in the Code,[40] regulates the juvenile's re-education pathway. If a custodial sentence not exceeding a maximum of five years imprisonment or a monetary penalty (alone or jointly with the custodial sentence) is applicable, the public prosecutor notifies the juvenile and the person exercising responsibility for him/her the application for early termination of the proceedings, provided that the juvenile enters into a civic and social rehabilitation and re-education path, based on a re-educational programme that provides for the performance of socially useful work or cooperation, free of charge, with non-profit organisations, or the performance of other activities for the benefit of the community to which the juvenile belongs. The duration of the pathway ranges from one to six months and is established by the judge, who suspends the proceedings for a maximum period of six months, within which the agreed pathway must be followed and the review hearing fixed.

38 In the event of a rejection, the judge shall order the documents to be returned to the prosecutor.

39 Sentenza 5-9 maggio 2003, n. 149 (G.U. 14 maggio 2003, n. 19 - Prima serie speciale).

40 Art. 8, clause 1, letter b), of D.L. 15 settembre 2023, n. 123, "Misure urgenti di contrasto al disagio giovanile, alla povertà educativa e alla criminalità minorile, nonché per la sicurezza dei minori in ambito digitale" (G.U. 15 settembre 2003, n. 216).

If the juvenile does not intend to access the pathway or interrupts it unjustifiably, the suspension of the trial, the probation and the possible declaration of extinction of the offence due to the positive outcome of the latter are precluded.

Once the pathway has been completed, the judge, after assessing the positive outcome of the re-educational programme and hearing the parties, if appropriate, makes a decision not to prosecute, declaring the extinction of the offence. In the event of a negative assessment, the judge returns the file to the public prosecutor and the criminal proceedings continue.

Another cause of extinction of the offence is the judicial pardon under Article 169 of the Penal Code, provided only for minors when the judge, within his/her margin of discretion, after assessing the seriousness of the offence presumes that the offender will refrain from committing further crimes.[41] A pardon may be granted only once and only when, for the offence committed by the juvenile, the law provides for a measure involving deprivation of liberty not exceeding a maximum of two years, or a fine not exceeding a maximum of five euros, even if combined with that sentence. Another condition for granting it is that the juvenile has not been previously sentenced to imprisonment for a crime, even if rehabilitation has taken place,[42] and is not a habitual or professional offender.[43]

The judicial pardon may be decided both before the committal for trial and later, after the trial is completed, as the judge may refrain from sentencing in the judgment.

Both acquittal on the ground of irrelevance of the offence and judicial pardon can be issued on the basis of the findings of a penal mediation, since it either mitigates the offence by reducing the size of damage[44] or helps to attribute the character of occasional to the conduct.

2.4. Reparation in alternative sanctions or probation in community service programs

Pursuant to Article 30, clause 1 of the Code,[45] with the conviction sentence the judge may replace the custodial sentence he/she deems to be applicable (provided that it does not exceed four years) with alternative sanctions (semi-detention or home detention); if the custodial sentence does not exceed three years, the judge may replace it, if there is the consent of the minor no longer subject to compulsory education, with work in the public interest; if it does not

41 According to the evaluation criteria laid down in Article 133 of the Penal Code.

42 As clarified by the Supreme Court, a previous conviction means one that has become final before the pardon decision.

43 Cases provided by Art.164, clause 1, n. 1, of the Penal Code.

44 Mannozzi, G. (Ed.) (2003). *La giustizia senza spada: uno studio comparato su giustizia riparativa e mediazione penale*. Milano: Giuffrè, p. 264.

45 As recently amended by Legislative Decree 150/2022.

exceed the limit of one year, it can be replaced by a pecuniary sentence. In any case, when substituting the custodial sentence and choosing the substitutive penalty, the judge shall take into account the juvenile's personality and work or study needs as well as his/her family, social and environmental conditions.

The judge may impose provisions on the minor that are functional to these needs and may also order the offender to act in favour of the victim.

Mediation may also be activated in the case of probation in a community service program outside the penal institute for a period equal to that of the sentence to be served, if the prison sentence does not exceed three years. The provisions to be followed by the subject are dictated in a special report drawn up at the time of assignment, in which it must also be stipulated that he/she «shall endeavour as far as possible in favour of the victim of his/her offence».[46]

2.5. Conduct of the mediation

In order to proceed to mediation, the spontaneous, never forced consent of both the defendant and the offended party is required.

Three ways of activating juvenile penal mediation can be identified:

1) sending the case by the Judicial Authority[47] directly to the local Mediation Centre or to the Juvenile Social Service Office (*Ufficio di servizio sociale per i minorenni*, U.S.S.M.), once the juvenile has given consent;
2) contextual contact with the offender, the victim and the Mediation Centre by letter from the Court; in this case, the Mediation Centre will proceed to verify the feasibility of the mediation and collect the consent of the parties involved;
3) proposal of a path of mediation to the minor by the U.S.S.M.; if he/she agrees, the Mediation Centre is contacted and will take charge of its implementation.

The most common practice is for the mediator to contact the juvenile, the parents, the victim and their lawyers by means of a letter which, in addition to a leaflet explaining the activities carried out in the mediation office where he/she works, contains an invitation to a preliminary interview, the date of which is set by telephone at a later date. This one-to-one interview takes place to allow the mediator to separately gather the parties' consent to mediation, but also to understand their expectations regarding the conduct of this instrument. Once the parties' consent to go ahead has been obtained, face-to-face meetings take place

46 Art. 47, clause 7, of L. 26 luglio 1975, n. 354, "Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà" (G.U. 9 agosto 1975, n. 212 - Suppl. Ordinario).

47 Usually, it is the prosecutor who sends the case in the context of the assessment of the minor's personality pursuant to Article 9 of the Code, while the judge intervenes mainly in the context of the suspension of the trial and probation, pursuant to Article 28.

between victim and offender, who confront each other about what happened and seek a reparation agreement or reconciliation.

Juvenile criminal mediation centres sign formal agreements with the Juvenile Justice Centre (usually memoranda of understanding), which may vary locally. The theoretical reference model for most centres is the humanistic model of the *Centre de Médiation et de Formation à la Médiation* in Paris. According to its creator, the founder of the C.M.F.M. Jacqueline Morineau, mediation is predominantly an emotional event, in which the main moment consists of the encounter between victim and offender, who externalise their emotions and finally search for the origin of the conflict with the help of a mediator; mediation, therefore, is not centred on the object of the disagreement, but on the transformation of the person and his/her relationship with the other.[48] There is no lack, however, of technical and operational modalities inspired by other, more "classical" models of mediation, albeit readapted to local needs and peculiarities.

Unfortunately, there is still a lack of a central system for monitoring interventions and mediators working in the centres, as called for by the first *Report on Juvenile Criminal Mediation* of the Department of Juvenile Justice, [49] which already dates back ten years ago.

2.6. Victim's rights

In conclusion, up to now we have been talking about the protection of the interests of minors, which is also expressed by the prohibition for the person offended by the crime to bring a civil action against the minor; Article 10, clause 2, of the Code, in fact, establishes that the criminal sentence does not have the force of *res judicata* in civil proceedings for restitution and compensation for the damage caused by the offence.[50]

In this way, the victim could see his/her legitimate aspirations and the protection of his/her rights mortified, maturing discouragement and resentment towards the offender, but also a lack of confidence in the judicial system. The restorative nature of mediation succeeds in balancing this perspective with a victim-oriented approach, giving the injured parties a chance to see their role acknowledged, to describe their experience of the crime and the emotional impact it caused, to express their feelings and to see their needs (material, financial, emotional and social) fully met.[51]

48 Morineau, J. (1998). *L'esprit de la médiation*, Toulouse: Trajets - Erès.

49 Mastropasqua, I. and Buccellato, N. (Eds.) (2012). *1° Rapporto Nazionale sulla mediazione penale minorile*. Roma: Gangemi.

50 Martucci, P. (1995), «La conciliazione con la vittima nel processo minorile». In Ponti, G. (Ed.), *Tutela della vittima e mediazione penale*. Milano: Giuffrè, p. 159.

51 Marshall, T. F. (1999), p. 5.

The long path to the recognition of victim's rights in Spain: past, present and future[1]

Dra. Núria Mallandrich Miret

Profesora Agregada de Derecho Procesal de la Universidad de Barcelona

1. INTRODUCCIÓN

The status and role of crime victims have not been static over the years. On the contrary, they have been dynamic. In some periods of history, victims have played an active role, while in others they have been completely neglected. Nowadays, in Spain, thanks largely to the European Union, the recognition of victims' rights is at the highest level. However, as some reports have shown, there is still a way to go. In the words of Directive 2012/29/EU, it is generally accepted that "crime is both a wrong against society and a violation of the individual rights of victims." States have an obligation to "ensure the effective recognition and respect of victims' human rights." It is impossible to completely erase the effects of crime, but we as a society should strive to do so. Hence, the current level of recognition is high, but it could be more elevated, or at least the current rights could be better protected. If we cannot prevent crime, we can at least try to improve the situation of the victims.

The aforementioned Directive 2012/29/EU, establishing minimum standards for the rights, support and protection of victims of crime, has been a turning point in the field of recognition of victims' rights, but a dynamic approach to the issue requires not stopping and going further to determine what can be improved. For this reason, the European Commission has adopted a specific policy for the period 2020-2025 called the Strategy on Victims' Rights.

Therefore, the purpose of this article is to analyze current trends in victims' rights. In other words, to try to determine where we are going or what we can expect in the future, focusing mainly on issues related to criminal procedure. Of

1 This paper has been done within the scope of Project "Estrategias transversales para la prevención de la delincuencia económica y la corrupción (PID 2021-1230280B-100) funded by the Ministry of Science and innovation.

course, this task is not the result of a mathematical operation, as many different factors are involved (i.e. political factors, costs, other rights engaged), but I think that some trends can be identified. Some will see the light of day in the near future, others perhaps in the medium or long term, or even never, but I think that if we can identify them, it is because there is a need beneath. In order to address the issue, it is necessary to review the current situation, but also to know where it comes from because, as I have said before, today is the result of the past. There has been an evolution that must be seen as a continuum to get a glimpse of what might come.

In view of the above, this paper is divided into five sections. This presentation is followed by three different sections dealing with: 1) the past, that is, what has led to our current legal system; 2) the present, which will present and overview of Directive 2012/29 EU and how it has been transposed in Spain; and 3) the future, including trends like digitalization, but also victim compensation or reparation, as some suggest. I do not pretend to deeply analyze the evolution of victims' rights, as this has already been done by others in detail and would far exceed the purpose and the extent of this paper. I will simply review important events, which may help understand why we are in the current situation and what might come in the future.

2. PAST: FROM THE SPANISH CRIMINAL PROCEDURE CODE TO SPECIFIC REGULATIONS ON VICTIM'S RIGHTS

2.1. The birth of victimology as a pivotal moment on recognizing victims' rights

Literature has traditionally identified three stages in the history in which victims' have played different roles in criminal proceedings[2]. The first stage covers primitive societies where victims played a fundamental role as they were a necessary element of reaction to crime[3]. The second stage begins when States assumed the ownership of *ius puniendi*. From this point on, the victim treated as an outsider, as some has said she was "forgotten" in criminal proceedings as those were carried only between the State, holder of *ius puniendi*, and the defendant. At this stage the victim was an "object" used in criminal proceedings as necessary

2 ORDEÑANA GEZURAGA, I., *El estatuto jurídico de la víctima el en el derecho jurisdiccional penal español*, Instituto Vasco de Administración Pública, Bilbao, 2014, pag. 61.

3 For further information on the historical evolution of criminal proceedings see BARONA VILLAR, S., *El proceso penal desde la historia. Desde su origen hasta la sociedad global del miedo,* Tirant lo Blanch, Valencia, 2017, *passim.*

evidence needed to convict the offender[4]. The beginning of the third stage, also known as the "resurgence of the victim"[5], began in the first half of the twentieth century, gaining strength in the second half of the 20th century, after the Second World War with the emergence of victimology due to the humanitarian horrors perpetrated during the armed conflict[6]. However, historically the birth of victimology, defined as the scientific study of victims of crime[7], has been placed in the I International Symposium on victimology that took place in Jerusalem in October 1973.

The path taken in the second half of the twentieth century evolved progressively. The first victimological studies were mainly aimed at delimiting the profile of the victims and their relationship with the crime and the offender[8]. In the late 1970s and early 1980s, awareness of the needs of victims began to grow and a new approach was adopted, based on empathy or sympathy for victims. The aim is to "help and assist" the victims, thus initiating a humanist movement[9]. From this perspective, the recognition of the right to compensation became one of the main instruments aimed at "alleviating the suffering of the victims"[10], and the first compensation programs were created, to be paid by the States[11]. Some voices also started to talk about victims as protagonists of criminal conducts and the proceedings, pointing out the importance of restorative justice[12].

4 MARQUEZ CÁRDENAS, A. E., "La victimología como estudio. Redescubrimiento de la víctima para el proceso penal*", Revista Prolegómenos – Derechos y Valores*, 2011, I, pp.35-36. ORDEÑANA GEZURAGA, I., *El estatuto jurídico de la víctima el en el derecho jurisdiccional penal español*, op. cit., pp. 63-64.

5 ORDEÑANA GEZURAGA, I., *El estatuto jurídico de la víctima el en el derecho jurisdiccional penal español*, op. cit., pp. 65-68.

6 AGUDO, E., JAÉN, M. y PERRINO, A. L., *La víctima en la justicia penal (el Estatuto jurídico de la víctima del delito)*, Dykinson, Madrid, 2016, pag. 24.

7 Op. Cit., pp. 23-24.

8 FATTAH, E. A., "Victimología: pasado, presente y futuro", traslation and notes are from DAZA BONACHELA, Mª M, en *Revista Electrónica de Derecho Penal y Criminologia*, 16r2, 2014, pp. 4-5. The original paper may be found as "Victimology: Past, Present and Future", *Criminologie*, vol. 33, nº 1, 2000, pp. 17–46.

9 Op. cit., pp. 6-7.

10 Op. cit., p. 14.

11 However, FATTAH points out that this evolution or transformation of victimology had serious consequences, identifying two of them that today still remain. The first consequence was "the reorientation of the concept of criminality on conventional crimes that had a direct, immediate and intangible victim". This meant that other types of crime, such as corporate crime, were left in the background. Nowadays we can observe how the concept of victim included in international texts and especially in 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, limits its scope of application -and the definition of victim- only to natural persons. In the author's opinion, this transformation had a negative impact on criminal policy, as it "helped to reinforce primitive vindictive reactions to crime and gave conservative politicians a lot of leverage, thus enabling them to implement their punitive agenda". Op. cit., p. 7.

Other applauded the inclusion of compensation as an instrument of criminal policy. Academics as MIR PUIG stated back in 1973 that the Spanish legal provision that rules that the decision on compensation has to be set as general rule in the criminal proceedings could be used as an intimidatory tool to future offenders in order to prevent crime. See MIR PUIG, S., *Introducción a las bases del Derecho Penal*, BdeF, Montevideo-Buenos Aires, 2ª edición, 2003, pp. 18-19.

12 MIR PUIG, S., *Introducción a las bases del Derecho Penal*, op. cit., pp. 48-49.

At the legislative level, the first demonstrations are found at the headquarters of the Council of Europe where, throughout the 80', different international instruments for the protection of crime victims were adopted. With this we can see how a new focus of attention emerges in the international community: the participation and relationship of the victim with the criminal process that will lay the foundations of a much more modern conception consisting of considering the victim as a subject holder of rights that place him/her in a central role, protagonist of the criminal process.

2.2 First legal steps in Spain

First laws passed by the Spanish legislative regarding victims' rights date back to the 90's although it is commonly agreed in the academic community that the Spanish Criminal Procedure Code have always had quite a protective approach to the victim. First law which dealt with victims' compensation was Law 35/1995, of 11 December on aid and assistance to victims of violent crimes and crimes against sexual freedom[13], which was the result of a social need, hence the 80's and 90's were strongly hit by terrorist attacks and bombings by ETA, and influenced by the European Council treaties and recommendations, such as European Convention No. 116 on the Compensation of Victims' of Violent Crimes, of 24 November 1983 and the Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the position of the victim in the framework of criminal laws and procedure, adopted by the Committee of Ministers on 28 June 1985. Together with Law 35/1995, should be mentioned Organic Law 19/1999, of 23 December, on witnesses' and experts' protection on criminal proceedings and Law 32/1999, of 8 October, on solidarity with victims of terrorism. Later in the early years of de XXI century were also passed by the legislative laws to protect women against gender-based violence.

Since Spain entered to the EU, the Spanish legislation has been linked to the European policies and regulations[14]. Standing victims' rights, among other, three different regulations have to be mentioned: 1) The Council Framework Decision 2011/220/JHA of 15 March 2001 on the sanding of victims in criminal proceedings which included the first ever list of victims' rights; 2) The Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims which seek to recognize the right of all European residents who were victims' of a violent crime in a country different where they had their residence could apply for compensation as residents would. It doesn't apparently provide the right to

13 Section I from the explanatory memorandum of Law 35/1995 states that "...for many years now, criminal science has focused its attention on the victim, calling for a positive intervention by the State aimed at restoring the situation in which he/she was before suffering the crime or at least at mitigating the effects that the crime has had on him/her".

14 ORDEÑANA GEZURAGA, I., *El estatuto jurídico de la víctima el en el derecho jurisdiccional penal español*, op. cit., pp. 67-68.

get compensation in any case but, as the European Union Court of Justice stated that Member States must guarantee victims not only access to compensation in accordance with the principle of non-discrimination, but above all a minimum compensation for all types of violent crime[15]; 3) The Directive 2012/29/UE of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

2.3. Council Framework Decision 2011/220/JHA of 15 March 2001 on the sanding of victims in criminal proceedings

The Framework Decision was not binding to the Member States but included a serial of recommendations regarding victims' that should be adopted by the member states in order to harmonize their legal systems and provide an equal legal framework to all de UE citizens[16]. This aim wasn't accomplished as many Member States failed on implementing the Council Framework Decision 2011/2020/JHA. In April 2009, the European Commission published a report assessing the degree of compliance with the Framework Decision from the Member States. It concluded that the implementation of the Framework Decision was unsatisfactory and that the objective to harmonize all UE states regulations on victims' rights had not been met due to the wide disparity in national legislation, pointing out that "many provisions have been implemented through non-binding guidelines, letters and recommendations and the Commission is unable to verify whether they are complied with in practice"[17]. The above conclusions were reaffirmed in the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions of 18 May 2011, entitled "Strengthening victims' rights in the EU"[18] which justified the later adoption of the Directive 2012/29/UE of the European Parliament and the Council of 25 October 2012, on establishing minimum standards of rights, support and protection for victims of crime"[19].

15 Judgement of the Court of Justice (Grand Chamber) of 11 October 2016, *European Commission/Italy* (C-601/14).

16 Regarding the right to compensation was also essential the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. The aim of this Directive was to harmonize the legislation of the Member States in order to make it easier for crime victims to receive fair and adequate compensation regardless of the State in which the crime was committed, facilitating the recovery of compensation in cross-border cases where the victim resides in a State other than the one in which the crime was committed.

17 Report from the European Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) [SEC(2009) 476], Brussels, 20.4.2009 COM(2009) 166 final.

18 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Strengthening victims' rights in the EU. {SEC(2011) 580 final} {SEC(2011) 581 final} Brussels, 18.5.2011 COM(2011) 274 final.

19 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.

2.4. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions of 18 May 2011, Strengthening victims' rights in the EU

The communication outlines a key issue in the evolution of the recognition and treatment of victims' rights. Victim is treated as a subject of fundamental rights in criminal proceedings, on an equal footing with the accused, stating that "[t]he effective recognition and respect of victims' rights, and in particular their dignity, private and family life, and property, must be protected at the same time as the fundamental rights of others, such as the accused, are guaranteed. EU action will raise the level of fundamental rights for all those involved in criminal proceedings, whether victims, defendants or detainees, while ensuring that any limitation of these rights is only where necessary and proportionate." Since then, not only victims are seen as holders of fundamental rights but also, which is more important, they hold them at the same level than the defendant.

In Spain, the foregoing had been previously held by some academic researchers and also by the Spanish Constitutional Court. The treatment of the victim in the frame of a criminal proceedings took a step forward with the arrival of democracy. The purposes of criminal proceedings -and those of criminal law- were rethought, moving from a classic conception in which the criminal proceedings are merely an instrument used to apply criminal law, to the assertion that it fulfills other purposes[20]. Academic literature has pointed out that under the rule of law criminal proceedings are neutral. Defendants are considered and treated as innocents until the contrary is decided in a final judgement. Proceedings should guarantee the rights and values that the Constitution recognizes[21]. In addition, the criminal process would also aim according to GIMENO SENDRA to obtain "prompt reparation for the victim and, as far as possible, the reintegration of the defendant"[22] or in words of ARMENTA DEU it aims to protect the victim of the crime and the rehabilitation and social reintegration of the offender" [23]. Therefore, criminal proceedings have under the rule of law further purposes than punishing the offender they, also seek social reintegration of the perpetrator and TO protect and compensate the victim of crime. Thus, the victim becomes

20 ARMENTA DEU, T., *Lecciones de Derecho Procesal Penal,* Marcial Pons, Madrid, 13ª ed., 2020, page 31; GIMENO SENDRA, V., *La simplificación de la justicia penal y civil,* BOE, Madrid, 2020, pages 35-36; RAMOS MÉNDEZ, F., *Enjuiciamiento criminal: Duodésima lectura constitucional,* Atelier, Barcelona, 2016, pages 26-27.

21 RAMOS MÉNDEZ, F., *Enjuiciamiento criminal…,* op. cit., pp. 26, SOLÉ RIERA, J., *La tutela de la víctima en el proceso penal,* J.M. Bosch, Barcelona, 1997, p. 11; CHOCRÓN GIRÁLDEZ, A. Mª, "Tutela cautelar y protección de la víctima en el proceso penal"; Boletín del Ministerio de Justicia, año 61, núm. 2041, 2007, p. 2828.

22 GIMENO SENDRA, V., *La simplificación de la justicia penal y civil,* op. cit., pp. 35-36.

23 ARMENTA DEU, T., *Lecciones de Derecho Procesal Penal,* op. cit., p. 31.

a protagonist who is placed on an equal footing with the accused, since both are holders of constitutional rights that must be respected in all cases[24].

The victim's participation in criminal proceedings is constitutionally framed in art. 24.1 CE, in the due process of law[25]. It is important to bear in mind that this right applies both to the application and interpretation of the law by the courts but also to the legislative. Law might be violated by the courts as far as the judge interpretate legal rules in a manifestly erroneous or unreasonable manner "or based on criteria that, due to their rigorousness, excessive formalism or any other reason, reveal a clear disproportion between the aims that the legal cause applied preserves and the interests that are sacrificed"[26]. The legislative is also bond by this constitutional clause. As the Spanish Constitutional Court has pointed out in its judgment 114/1992, of 14 September, "the due process of law is a right of legal configuration, a right of provision that can only be exercised through the channels established by the legislator, who enjoys a wide margin of freedom in the definition and determination of the conditions and consequences of access to the jurisdiction for the defense of legitimate rights and interests. In this regulation it may establish limits to the exercise of the fundamental right that will be constitutionally valid if, while respecting its essential content, they are aimed at preserving other constitutionally protected rights, goods or interests and are adequately proportional to the purpose pursued. In principle, therefore, the right recognized in art. 24.1 C.E. can be violated by those rules that impose requirements that impede or hinder access to the jurisdiction, if such obstacles are unnecessary, excessive and lack reasonableness or proportionality with respect to the purposes that the legislator may lawfully pursue, and also by the imposition of conditions or consequences that merely limit or dissuade the exercise of actions or legally established remedies" [27].

This egalitarian approach to victims' and offenders' rights is, as will be further explained later, reinforced in the recently published Proposal to amend the 2012/29/EU Directive where this idea is referred as "victim-centred justice".

Back to the Communication "Strengthening victims' rights in the EU", two more issues should be outlined for the purposes of this paper. First, it should be noted that the document identifies five needs or areas of action that should be addressed in order to enhance victims' rights: 1) recognition and respectful treatment of the victim; 2) protection; 3) support; 4) access to justice; and 5) compensation and reparation. Although all five areas are relevant for the purpose of providing a comprehensive status to the victim, from a procedural point of view, the last two take on special relevance.

---

24 SOLÉ RIERA, J., *La tutela de la víctima en el proceso penal*, op, cit., pp. 13-14.

25 Regarding significance of the due process of law and its interprepation by the Spanish Constitutional Court see VALLESPÍN PÉREZ, D., *El modelo constitucional de juicio justo en el proceso civil*, Atelier, Barcelona, 2002, page 129 and ahead.

26 STC 22/2011, of 14 February and STC 2020/2012, of 16 November, among other.

27 STC 158/1987, of 20 October, STC 206/1987, of 21 December, STC 60/1989, of 16 March, STC 147/1989, of 21 September, among other.

The second issue to highlight is that the communication provide a joint definition or description of the different types of victims, and in particular, of the categories of subjects that are considered particularly vulnerable victims. Among others, it refers to victims who may be vulnerable for "other reasons related to their personal characteristics". This definition includes those who present a high level of fear and distress, as well as those who are in a situation of risk of intimidation or repeated violence or "in a personal, social or economic situation that makes it difficult for the victim to cope with the consequences of the crime or to understand the legal proceedings". In contrast to specific categories of vulnerable victims which are also listed this definition broadens the concept considerably including many people in different circumstances. It sketches a case to case approach that will take much more prominence in the recently published Proposal to amend the Directive 2012/29/UE.

2.5. Directive 2012/29/UE of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime

The next step on the road to the recognition of crime victims' rights is 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. The aim of the Directive is, according to the fourth recital "to review and supplement the principles set out in Framework Decision 2001/220/JHA and to make significant progress in the protection of victims throughout the Union, in particular in the context of criminal proceedings". The victim's statute is developed around three blocks of rights: information and support, participation in the process and protection. Although, as indicated above, for procedural purposes the block or chapter dedicated to the victim's rights of participation in the process is of particular interest, it should be borne in mind that the other blocks also introduce procedurally relevant issues insofar as both information and protection are projected both outside and within the criminal process itself.

2.6. Law 4/2015, of victims' rights statute

Directive 2012/29/EU was transposed into Spanish law through Law 4/2015, of April 27, 2015, on the Statute of the victim of crime, which also incorporates Directive 2011/92/EU of the European Parliament and of the Council, of December 13, 2011, on combating the sexual abuse and sexual exploitation of children and child pornography, and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims replacing Council Framework Decision 2002/629/JHA. The EVD broadly follows a similar scheme to that of the

Directive, distinguishing between three types of rights: the basic rights that would correspond to the block relating to the rights of information and support (arts. 4 to 10 EVD), the participation . 6. of the victim in the process (arts. 11 to 18 EVD), and the protection of the victim (arts. 19 to 26 EVD).

In the area of the victim's participation in the process, two aspects should be highlighted for the purposes of this paper. Firstly, it should be pointed out that art. 11 EVD allows a greater degree of intervention in the process than that provided for in the Directive. The EVD, following our historical tradition, expressly recognizes the right of the victim to appear in the proceedings and exercise both civil and criminal action, while the Directive only provides for a right for the victim to be heard in the criminal proceedings. For this purpose, it should be borne in mind that the Directive establishes a uniform regulation for the States of minimum standards, so that they can, if they wish, raise the standard of protection offered by the European standard. The second issue that is striking is that one of the few provisions that has not been transposed in parallel to the Directive is Art. 16 of the Directive, concerning "the right to obtain a decision on compensation from the offender in the course of criminal proceedings". This is probably due to the fact that the Spanish Criminal Procedure Code already provided for this possibility in arts. 100 and following and that in a certain way it is indirectly recognized through art. 11 EVD when it expressly authorizes the victim to exercise the civil action together with the criminal action. However, a provision in this sense is strange insofar as the objective of the EVD, like the Directive, has a unifying vocation, establishing "a general catalog of victims' rights"[28]. Legal literature has remarked the importance of recognizing a complete catalog of victims' rights, both procedural and extra-procedural, as a mechanism to avoid a process of secondary victimization[29].

3. PRESENT: THE UE STRATEGY ON VICTIMS' RIGHTS (2020-2025)

3.1. The background of the Strategy: The assessment of Directive 2012/29/UE on victims' rights

The intense work carried out by the European institutions on the protection of victims of crime did not end with the adoption of Directive 2012/29/EU, but in subsequent years work has continued to enhance and improve the rights of victims, first assessing the Directive implementation and secondly, adopting an active position planning future actions to take.

In order to evaluate the Victims' rights Directive, there has to be considered three main EU documents: 1) The European Parliament Resolution of 30

28 Law 4/20105, Explanatory Memorandum, expositive II y III.

29 AGUDO, E., JAÉN, M. y PERRINO, A. L., *La víctima en la justicia penal*, op. cit., p. 27.

May 2018 on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (2016/2328(INI)[30]; 2) Independent report "Strengthening victims' rights: from compensation to reparation, from the special adviser J. Milquet to the President of the European Commission Claude Juncker (11 March 2019)[31]; and 3) Report from the Commission to the European Parliament and the Council on the implementation of 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 20017220/JHA (11/05/2020)[32].

Both the European Parliament Resolution of 30 May 2018 and the Report form the Commission to the European Parliament form 11 May 2020, outline similar defaults on the implementation of Directive 2012/29/EU. As general assessment they point out that victims were still treated differently from one country to another and that may States had failed on transposing the Directive to their legal systems or had incompletely or incorrectly done it. In this respect, in September 2017 only 23 States from 27 had transposed the Directive which lead the Commission to launch infringement proceedings to some countries. According to the data provided by those documents, in January 2016 the Commission had opened infringement proceedings to 16 Member States and in May 2020 when the Report from the Commission to the European Parliament was issued, there were 21 ongoing proceedings. None of them was against Spain. In June 2022, there was still one infringement proceeding open against Bulgaria[33].

Regarding specific aspects ruled by the Directive, those documents highlight the following conclusions:

- Victims still often lack awareness of their rights, undermining the Directive's effectiveness on the ground and in particular the access to the information requirement. The Commission Report outlines that some State Members failed to assure that the proper information was provided to the victim from the first contact with competent authorities as well as the state of the criminal proceedings. It also remarks shortfalls regarding translation services in many countries.
- Some Member States display a lack of victim support services and of coordination between them at local, regional, national and international level, which make difficult for victims to access to existing support

30 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018IP0229

31 https://commission.europa.eu/system/files/2019-03/strengthening_victims_rights_-_from_compensation_to_reparation_rev.pdf

32 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0188

33 Commission Staff working document evaluation of 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 20017220/JHA (11/05/2020), pag. 11. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022SC0179

services. About this issue, the Commission report points out that many States limit the access to those services to some specific categories of vulnerable victims, such us victims of domestic violence or of trafficking in human beings.

- Evidence shows that some professionals (i.e. health professionals) receive limited training in responding effectively to gender-based violence.
- The is a systematic underreporting of crimes in the EU, particularly in cases involving minorities.
- There is a need to protect victims in trial from second victimization, specially, according to the Commission Report regarding child victims.
- Regarding some specific types of victims, and specially, related to gender-base violence victims there is a short-coming in the implementation of the Directive. It is noted that procedures for accessing to support services are complex and there is also insufficient legal aid and compensation for them.
- According to the Commission Report, although the implementation of restorative justice was not binding, those States that have done so have failed to transpose completely one or more of the minimum conditions for restorative justice set out in art. 12(1) Directive 2012/29/EU.

3.2. The strategy goals and priorities

In June 2020, the "first EU strategy on victims' rights (2020-2025)" was published as part of the Commission's work for the years 2020-2025. It highlights in many cases the incomplete and in other cases erroneous transposition of Directive 2012/29/EU by the Member States as previous reports and Resolutions had previously mentioned. The Strategy outlines two main goals that are later divided in five priorities:

1) Empowering victims of crime through:
    a. Maintaining effective communication with victims and a safe environment for victims to report crimes;
    b. Improving support and protection for the most vulnerable victims;
    c. Facilitating victims' access to compensation.
2) Working together with victims which requires:
    a. Strengthening cooperation and coordination between all relevant actors;
    b. Strengthening the victims' rights dimension.

In each of these five priority areas, the Commission, in order to achieve the proposed objectives, has established a series of key actions to be developed by different stakeholders: the Commission itself, the Member States and other

EU bodies and stakeholders. Most of the actions to be taken are enforcement measures that would lead to a better harmonization of the EU States criminal systems. However, it also it considers in the possibility of adopting new legislative measures when necessary. Although the possibility to amend the Directive or even to adopt new legislative instruments is mentioned as a general option, only while developing two of those five priorities, considers to do so. First, regarding priority 2, this is, "improving support and protection of the most vulnerable victims" and second, related to priority 3 which aims to "facilitate victims' access to compensation". However, as it will be explained later, the Commission Proposal to amend the Victims' rights Directive, introduces legislative proposals that have to do with all five priorities which is the result of a most resent evaluation that has been led by de Commission as part of the Strategy roadmap[34].

Back to the UE Strategy on victims' rights, while developing priority 2, it orders to the Commission to "assess introduction of minimum standards on victims' physical protection, including minimum conditions on issuing and modalities of protection measures, and where necessary present legislative proposals by 2022". In similar terms, and even clearer, on priority 3, it orders to the Commission to "monitor and assess UE legislation on compensation, (including state compensation and offenders' compensation), including Framework Decision on mutual recognition of financial penalties, and if necessary propose measures to complement the framework by 2022".

It has to be said that it is the first time that the Commission directly deals with victims' compensation issues. Before, some assessing documents had made a general statement in terms of recognizing that victims' compensation has to be improved as it had been noticed that many victims' in the UE were not compensated but they had not provided further explanations. An exception might be the Report of the Special Adviser, J. Milquet, to the President of the European Commission, Jean-Claude Junker: Strengthening victims' rights: from compensation to reparation, issued in March 2019, which at first sight appeared as a quirky document, different to previous reports that mainly focused on other issues. Neither immediately issued documents as the previously mentioned Report from the Commission to the European Parliament and the Council on the implantation of Directive 2012/29/EU, specifically collected its most aggressive contents and conclusions. They went unnoticed. In fact, the Strategy itself only refers to some assessing conclusions but not to the proposals it included. In this regard, the Strategy remarks from the Special Report that the causes of the fail in order to provide compensation to victims of crime relies on the "lack of sufficient information about victims' rights to compensation, numerous procedural hurdles including restrictive time limits, insufficient allocations from national budgets and complicated rules governing offender compensation and state compensation". This is, of course, a general conclusion which means that not necessarily has to

34 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0258

be the same in all EU States. Furthermore, the Strategy text at this point is written in terms of recommendations to the Member States. Without being exhaustive, it recommends to the States "to make national schemes of compensation more victims-friendly by simplifying on access to compensation and by increasing available amounts of compensation by adapting national budgets". Consistently it outlines that those victims of violent crimes should not be exposed to risks of secondary victimization during the compensation procedure.

Nothing from my point of view, announced the legislative measures regarding victims' compensation that, among others, would be presented by the Commission later in July 2023 as a proposal of Directive to amend the Directive 2012/29/EU, neither did the internal evaluation that the EU Commission carried on along 2021 and 2022 which was published in June 28th, 2023, namely, Commission Staff working document evaluation of 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 20017220/JHA (11/05/2020). The Commission Staff working document outlined some difficulties that, according to the previous reports and assessments, had been noticed. Most relevant ones are listed below, but first, it has to be said that none of them refer to victims' compensation. Moreover, the document does not mention at all victims' compensation which led to think that it was not a real priority to work on further than the specific enforcement actions stated by the Strategy[35].

The Commission Staff working document points out as main difficulties found:

- The interpretation of certain fundamental terms from the Directive, as the concept itself of victim, lacking of minimum standards to apply.
- Victims' access to qualified professionals who provide support services and particularly access to translators and interpreters or professionals who must provide legal aid.
- The lack of adequate training to all subjects who provides support to victims', which weights negatively on the right to receive information about the case, to be heard or to have an individual assessment of the victims' needs which is the base to get proper support an even protection which includes physical, emotional and psychological protection in court but also outside. So, it includes both second victimization and revictimization.

35 Even Recommendation CM/Rec (2023)2 of the Committee of Ministers to Member States on rights, services and suport for victims of crime differs from the Proposal. In this regard, article 13 although promotes Member State to ensure that victims may obtain a decision on compensation by the offender in the course of criminal proceedings, it permits States to provide an alternative scheme when the previous provision is irreconcilable with their national legal System. Nothing is mentioned about the States paying upfront the compensation due from the offender to the víctima.

4. FUTURE: PROPOSAL FOR A DIRECTIVE AMENDING DIRECTIVE 2012/29/UE ESTABLISHING MINUMUM STANDARDS OF THE RIGHTS, SUPPORT AND PROTECTION OF VICTIMS OF CRIME, AND REPLACING COUNCIL FRAMEWORK DECISION 2001/220/JHA

Last stop in this journey along victims' rights evolution is the recently issued Proposal for a Directive amending Directive 2012/29/UE establishing minimum standards of rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. As a proposal is not a binding document and it has not to be interpreted as intangible future to come. Legislative procedures are complex, may be long and are influenced by political factors. However, they allow to know which are the current concerns of the European Commission regarding victims' rights and may be also read as a trend.

The aforementioned proposal pursues, in short, a better protection of the victim and a more satisfactory relationship between the victim and the criminal proceeding with less secondary victimization which will in long term contribute to the UN Sustainable Development Goal (SDG) 10 aiming to reduce inequalities, as well as UN SDG 16, referred to peace, justice and strong institutions, contributing to the European area of freedom, security and justice. All legislative amendments to the Victims' Rights Directive proposed by this document, seek somehow to fulfill one of these wide aims.

Later on, I will overview the main modifications or new provisions suggested by the proposal. I will not be able to analyze them in detail because this task exceeds by far the scope of this paper, but I will mention main changes included and I will provide a closer look to some of them, specially the new regulations on victims' compensation which were not expected, as the reader might assume from the previous paragraphs. I will also refer to some other provisions dealing with improving the access to justice.

The explanatory memorandum of the proposal departs from a no-brainer idea. Our society has changed in the latest ten years and so have done the minimum standards which were considered when the Directive was adopted back in 2012. This single idea may justify, once detected the changes, the proposal to modify the Directive 29/29/EU. As society move on so does law go after. As result, two main standards should, in my opinion be outlined for the purpose of this paper: the definitive adoption of a victim-centred approach to criminal proceedings and the digitalization of justice.

4.1. A victim-centred approach to justice

First, all explanatory documents joined to the proposal for a Directive to amend the Directive 212/29/EU, consolidate the idea of a victim-centred justice. This approach had previously been presented and mentioned in some

of the Victims' rights Directive assessment documents, but a careful reading of the explanatory documents suggest that, now, the concept has been settled. The use of this expression without further explanations could lead to assume that this document suggests a new approach stepping forward from the recognition of the victims' rights at the same level of the rights of the defendant made by the Directive 212/29/EU to a further level of recognition. However, the use of the expression "victim-centred justice" don't have to be understand as a recognition of a situation in which the victim is located in a higher level of protection than de defendant. Instead it has to be understood as a situation in which justice "aims bringing the right balance to the criminal proceeding by ensuring that focus is not only on those who committed the crime but also on victims. It recognises victims as individuals whose fundamental rights were violated by a crime and who have a standing and a voice in criminal proceeding and are supported by their communities"[36]. The term used seem at first sight to go beyond the concept but the concept stays although it is reinforced thanks to the terminology.

Nonetheless it is not just an idea or a term used in the documents joined to the Proposal, the concept reflects on the Proposal specific provisions when, for instance, in article 26d states that "Member States shall ensure that victims have an effective remedy under national law in the event of a breach of their rights under this Directive". It is a general clause that should be developed by each national procedural system but as the Explanatory Memorandum of the Proposal outlines, it mirrors similar provisions in EU rules on rights of suspects and accused which contributes to fulfill a legal gab and brings the necessary balance between the rights of the defendant and the rights of the victims[37].

Many other provisions are thought to improve and balance the victims' rights.

4.2. Digitalization of justice

A second change outlined by the European Commission that has been widely developed in the latest ten years is access to technology and specially digitalization of many human acts. Our society has become more digital and justice must lean this tendency adapting its regulations. The Proposal adopts a crossover approach to digitalization. In this regard many provisions along the text deal with digitalization and new technologies. In this way, the Proposal aims assure victims a more effective access to information and access to justice using electronic communication. Specific provisions regarding digitalization are set, for

36 Commission Staff Working Document. Impact assessment report accompanying the document Proposal for a Directive amending Directive 2012/29/UE establishing minimum standards of rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, pag. 5. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023SC0246

37 Explanatory Memorandum of the Proposal for a Directive amending Directive 2012/29/UE establishing minimum standards of rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, page 19.

instance, new Article 3a which deals with the implementation of a new Victims' helpline which will be available by phone, through the harmonized number "116 006" but also through "other information and communication technologies, including websites". These sites will have to available in other languages than the official one, including, at least the languages most used in the Member State. Transposition of this provision to the Spanish legal system would require to provide that information not only in Spanish but also in other regional languages. What is not clear is if the site should also be translated to other international languages as English or other foreign languages. In this regard it should to be noticed that Spain receive every year a large number of international tourists which may become victims of crime. A proper transposition of the Proposal if passed by the legislative, should require to check victims state of origin statistics or in default, tourism figures by country of origin. This is also coherent with other provisions which seek to facilitate access to justice for victims who are resident of a Member State different from that in which the crime was committed. In this respect, the Proposal also promotes cross-border victims' participation in criminal proceedings through video conferencing and telephone calls.

Another measure to be adopted is the implementation of communication technologies to report criminal offences. According to the new Article 5a "Member States shall ensure that victims can report criminal offences to the competent authorities through easily accessible, user friendly information and communication technologies. Such possibility shall include submission of evidence where feasible". Article 26b also refers in general to the right of victims to exercise some rights using of electronic means of communication. However, article 26b refers to article 5a as a whole, not just to its first paragraph which may be challenging as includes, among other provisions, the obligation set forth in paragraph 3 of ensuring that victims can effectively report crimes committed in detention facilities where detainees have no or restricted access to communication technologies. Paragraph 4 also require some attention as it states that "where children report criminal offences, Member States shall ensure that reporting procedures are safe, confidential, designed and accessible in a child-friendly manner and use language in accordance with their age and maturity. Probably some under age, not all, may report using electronic technologies, but in those cases special safeguards should be taken.

This kind of measures are expected to contribute in a rise of the percentage of crime report and crime solving, smoothing as consequence, the functioning of the European area of freedom, security and justice. However, in my opinion, even though a higher rate of crime reporting may lead to a higher rate of crime solving from a quantitative point of view, the increase does not necessarily have to be qualitative. Raising crime solving rates also requires improvements on crime investigation among other aspects such as providing a safe environment to the victim and other actors such as eyewitnesses, in criminal proceedings.

4.3. Other measures to improve support, protection and compensation to victims of crime

4.3.1. Victims' support and protection

The Proposal also takes into consideration victims protection and support. The proposal includes several provisions which deal with support and protection to the victim of crime, specially for children seeking, what has been called "child-friendly justice[38]", through different measures as the one stated on article 9a. Member States will have to settle set targeted and integrated support services for children which must provide information, medical examination, emotional and psychological support; crime reporting, individual assessment of protection and support needs and video recording of testimonies. Another article which is seriously amended is article 22. The original article from Directive 2012/29/UE ordered to the Member States to carry on an "individual assessment of victims to identify specific protection needs. The proposal widens the scope of this article addressing this assessment not only to detect protection but also support needs.

4.3.2. Compensation

The most unexpected measures that in my opinion the Proposal includes are the ones referred to compensation. Even though, improving compensation was included as one of the five priorities of the Victims' Strategy, as I previously have explained apparently nothing pointed out that strong legislative measures would be taken. Far from this the Proposal suggest to amend article 16 introducing two high impact measures. Thus, "Member States shall ensure that, in the course of the criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time" with no exception. The Proposal suppresses the last part of the article which allowed the Member States, to provide the decision on compensation though a different proceeding according to their national law.

This is not the case of Spain. As know, our legal system has for long provided quite a victims' friendly criminal proceedings in which victims' may participate as parties and obtain a decision on compensation unless they decide to resign or to exercise their right later on a civil proceeding (article 108 Spanish Criminal Procedure Code). Legal literature has mostly applauded this legal option which was justified mainly for reasons of procedural economy insofar as it seeks to resolve all the legal consequences of the crime - criminal and civil - in a single proceeding,

38 The term "child-frienly justice" refers according to Commission Staff Working Document from 12 July 2023, Glossary "to justice Systems which guarantee the respect of the effective implementation of all children rights at the highest attainable level (Counsil of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum)".

saving time, procedural activity and resulting in greater legal certainty as the same facts are judged jointly by the same judge. It also contributes on avoiding the risk of contradictory rulings. However, literature has also pointed out some inconvenience. Thus, the secondary nature that the Public Prosecutor's Office attributes to the civil action, the long duration of the criminal proceeding, as well as the frequent declaration of insolvency of the accused, undermine its benefits. In any case, these are exogenous motives, related rather to the behavior of the other legal actors or parties. The only case in which the current Spanish regulation could affect the course of the criminal proceeding and, especially, the constitutional right to a trial without undue delay, is that in which dealing with compensation issues -assuming that it is diligent affects duration of the proceeding. This argument has been more recently raised by some literature and in fact had some impact on some legislative drafts. In this regard, it justifies the case of exclusion provided for in art. 126.2 of the Preliminary Draft of the Criminal Procedure Law of November 2020. According to that article, "the prosecutor may request the Judge of Guarantees the exclusion of the exercise of the civil action in the criminal process when, due to the special complexity of the determination of the civil liability or due to the number of affected parties, it may cause serious delays in the processing of the case", The argument lays on the respect of a fundamental right of the defendant (article 24 of the Spanish Constitution), the right to a trial without undue delay which would encounter the right of the victim to compensation. I can not develop in more detail this discussion here as it exceeds the scope of this paper and would require to analyze the content of the to a trial without undue delay but, apparently, the EU Commission has balanced both rights and slanted towards the victim.

The other major legal amend introduced in article 16 is set on paragraph 2 which would move from the current order to de Member States "to promote measures to encourage offender to provide adequate compensation to victims" to ensure that their competent authorities pay upfront the adjudicated compensation due from the offender to the victim without undue delay and then seek the reimbursement of the compensation from the offender. It must be clear that the Proposal doesn't introduces a State compensation scheme for all crimes. As the Commission staff working document impact assessment reports explains this later measure, which was also considered, would have required to amend Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims besides it had a high economic impact for the Member States, scoring less in terms of Effectiveness, efficiency and coherence that the option finally assumed[39].

5. CONCLUSIONS

Although the Spanish criminal procedural system has traditionally been seen as victim-friendly in the latest four decades there has been walked a long path

39 Commission staff working document impact assessment reports, cit., pp. 49-50.

on improving the victims' rights. These improvements have come from different sources. The Spanish Constitution was turning point but many developments have been carried out thanks to the work of international organizations as European Council but specially the European Union. They have put attention in three different dimensions of victims' rights: information, protection and participation in criminal proceedings. As the reader can conclude from this paper all these three dimensions are no sealed compartments, they are interconnected in all directions. Only if all them work properly, the victim may trust in her rights, in society and at the end in herself.

If the Spanish Constitution was a turning point in the Spanish recent history, the adoption of Directive 2012/29/UE establishing minimum standards of rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, has been another one. As all reports which has assessed the Directive have pointed out, it has contributed to improve the level of recognition of the victims' rights. However, what they also stated is that there is still a path to go through in order to harmonize the treatment of the victim in all Member States and to assure a proper development of her rights. With this aim, the European Commission launched the EU (2020-2025) Strategy on Victims' rights. The Strategy sets a serial of enforcement measures which has to be implemented by the European Commission, the States and some relevant stakeholders but also advocates for legislative measures where necessary. On this regard it has recently published a Proposal to amend Directive 2012/29/UE which includes provisions lead to increase the level of protection of some rights as the right to information, the right to participate in criminal proceedings, or the right to compensation. At this point it is just a draft which means that not necessarily it has to be adopted or at least no entirely, but some of their provisions, as article 16 may be quite controversial and have a deep impact.

The applicability of universal jurisdiction - Have we forgotten to act as a society?

Dra. Andrea Spada Jiménez

Associate Professor of Procedural, Criminal and Civil Proceedings.
Universidad de Málaga

1. INTRODUCTION

This paper[1] addresses the principle of universal jurisdiction from the perspective of access to justice. This is done in a critical manner, highlighting the victim as the subject who has the right of access to justice. To this end, the content is framed within the general right of access, and then linked to the basis of the principle of universal jurisdiction. This makes it possible to observe how the fight against impunity is the main basis of the principle of universal jurisdiction and is closely related to the right of access to justice. Therefore, in this paper, a review of its particular foundation is carried out, which leads to a focus on the effective access to universal jurisdiction in Spain.

Since its latest reforms, the configuration of universal jurisdiction in Spain has become increasingly restrictive and therefore affects the right to effective judicial protection of the victims of certain criminal acts, so much so that it is practically inapplicable. This is the main reason why access to jurisdiction through this principle has been achieved by establishing limitations on access. Limitations which are mainly based on the figure of the victim, but also from the procedural point of view, as applicable assumptions are established which condition the prosecution of the criminal act.

With the content provided, various questions are raised, on the one hand, in relation to access to justice in today's society, as this part considers that it is framed in the efficiency of the procedural system and not in the original meanings. Likewise, the difficulty of the regulatory precept of the principle of universal jurisdiction is raised, for which this part systematises in a schematic way,

1 It is part of Project PID2020-113083GB-I00 (IPS Sonia Calaza and José Carlos Muinelo): Ejes de la Justicia en tiempos de cambio.

as well as the pitfalls that a victim of certain criminal acts has to face in view of the conceptualisation of victim granted by our law, as well as their nationality and corroborated in the strict sense by our jurisdictional bodies.

2. THE PRINCIPLE OF UNIVERSAL JURISDICTION AND ITS TWO MAIN PURPOSES: GUARANTEEING THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION AND THE FIGHT AGAINST IMPUNITY

2.1. The protection of an injured right outside the national territory

In my opinion, the principle of universal jurisdiction has two main purposes: To guarantee the right to effective judicial protection of citizens and at the same time to fight against impunity, the latter is the classic and original basis that has been attributed to the creation of the principle of universal jurisdiction when victims were not yet protagonists in the creation of international procedural instruments; peace and social security were simply sought through the fight against impunity without taking into account that the right to effective judicial protection as a human right has to be recognised as another of the purposes and at the same level as the aforementioned.

Therefore, in this article, in order to analyse the applicability of the principle of universal jurisdiction, we will address, on the one hand, the recognition of access to jurisdiction as a subjective right that is included within the right to effective judicial protection, and on the other hand, the classic basis of the fight against impunity and its relationship with access to justice and the search for international peace and security.

The right of access to jurisdiction falls within the right to effective judicial protection, as Reifarth[2] states that it is the "core substance" (the author refers to: SSTC 37/1995, of 7 February (FJ 5º.);201/2012, of 12 November (FJ 3º);90/2013, OF 22 April (fjº3);140/2016,of 21 July (FJ 12º);149/2016, of 19 September (FJ 3º)) of effective judicial protection, through which the possibility of being able to turn to a judicial body and obtain a pronouncement on the right or interest injured is recognised.

According to Añón[3], the right of access to justice is not only instrumental in nature, but is also a fundamental part of the rule of law, closely linked to the principles of independence, impartiality, integrity and credibility through which the judiciary is legitimised . It is conceived as a human, social

2 Reifarth Muñoz, Walter. *La tutela colectiva de los derechos fundamentales*. Aranzadi, 2023, p.189.

3 Añón, Maria José. «El derecho de acceso como garantía de justicia», in García-Pascual, Cristina *Acceso a la justicia y garantía de los derechos en tiempos de crisis: de los procedimientos tradicionales a los mecanismos alternativos*. Tirant lo Blanch, 2018,p.20.

and multidimensional right that should be characterised as such due to its complexity[4] , not only because of the rights intrinsic to access to justice, but also because of the humanisation of justice[5] , which in its evolution has meant that the guarantee of the right of access to justice must be carried out from various dimensions.

As Garcia Añón states, the right of access to justice includes, on the one hand, the acquisition of rights, and on the other, the guarantee and effectiveness of their recognition by the State Administration or other entities[6] . Therefore, in order to guarantee the right of access to justice, it must not only be carried out from a procedural point of view, but also from an institutional point of view, and must be adequate for the parties and citizens. This adequacy refers to the fact that it should not be forgotten that the quality and management of justice are also included in the right of access to justice, in line with Juan-Sánchez[7].

The right of access to jurisdiction provided for above must be linked to the right of victims of criminal acts in accordance with the principle of universal jurisdiction. However, in order to address these aspects, it is undoubtedly necessary to refer to the basis of the principle of universal jurisdiction itself, since this basis is what allows us to configure access to justice in a State other than the one where the criminal act is committed. However, it is worth noting that the main basis for the regulation of the principle of universal jurisdiction was the fight against impunity and the safeguarding of peace and international security, but it has not been determined that it is access to justice, because the victims of criminal acts have hardly played a leading role.

Without an adequate configuration of the jurisdictional system in a globalised society such as today's, insofar as the aim is to extend the exercise of the jurisdictional power of the judges and courts of a state to judge and enforce what has been judged when a criminal act is committed, a system of access to justice for the victims of criminal acts is being developed. However, the recognition of the status of victim, which allows you to articulate this right of access to jurisdiction through the system of universal jurisdiction, will be nuanced and even threatened, as we will see below.

---

4 Idem. P.21

5 De Lucchi López-Tapia, Yolanda, *Las personas con discapacidad: el derecho fundamental de acceso a la misma en condiciones de igualdad.* Revista de Estudios Europeos, n.º Extraordinario monográfico, 2023, p.156-181.

6 García Añon, J. "El acceso a la justicia como garantía de los derechos humanos: apuntes sobre su evolución", in De Lucas Martín, Javier; Vidal Gil, Ernesto; Fernández Ruiz-Gálvez, Encarnación; Bellver Capella, Vicente (coord.).Pensar el tiempo presente Homenaje al profesor Jesús Ballesteros Llompart. Tirant lo Blanch,2018,p.663-676.

7 Juan-Sánchez, Ricardo. "Calidad de la justicia, gestión de los tribunales y responsabilidades públicas: algunos estándares internacionales y otras buenas prácticas para favorecer el acceso a la justicia", in Acceso a la justicia y garantía de los derechos en tiempos de crisis: de los procedimientos tradicionales a los mecanismos alternativos. Tirant lo Blanch, 2018.

2.2. First aim: The principle of universal jurisdiction as a guarantee of effective judicial protection

It is necessary to go into the basis of the principle of universal jurisdiction for one main reason, and that is that if we do not understand its origin and basis, or if we do not know it in a few brief lines that will be dedicated to it, it is not possible to articulate and configure an adequate access to jurisdiction through this principle.

First of all, it is necessary to define the principle of universal jurisdiction; however, we note that there is no unanimous definition, nor even a consensus in the doctrine regarding its name, as the reference to this principle has different names[8] . Denominations which allude to the branch of specialisation of the author who studies it. The definition that will be given here is taken from the *Princeton Principles on Universal Jurisdiction*, basically because it is the one used by the United Nations General Assembly (United Nations General Assembly, 2001):

> "universal jurisdiction means a criminal jurisdiction based exclusively on the nature of the offence, regardless of the place where the offence was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim or any other nexus with the state exercising such jurisdiction".

In our view, from a procedural perspective, the above definition does not really give the principle of universal jurisdiction its true material use, for one simple reason, and that is that with the first sentence "universal jurisdiction means criminal jurisdiction based exclusively on the nature of the crime" it seems clear that the jurisdiction of a state will extend beyond its territory based on the nature of the criminal act, which is indeed the case. This is indeed the case, but the following sentence alludes to a principle of territoriality, which is meaningless, because the state exercises its *ius puniendi* in its territory, except when certain circumstances arise that generate impunity and therefore the jurisdiction of another state must be applied in order to protect the general interests of international society. It also goes on to refer to the principle of active and passive personality and suggests that there must be a connecting link for its application. This has meant, over the years, the transition to restriction in the various states, which is why this part considers that this definition would not be the most appropriate given the basis and application of the principle. However, it is not the main objective of this paper to go into it in more detail.

Now, this foundation of the principle of universal jurisdiction to which reference is made, is the one unfounded by Grotius[9] which determined that the punitive power held by a State extends to any State because it emanates from natural law, with the following sentence: "*Ponunt enim illi puniendi potestatem*

8 Vázquez Serrano, Irene. The principle of universal jurisdiction. Revista Electrónica de Derecho Internacional Contemporáneo: REDIC, ISSN-e 2618-303X, Vol. 1, Nº. 1, 2018, p. 6-31.

9 Grotius, H. De iure belli ac pacis. 1625. Translation: Arriaga Benitez, J.M. Annotated translation of Hugo Grotius' De Iure belli ac pacis on the *Ius ad bellum*.2015, p.XX,XL,4.

esse effectum proprium jurisdictionis civilis, cum nos eam sentiamus venire etiam ex jure natural". It also determined that sovereigns had the duty to take care of human society in the face of serious violations of natural law[10] . Nor should we forget De Vattel[11] , who defended the possibility of applying the punitive power of a State to the most serious crimes in order to safeguard public security, as Covarrubias referred to the protection of international peace and security through the exercise of a State's jurisdiction[12] .

Well, beyond the spiritual foundations of the principle's basis, as Bassiouni[13] stated, the principle of universal jurisdiction is about going beyond criminal cooperation. The principle of universal jurisdiction is therefore the principle applicable to the commission of a given criminal act regardless of the territory and the persons who have committed it, with the aim of guaranteeing international peace and security as well as the fight against impunity.

The recognition of the rights and freedoms of natural persons at the international level undoubtedly entails the recognition of the principle of universal jurisdiction because it is the procedural means by which their protection is guaranteed[14] . In the same sense, Orihuela[15] states that the basis of the instruments which provide for the exercise of jurisdiction outside the territory is based on the defence of the interests of the community and acts as a suitable principle for this purpose. He mentions the *Principles for the Protection and Promotion of Human Rights* and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (A/RES/60/147) as two of the instruments that provide for such a basis.

The need for such protection is reflected in the United Nations Charter of 26 June 1945, the Universal Declaration of Human Rights of 10 December 1948, the four Geneva Conventions of 1949 and their Additional Protocols, the United Nations General Assembly, the International Covenant on Civil and Political Rights and its annexed Protocols on the Implementation of Obligations and on the Abolition of the Death Penalty of 1966, among many others that were adopted subsequently.

---

10 Ollé Sesé, Manuel. Universal Justice for International Crimes. La Ley. 2008,p.96-98.

11 De Vattel, Emer. The Law of Nations. Liberty Fund, 1797.

12 Martinez Alcañiz, Abraham. "El principio de justicia universal. In: El Principio de Justicia Universal y los Crímenes de Guerra. p.119 y ss. IUGM-UNED. Madrid, 2015.

13 Cherif Bassiouni, Mahmud. Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice. Virginia Journal of International Law Association. 2001, 42 Va. J. Int'l. L. 81.

14 See in this regard: Berdugo Gómez de la Torre, Ignacio. "Acerca de la Internacionalización del Derecho Penal", in El principio de Justicia Universal: Fundamentos y límites. Tirant Lo Blanch. 2012. p. 23-32. Simón, J.M. Universal Jurisdiction. La perspectiva del derecho internacional público. Revista Electrónica de Estudios Internacionales, 2002, www.reei.org.

15 Orihuela Calatayud, Esperanza. Universal Jurisdiction in Spain. Real Academia de Legislación y Jurisprudencia de la Región de Murcia, 2016, p.19.

Likewise, taking a brief look at the various international instruments which include the principle of universal jurisdiction, it is worth highlighting, as Brotons and Orihuela[16] determine, that there are instruments which provide for mandatory prosecution by any state in the prosecution of a specific criminal act, but through a regulatory framework to be developed by the domestic state, which will be of obligatory application as long as the principle of territoriality is not applied in order to avoid impunity; On the other hand, there are other conventions which, for the same purpose, provide for the *aut dedere aut iudicare* rule, such as, for example, the following, among others *Convention on the Prevention and Punishment of Genocide, of 9 December 1948; Convention relating to the Status of Stateless Persons, of 13 September 1954; Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 4 September 1956; International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 10 December 1988.*

As can be seen, the basic foundation of the principle of universal jurisdiction is therefore to be the mechanism through which the rights and general interests of international society are protected in order to fight against impunity, provided that the principle of territoriality does not apply in the territory where the criminal act is committed. What do we mean by impunity in a state, and what is its relationship with access to justice?

2.3. Second aim: the fight against impunity as a safeguard for international peace and security

As stated above, the main basis of the principle of universal jurisdiction is the fight against impunity, since this principle undermines the *forum loci comissi delicti*, i.e. the sovereignty of a state to exercise jurisdiction over the commission of a criminal act in its own territory is transferred to another state, which acts through the exercise of its jurisdictional power as if the criminal act had been committed within its own territory. However, the impunity that arises from the commission of certain criminal acts has various meanings, as we shall see below. On the one hand, the study on impunity carried out by Saavedra[17] , states that the basis of universal jurisdiction falls within the so-called "structural impunity", and what does this impunity consist of? The author points out two kinds of impunity,

16 See in this regard: Orihuela Calatayud, Esperanza. La Jurisdicción Universal en España. Real Academia de Legislación y Jurisprudencia de la Región de Murcia, 2016,p.52./Remiro Brotóns, Antonio. La persecución de los crímenes internacionales por los tribunales estatales: el principio de universalidad. Tirant lo Blanch, 2007. Chapter XXX (paragraph CLII)/.

17 Saavedra Alessandri, Pablo. "La respuesta de la jurisprudencia de la Corte Interamericana a las diversas formas de impunidad en casos de graves violaciones de derechos humanos y sus consecuencias", in La Corte Interamericana de Derechos Humanos. Un Cuarto de Siglo: 1979-2004, San José de Costa Rica: Corte Interamericana de Derechos Humanos, 2005, p. 385-413.

one called normative or legal impunity, and the other, structural impunity. The first, the author determines, is produced when the state renounces its punitive power through the promulgation of certain norms; the second is that which is generated by factors that affect the *ius puniendi* of the state, that is, it is generated because a series of factors lead the state to act evasively or omissively in the face of the commission of criminal acts. This distinction was already made by Ambos[18] , who referred to the existence of three levels of impunity, distinguishing between legal-material impunity, procedural impunity and structural impunity.

a) Legal-material impunity: Within this, a distinction is made between so-called normative impunity, which arises from an absence of norms or norms that determine the punishable act as lawful or exempt from criminal responsibility; or it can be factual because it arises from an absence of material elements that allow for criminal prosecution and punishment.

b) With regard to procedural impunity, what the author does in order to determine it is to relate it to what we currently recognise as the efficiency of the justice administration system and he relates it to the phase of the process affected by this inefficiency, whether it is investigative, declaratory or executive - the author uses other terminology: investigative, plenary and executive - by establishing the existence of different types of impunity which can be schematically determined in the following way:

De facto impunity: impunity arising from the absence of a criminal prosecution for the initiation of proceedings.

Investigative impunity: Lack of mechanisms for the development of an adequate investigation or directly the absence of an investigation of the act.

Impunity by congestion: Collapse of the system of administration of justice.

Legal impunity: Lack of procedural or procedural rules applicable to the case.

Criminal impunity: Criminal acts are committed against the parties to the proceedings.

c) Impunity as a structural problem: According to Ambos, this impunity stems from socio-political problems, representing "an image of the socio-economic and political relations of an "underdeveloped" society"[19] which produces an absence of credibility on the part of society in justice, favouring those who hold a privileged social class and generating inequality.

Thus, having explained the various types of impunity, this section observes the existence of impunity related to the set of substantive and procedural rules that directly affect the exercise of jurisdictional power, the effectiveness of the system of administration of justice and, therefore, the right of access to justice. It is deduced that the levels of impunity determined by Ambos and Saavedra are

18 Ambos, Kai. Impunity and International Criminal Law. Ad-Hoc, 1999.

19 Ambos, Kai. Impunity and International Criminal Law. Ad-Hoc, 1999, p.42, *in fine*.

interrelated, which is why this party considers that in view of the protection of human rights through universal jurisdiction as a mechanism to fight impunity, and considering the existing relationship between access to justice and impunity, it would not be necessary to make such a differentiation at the present time, Rather, impunity could be defined as impunity resulting from the ineffectiveness of the system of administration of justice, which *per se* encompasses the impunity that exists in the norm for the commission of certain criminal acts, impunity resulting from a deficient procedural and procedural system, and impunity resulting from a corrupt social system, promoted by politics and the economy as the driving force of society and not by the protection of human rights.

Currently, States, at least theoretically, seem to be moving towards a more effective justice system, towards the achievement of Sustainable Development Goal 16 "Peace, justice and strong institutions", which reflects the implementation of a justice system in which access to justice is guaranteed to any citizen, who knows the institution, has the appropriate information mechanisms, is involved to the extent that he/she considers it appropriate in this justice[20] , we are moving towards a more humane, closer, integrative, collaborative justice system, which aims to guarantee the absence of impunity for acts that violate the rights or interests of another person or a group, and also aims to protect victims as vulnerable persons[21].

The change of paradigm and the evolution in access to justice that has been observed over the years allows us to determine that the relationship between the efficiency of the justice administration system, impunity and the right to effective judicial protection is unavoidable. For this reason, it is necessary to reflect on the relationship between the basis of the most classic principle of universal jurisdiction, in order to adapt it to the social reality and to guarantee access to justice for all citizens regardless of the territory where they reside, or rather in today's globalised society, where their rights have been violated.

See also the study by Juan-Sanchez[22] in relation to the quality of justice in which he states that effective access to justice "is also achieved by improving the conditions in which the Administration of Justice is administered and managed", and invites us to reflect by referring, for example, to technological updating through the incorporation of new computer equipment in the administration of justice, which undoubtedly conditions the exercise of jurisdictional functions

20 Corneloup,S./Verhellen,Jinske. "SDG 16: Peace,Justice and Strong Institutions", in The private side of transforming our World.UN Sustainable Development Goals 2030 and The Role of Private International Law.Intersentia, 2021, p. 507.

21 De Lucchi López-Tapia, Yolanda, Las personas con discapacidad: el derecho fundamental de acceso a la misma en condiciones de igualdad. Revista de Estudios Europeos, n.º Extraordinario monográfico, 2023, p.156-181.

22 Juan-Sánchez, Ricardo. "Calidad de la justicia, gestión de los tribunales y responsabilidades públicas: algunos estándares internacionales y otras buenas prácticas para favorecer el acceso a la justicia", in Acceso a la justicia y garantía de los derechos en tiempos de crisis: de los procedimientos tradicionales a los mecanismos alternativos. Tirant lo Blanch, 2018.

and adds that the quality of justice is a criterion for legitimising a public service; however, it is doubtful whether the jurisdictional power provided to guarantee the protection of the injured right or interest includes these aspects that condition its exercise, which inevitably affect the right of access to justice.

3. THE MATERIAL APPLICABILITY OF THE PRINCIPLE OF UNIVERSAL JURISDICTION

The functioning and configuration of the principle of universal jurisdiction in Spain is regulated in Article 23.4 of the Organic Law of the Judiciary (LOPJ) [23]. A reading of the precept, and taking into account the definition initially set out, which relates the application of the principle of universal jurisdiction to the nature of the criminal act, could lead us to wrongly deduce that the model applicable in Spain regarding the principle of universal jurisdiction is a broad model; however, unfortunately, this is not the case *"appearances can be deceiving"* also in a normative sense.

The system currently regulated in the LOPJ is configured as a restrictive model of universal jurisdiction whereby certain conditions are established to determine the applicability of the State's jurisdiction. However, the absolute model, which was the one initially envisaged in Spain, defended by this party, is not conditioned by the subjects of the legal relationship, or by attempting to link it to the State. Rather, its application is based on the nature of the criminal act, see the different models [24]:

This party's decision to opt for this model is basically based on the rationale of the principle, which is the instrument for guaranteeing those rights that are injured and which are not protected by the state where the injury occurred in defence of the general interests of international society, which, by conditioning them, not only runs the risk of directly affecting the sphere of the right to effective judicial protection, but also of creating a legal-material or procedural impunity in a state outside the state where the act was committed, which produces structural impunity at the international level; but also of creating a legal-material or procedural impunity in a State where the act was committed and in the State outside the State where the act was committed, which produces structural impunity at the international level.

When analysing the models of impunity, it seems that the description of the models only applies to a specific state, but not to the international level, when it should be the most relevant in order to safeguard peace and security. In this

23 Ley Orgánica del Poder Judicial. Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.BOE núm. 157, de 02/07/1985.

24 Ollé Sesé, Manuel. "La aplicación del derecho penal internacional por los Tribunales nacionales", in Gil Gil, Ailicia. Maculan, Elena. Derecho Penal Internacional. Dykinson. 2019.

respect, and taking Taruffo's phrase, it should be borne in mind that the right of access to justice as a constitutional guarantee "cannot be interpreted as if it referred only to individual rights, simply leaving aside collective rights"[25] and the fact is that we live in a globalised society and the models of guarantees of the right to effective judicial protection must be adapted to today's society.

Analysing the principle of universal jurisdiction is an arduous task, firstly because Article 23.4 is made up of 16 paragraphs (from letter a) to p), each of which provides for certain types of crime, some of which refer to only one and others to several. Within each of these sections, in turn, certain requirements or conditions are laid down which are cumulative or alternative for the initiation of criminal proceedings, through the exercise of criminal action. Therefore, in view of their configuration and for purely methodological purposes, the most appropriate approach is to analyse access to universal jurisdiction through the provision of connective links with the State, which are the conditions and limits of access that are provided for and which are of different natures.

Therefore, firstly, we will consider the crimes included in the aforementioned precept and for which the principle of universal jurisdiction can be applied. Secondly, we will consider the limits that we could classify as merely procedural and personal.

3.1. The applicability of the principle to certain criminal acts

The application of the principle of universal jurisdiction in each State, as has already been stipulated, can be delimited in accordance with the type of crime that has been committed. Thus, in Article 23, section 4 of the Organic Law of the Judiciary, we find a diversity of criminal acts which, following the classification made in a previous work[26] , can be divided into three large groups: a first group of crimes which can be committed anywhere; a second group of crimes which refer to international conventions because they are included in them; and a third group which are crimes committed in marine areas.

a) The first group: Offences committed in any territory in a broad sense.

1. Crimes of genocide. Art. 607 CP.

2. Crimes against humanity. Art. 607 bis CP.

3. Offences against persons and property protected in the event of armed conflict. Art. 608 to 614 bis CP.

4. Provisions common to those of Art. 615 to 616a.

5. Crimes of torture and against moral integrity. Art. 173 to 177 CP, although 23.4 LOPJ excludes the basic type of art. 173, specifying the inclusion of the types of art. 174 to 177 CP.

25 Taruffo, Michele. Páginas sobre justicia civil. Marcial Pons, Madrid,2009,p.35.

26 Spada Jiménez, A. Climate justice and procedural efficiency, Thomson Reuters Aranzadi, 2021.

6. Terrorism. Art. 573 to 580 CP.

7. Trafficking in human beings. Art. 177 bis CP.

8. Illegal trafficking in toxic drugs, narcotics or psychotropic substances. Arts. 359 to 378 CP.

9. Corruption offences between individuals or in international economic transactions. Articles 286 bis to 286 *quater* CP provide for corruption in business dealings.

10. Offences related to criminal groups or criminal organisation (formation, financing, integration or implementation).

11. The autonomous classification of the offence of belonging to a criminal organisation or group for the commission of crimes is established in Arts. 570 bis to 570 *quáter* and in relation to terrorism, in Arts. 571 and 572 CC, however, there are various offences that provide for the commission of the offence by a criminal organisation or group: Threats by terrorist groups or organisations: Art.170.2 CC; Trafficking in human beings: Art. 177 bis. 6 CC. Organisations for corruption or money laundering: Art. 302; For the illegal financing of political parties: Art. 304 ter CC; Against the right of foreign citizens: Art. 318. Bis. 3. a) CC; Against public health: Arts. 371 and 376 CC; Against State institutions and the division of powers. Art. 505 CC. Unlawful associations: Art. 515 CC.

12. Crimes against sexual freedom and indemnity in underage victims.

To be taken into account: All of Title VIII CP would be included as long as the victim is a minor. Sexual assault: Art. 178 to 180 CP; Sexual abuse: Art. 181 to 182 CP; Sexual assault and abuse of minors under the age of sixteen: Art. 183 to 183 *quater*; Sexual harassment: 184 CP; Exhibitionism and sexual provocation: 185 and 186 CP; Prostitution, sexual exploitation and corruption of minors: Art. 187 to 190 CP; Provisions common to the above: Art.191 to 194 CP.

b) The second group: refers to offences referred to in Conventions to which the precept refers.

1. International Convention for the Protection of All Persons from Enforced Disappearance, done in New York on 20 December 2006[27] . In the Convention, art. 6 defines the conducts that should be criminalised as the crime of enforced disappearance. In our national legislation, art. 607 bis. CP integrates it within the crime against humanity, where enforced disappearance is included as a subspecies of it. Therefore, there is no autonomous and specific classification of the crime of enforced disappearance in national legislation as provided for in the Convention.

27 Instrument of Ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, done at New York on 20 December 2006. BOE No. 42, 18 February 2011, pages 18254 to 18271.

2. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970[28] . Although national legislation does not specifically mention the offence, the criminal conduct included in the Convention coincides with that of Art. 616 ter and *quater* of the CP, as a crime of piracy, and in turn is included within the conduct of the crime of terrorism in Art. 573 CP. However, the CP is not the only text that regulates such conduct, as it is established in the Criminal and Procedural Law on Air Navigation of 1964, specifically in Art. 39 and 40 as an offence against the law of nations[29] .

3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 1988[30] . In relation to the conducts envisaged by this procedural instrument, as with the aforementioned Convention, they are not specifically regulated in the CP, and therefore the applicable precepts are Art. 573 and 616 *ter* and *quater* CP, Title II of the Criminal and Procedural Law on Air Navigation and Art. 1 of the Convention itself.

4. Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on 3 March 1980[31]. The Spanish Criminal Code (CP) regulates offences relating to nuclear energy and ionising radiation, from Art. 341 to 345, typifying the criminal conduct foreseen in Art. 7 of the Convention.

5. Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011[32] . The criminal conducts regulated by the Convention from art. 36 to 42, coincide with some of the conducts included in the CP, being found in different systematic locations within the law itself, in relation to female genital mutilation, which is provided for in art. 149; the crime of abortion, in art. 144 to 146; the crime of abortion, in art. 144 to 146; the crime of abortion, in art. 144 to 146; the crime of rape, in art. 149; and the crime of rape, in art. 149.The crime of abortion, in Art. 144 to 146; forced marriage, in Art. 172 bis and marriage included in human trafficking in Art.177 bis.1, e); in relation to the crimes of sexual indemnity and freedom in Title VIII of the CC, they should also be considered included. The CP qualifies

28 Instrument of Ratification of the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970. BOE No. 13 of 15 January 1973, pages 742 to 743.

29 Law 209/1964, of 24 December 1964, Criminal and Procedural Law on Air Navigation. BOE no. 311, 28 December 1964.

30 Instrument of Ratification of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971, BOE No. 9 of 10 January 1974, pages 551 to 553. Instrument of Ratification of the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (done at Montreal on 23 September 1971), done at Montreal on 24 February 1988. BOE No. 56 of 5 March 1992, pages 7565 to 7567.

31 Instrument of ratification of the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on 3 March 1980. BOE No. 256, 25 October 1991, pages 34558 to 3456.

32 Instrument of ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, done at Istanbul on 11 May 2011. BOE No. 137, 6 June 2014, pages 42946 to 42976.

what the Convention establishes and the Convention does not specifically provide for certain conducts.

6. Council of Europe Convention on the counterfeiting of medical products and similar offences that pose a threat to public health of 28 October 2011[33] . The Convention provides for criminal conduct from art. 5 to art. 9, coinciding with those regulated in art. 361 to 362 *quater* CP.

c) The third group: Offences committed in marine areas.

The article itself differentiates it as the only paragraph that has a broad applicability of the principle of universal jurisdiction, including the following:

1. Piracy. Arts. 616 ter and 616 *quáter* CP.

2. Terrorism. Arts. 573 to 580 CP.

3. Crimes of illegal trafficking in toxic drugs, narcotics and psychotropic substances. Arts. 359 to 378 CP.

4. Trafficking in human beings. Art. 177 bis. CP.

5. Against the rights of foreign citizens. Art. 318 bis CP.

6. Against the safety of maritime navigation. The offence is not defined in national legislation, although it can be included in the offence of terrorism by determining the commission of the offence against maritime navigation in Art. 573 CP.

To be taken into account: Despite the absence of criminal conduct constituting the offence expressly, the European Union has set the protection of peace and security at sea as its main objective in the 2014 Maritime Safety Strategy[34] , for which it has developed various action plans. Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[35] is responsible for defining what constitutes conduct against maritime safety.

3.2. Conditional right of access to jurisdiction for victims

3.2.1. The concept of victim and its interpretation as a first condition

The concept of victim is relevant in relation to the active legitimation in the process, given that for the attribution of competence for universal jurisdiction, the LOPJ establishes the need for a complaint to be filed by the offended party or by the MF, but who holds the status of offended party?

33 Instrument of ratification of the Council of Europe Convention on counterfeiting of medical products and similar offences that pose a threat to public health, done at Moscow on 28 October 2011. BOE No. 286 of 30 November 2015, pages 112677 to 112692.

34 European Union Maritime Safety Strategy of 24 June 2014.

35 Instruments of Ratification of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. BOE No. 99 of 24 April 1992, pages 13842 to 13846.

3.2.1.1. The general concept of victim under international law

In an international context and with a universal scope of application, the concept of victim is established in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[36] , where two groups of victims are described: as a victim of an unlawful criminal conduct and as a victim of a conduct derived from abuse of power[37] , establishing a fairly broad concept, however, the national legislations of various States recognise the victim as the one who suffers the harm directly, i.e. as the owner of the protected legal right[38] . The above definition was qualified by General Assembly Resolution 60/147 of 16 December 2005[39] , adding the possibility of attributing the term victim to the family, dependents of the victim or persons who have assisted the victim, thus distinguishing the subjects and leaving it to the discretion of each state to regulate it.

However, the International Criminal Court, in the Rules of Procedure and Evidence[40] , grants the status of victim to persons who have suffered harm without distinguishing whether the harm should be direct or indirect, although it does establish this in the case of institutions or organisations, which will only have such status for direct harm.

3.2.1.2. The general concept of victim in Community law

The concept of crime victim is defined in Directive 2012/29/EU[41] , although it is not applicable to victims of particularly serious crimes, which have their own specific European legislation[42] , which establishes that a victim is a natural person who has suffered physical, mental, emotional or economic harm as a result of a criminal offence and includes in the following section the relatives of the victim who have suffered harm or damage as a result of the death. It establishes a

36 General Assembly Resolution 40/34 "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" A/RES/40/34 (29 November 1985).Available at: https://www.ohchr.org/sp/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx

37 To understand by any harm those included in the Resolution *"physical or mental injury, emotional suffering, financial loss or substantial impairment of their fundamental rights"* Paragraphs A and B of A/RES/40/34 (29 November 1985).

38 Sanz Hermida, Ágata. *La situación jurídica de la víctima en el proceso penal.* Tirant lo Blanch. Valencia 2008. p. 21-25.

39 General Assembly Resolution 60/147 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". A/RES/60/147 (of 16 December 2005). Available at: https://www.ohchr.org/sp/professionalinterest/pages/remedyandreparation.aspx

40 Rule 85 of the Rules of procedure and evidence. Available at: https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdfn

41 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. OJEU No. 315 of 14 November 2012, pages 57-73.

42 Blázquez Peinado, Mª D. "La Directiva 2012/29/UE ¿Un paso adelante en materia de protección a las víctimas de la Unión Europea?" *Revista de Derecho Comunitario Europeo.* Madrid September/December.2013. p. 919 .

definition in a later section of "family members", where it includes the spouse, a person of analogous relationship, direct relatives, siblings and dependants of the victim.

3.2.1.3. The general concept of victim in domestic law

The transposition of Directive 2012/29/EU in Spain is carried out through the creation of the Crime Victims' Statute (EV)[43] , the Regulation for the development of the Statute and the regulation of assistance offices[44], Real Decreto 1110/2015[45] and the modification of articles 109 *bis* and 110 of the Criminal Procedure Act (LECrim)[46] .

The concept of victim in the EV, like the Directive, is divided into direct victim and indirect victim, however, it limits the concept of indirect victim by establishing a list of family members in order of priority[47] , which is quite debatable, given that it makes the bringing of criminal proceedings against some family members conditional on the existence or not of others, thus excluding the victim's siblings or parents[48] . Do these subjects not suffer the loss; would they not have the same right to bring criminal proceedings as the spouse and children?

The practical consequence of such wording, together with the restriction of the JU, is materialised in Judgment 1/2017 of Audiencia Nacional, where the sister of a citizen who is dead after suffering the commission of several crimes by the Syrian regime is denied the status of victim and in which the status of victim is attributed only to the passive subject of the crime, in accordance with the Plenary Order of the Audiencia Nacional[49] under appeal and the jurisprudence of the SC on the JU. Therefore, the Spanish judicial body is declared to lack jurisdiction, not having been considered an indirect victim of the crime[50] .

3.2.1.4. Concept of victim in specific crimes

For the specific types of crime where the victim is allowed to prosecute, there are a number of legal instruments that provide for victim protection and which could be useful to reinforce the restricted victim concept.

43 Law 4/2015, of 27 April, on the Statute of the Victims of Crime. BOE" no. 101, of 28/04/2015.

44 Royal Decree 1109/2015, of 11 December, which implements Law 4/2015, of 27 April, on the Statute of the Victims of Crime, and regulates the Offices for Assistance to Victims of Crime. BOE no. 312, of 30 December 2015, pages 123162 to 123181.

45 Royal Decree 1110/2015, of 11 December, which regulates the Central Register of Sex Offenders. BOE No. 312, 30 December 2015 Sec. I. P. 123182.

46 Amended by Law 4/2015, of 27 April. Ref. BOE-A-2015-4606.

47 See art.2 of Law 4/2015, of 27 April, on the Statute of the Victims of Crime. BOE" no. 101, of 28/04/2015.

48 Gutiérrez Romero, F.M. "Estatuto de la víctima del delito: algunos comentarios a la Ley 4/2015" Revista Aranzadi Doctrinal num.7/2015 parte Estudios. Editorial Aranzadi, S.A.U., Cizur Menor.2015.

49 Audiencia Nacional. Sala de lo Penal. Order 35/2017, of 27 July 2017.

50 Audiencia Nacional. Sala de lo Penal. Judgment 1/2017 of 15 December 2017.

For terrorist offences: Directive 2017/541/EU on combating terrorism[51] does not establish the concept specifically, although it does determine the applicability of protection measures to victims and family members, without distinction, so it could be understood that both the owner of the legal asset and their family members would have the status of victim[52] . At the state level, the recipients of compensation for being victims of terrorism are established in Law 29/2011[53] , however, in accordance with the purpose of the regulation, in my opinion, it only provides for the recognition of the victim for the purposes of compensation and not for legal standing.

For human trafficking offences: Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims[54] does not specifically define the victim, but the Convention of 16 May 2005 on Action against Trafficking in Human Beings[55] does[56] and equates it with the passive subject of the offence, i.e. the holder of the protected legal interest.

For crimes against sexual indemnity and sexual freedom: In the 2011 Istanbul Convention[57] , the victim of a crime of violence against women and of domestic violence is defined as the victim who has suffered physical, mental or economic harm, without specifying the subjects. At the European level, Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order[58] and Regulation No. 606/2013[59] , although they seem to apply specifically to crimes of gender-based violence, do not define the concept of victim.

In offences of counterfeit medical products that are a threat to public health: The 2011 Moscow Convention[60] does not distinguish between family members and victim, it only requires the harm to have been suffered as a

51 Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. OJ L 88/6 31.3.2017.

52 Vid. art.24 section 1 and 7, and art. 25 *Ibid.*

53 Law 29/2011, of 22 September, on the Recognition and Comprehensive Protection of Victims of Terrorism. BOE no. 229, 23 September 2011, pages 100566 to 100592.

54 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims, and replacing Council Framework Decision 2002/628/JHA. OJ L 101/1 of 15.4.2011.

55 Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention No. 197), done at Warsaw on 16 May 2005. BOE" No 219 of 10 September 2009, pages 76453 to 76471.

56 BOE" No 219 of 10 September 2009, pages 76453 to 76471.

57 Council of Europe Convention on preventing and combating violence against women and domestic violence, done at Istanbul on 11 May 2011. BOE" No. 137, 6 June 2014, pages 42946 to 42976.

58 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order. OJ L 338/2, 21.12.2011.

59 Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters. OJ L 181/4 of 29.06.2013.

60 Council of Europe Convention on counterfeit medical products and similar offences that pose a threat to public health, done at Moscow on 28 October 2011.

result of the use of a particular product[61] . The Convention also includes a state obligation around the exercise of jurisdiction when a national or habitual resident is the victim.

For offences against maritime navigation and piracy: In the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)[62] and for piracy offences and in the United Nations Convention on the Rights of the Sea (UNCLOS)[63] , there is an absence of the concept of victim.

3.2.2. The nationality of the victim and the perpetrator as a condition for access

Once the limits set around the victim and his or her conceptualisation have been overcome, there are also limits around the nationality of the victim, granting him or her the possibility of accessing the jurisdiction if he or she is a Spanish national for certain criminal acts[64] . For other types of criminal offences, it is determined that the victim can bring a criminal action regardless of his or her nationality[65] ; and for others, access to justice is conditional on the perpetrator of the criminal offence, allowing access if the perpetrator is in our territory[66] , otherwise, it is not possible.

The legislator does not go beyond the above, which means that it will always be materially unfeasible for a victim who does not know whether or not the perpetrator is in Spain to bring a criminal action, the proceedings could not be initiated due to a lack of standing, and a pre-procedural investigation phase will not be initiated because it is a procedural requirement. In view of the above, we can only question whether this regulation complies with Directive 2012/29, insofar as it states (recital 10) that Member States may not make victims' rights conditional on nationality or residence. With the above, we refer to the provisions on nationality for each type of crime set out in the list of Article 23 LOPJ, in which the legislator confuses the principle of universal jurisdiction with the principle of passive personality, as some require the victim to be a national, in others the perpetrator and in others that he/she is in Spain, whether or not he/she is a national.

---

61 Art. 4 (k) *Ibid.*

62 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. BOE No. 99 of 24 April 1992, pages 13842 to 13846.

63 United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982. BOE No. 39 of 14 February 1997, pages 4966 to 505.

64 Art.23.4 e), k) LOPJ.

65 Art. 23.4 d), j), e) LOPJ.

66 Art.23.4 b), c) LOPJ. Instrument of ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, done at Istanbul on 11 May 2011. BOE No. 137 of 6 June 2014; Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention No. 197), done at Warsaw on 16 May 2005. BOE No. 219 of 10 September 2009.

3.2.2.1. Offences where the nationality of the victim or the perpetrator is not a determining factor

The only offences for which no limitation is foreseen in relation to either the perpetrator or the victim are the following:

a) In the crimes of piracy, terrorism, illegal trafficking in toxic drugs, narcotics or psychotropic substances, trafficking in human beings, crimes against the rights of foreign nationals and the safety of maritime navigation[67] , provided that they have been committed in "maritime areas", meaning international waters[68] .

b) Crimes intended to be committed in Spain by a criminal group or organisation, including the constitution, financing or integration, punishable by more than three years' imprisonment[69] .

3.2.2.2. Crimes in which the victim is not conditioned by reason of his or her nationality

Access to jurisdiction through the above-mentioned offences is not provided for in a broad manner and should not be confused with the above-mentioned offences. This group includes those offences in which the victim is not required to fulfil a condition, but the possibility of bringing a criminal action depends on the nationality of the perpetrator of the offence.

a. Crime of genocide, against humanity or against protected persons and property in the event of armed conflict[70] .

b. Offences that are included in the Convention for the Suppression of Unlawful Seizure of Aircraft, which are the exercise of violence, threat, or intimidation for the purpose of seizing or unlawfully controlling an aircraft in flight[71] .

c. Offences set out in the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation[72] and its 1988 Supplementary Protocol[73] .

67 Art. 23.4 d) *Ibid.*

68 Supreme Court. Judgment 810/2014, of 3 December of the Criminal Chamber, establishing the difference between letter d) and i) of Art.23.4 LOPJ, understanding "marine spaces" as international waters.

69 Art.23.4(j) *Ib.*

70 Art.23.4.a) of Organic Law 6/1985, of 1 July, of the Judiciary. "BOE" no. 157, of 02/07/1985.

71 Art. 1 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. BOE No. 13 of 15 January 1973.

72 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971. BOE No. 9 of 10 January 1974, pages 551 to 553.

73 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (done at Montreal on 23 September 1971), done at Montreal on 24 February 1988. BOE No. 56 of 5 March 1992, pages 7565 to 7567.

d. Offences under the 1980 Convention on the Physical Protection of Nuclear Material[74] .

e. Crime of illegal trafficking in intoxicating drugs that is not carried out in international waters[75] .

f. Corruption offences between private individuals and international economic transactions[76] .

3.2.2.3. Crimes in which only the victim with Spanish nationality can bring criminal proceedings

In this case, the legislator confuses the principles applicable to the extension of jurisdiction, as it confuses the principle of universal jurisdiction with the principle of passive personality. This means that it determines access to jurisdiction only for its own nationals when they are the passive subjects of the crime.

a. In relation to the crime of terrorism[77] not committed in international waters, the victim of Spanish nationality will be able to exercise the criminal action as long as he/she had it at the time the criminal acts were committed. It is unfounded that the legislator does not add requirements for the victims in the case of terrorist crimes committed in maritime space, and when they occur on land, it does the opposite; such a differentiation makes no sense, as both are victims of the same criminal act.

b. For crimes against sexual freedom and indemnity whose victims are minors[78] .

c. For offences under the 2011 Convention on the counterfeiting of medical products and which are a threat to public health[79] .

3.2.2.4. Offences in which the victim is dependent on the passive subject being in Spain

a. Crimes of torture, offences against moral integrity[80] and enforced disappearance[81].

74 The types of offences provided for in the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on 3 March 1980. BOE No. 256, 25 October 1991, pages 34558 to 34562.

75 Art. 23.4.i) Organic Law 6/1985, of 1 July, of the Judiciary. "BOE" no. 157, of 02/07/1985.

76 Art. 23.4.n) *Ibid.*

77 Art.23.4 e) *Ib.*

78 Art. 23.4 k) *Ib.*

79 Council of Europe Convention on counterfeiting of medical products and similar offences that pose a threat to public health, done at Moscow on 28 October 2011. BOE No. 286 of 30 November 2015, pages 112677 to 112692.

80 Art.23.4 b) *Ut supra.*

81 Art.23.4 c) *Ibid.*

b. Section 23.4 (l) refers us to the crimes of violence against women and domestic violence provided for in the 2011 Istanbul Convention[82].

c. Crimes of trafficking in human beings. Although it is contrary to the provisions of the Convention on Action against Trafficking in Human Beings[83] which determines the exercise of jurisdiction among other cases when the victim is a national of the State Party[84].

3.3. Kinship as a condition for legitimising the victim

They are called personal limits because they relate both to the active subjects, who are those who have committed the criminal act, and to the passive subjects, who are the victims. It is the latter who will be the focus of attention in this part of this section, as they are where the right of access to jurisdiction effectively lies.

The victims, as we have previously observed in the procedural requirements, must file a complaint to initiate the process, but beyond this requirement to activate the jurisdictional function, they must take into account that depending on the criminal act that has been committed, certain requirements must be met for the exercise of the criminal action; or rather, certain external conditions must be met that do not depend on them in order to do so.

Bearing this in mind, first of all, it should be observed whether the victim has standing to be considered a victim and to bring a criminal action, otherwise it will be impossible to do so. However, it should be borne in mind that the condition of victim is not a specific requirement in the procedural rule that regulates the principle[85] , nor in the Statute of the Victim of the Crime[86] , and if we go deeper, neither in the international or European Union regulations, Rather, it is at the jurisprudential level where such statements have been made and the initiation of proceedings through the principle of universal jurisdiction has been made impossible, alleging an absence of jurisdiction because the criminal action must be brought by the person who the court interprets to be considered a victim (see STS 139/2019, 13 March).

However, in order to carry out an adequate analysis of this issue, a more in-depth study should be carried out, but with regard to access to jurisdiction through the principle of universal jurisdiction, reference will be made to the

82 Instrument of ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, done at Istanbul on 11 May 2011. BOE No. 137 of 6 June 2014, pages 42946 to 42976 (31 pp.).

83 Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention No. 197), done at Warsaw on 16 May 2005. BOE No. 219 of 10 September 2009, pages 76453 to 76471.

84 Art.31 Ibid.

85 Art.23.4.a) of Organic Law 6/1985, of 1 July, of the Judiciary. "BOE" no. 157, of 02/07/1985.

86 Law 4/2015, of 27 April, on the Statute of the Victims of Crime. BOE" no. 101, of 28/04/2015.

concept of victim in the legislation and then to the provisions of the courts in this regard.

If we go into the framework of international law, the recognition of rights and respect for international legislative instruments for victims is provided for in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[87] , However, the general concept of victim as a subject of rights regulated in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*[88] , is a broader and less descriptive concept, where two groups of victims are distinguished: As a victim of unlawful criminal conduct and as a victim of conduct arising from abuse of power - which have resulted in any harm whether physical, moral or pecuniary. On the other hand, the *Rules of Procedure and Evidence of the International Criminal Court*[89] , attribute the status of victim to natural persons and to institutions or organisations. For the former, it only provides that they have suffered harm without distinguishing whether the harm should be direct or indirect, whereas for the latter, they will only be considered when they suffer direct harm.

In the European Union, the concept of victim is set out in Directive 2012/29/EU[90] , which establishes as an objective the need to recognise the need for information, support, protection and participation in criminal proceedings. As regards the general definition of "victim" in Article 2, which states *"(i) a natural person who has suffered harm or damage, in particular physical or mental injury, emotional harm or economic loss, directly caused by a criminal offence, (ii) the relatives of a person whose death has been directly caused by a criminal offence and who have suffered harm or damage as a result of that person's death;The* term "family members" includes *"the spouse, the person who lives with the victim and maintains an intimate and committed personal relationship with him or her in a common household on a stable and continuous basis, immediate family members, brothers and sisters, and dependants of the victim".*

As regards the commission of specific offences for which there is specific regulation, the Directive does not apply. There are numerous instruments specialised in certain criminal acts[91] , in some there is no definition of the victim,

87 General Assembly resolution 60/147 of 16 December 2015. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. A/RES/60/147.*

88 General Assembly Resolution 40/34 of 29 NOVEMBER 1985. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. A/RES/40/34.

89 Rule 85 of the Rules of procedure and evidence.

90 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. OJEU No 315 of 14 November 2012.

91 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order. OJ L 338/2, 21.12.2011; Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on the mutual recognition of protection measures in civil matters. OJ L 181/4 of 29.06.2013.;Council of Europe Convention on the counterfeiting of medical products and similar offences that pose a threat to public health, done at Moscow on 28 October 2011.

but in others where it is determined, there is also no distinction of any kind of victim[92] , the victim being the natural person who is the subject of the protected legal right that has been damaged and his or her relatives in the event of death, who have the status of victim, and therefore, the legitimacy to attribute to him or her all the rights inherent to the right to effective judicial protection.

However, in the national regulation on the victim of the crime, there is a restriction on the concept of victim. This restriction, as mentioned above, is due to the interpretation that has been given at the jurisdictional level. This party does not consider understandable the regulation granted by our legislator to the concept of victim when transposing Directive 2012/29/EU developing the Statute of the victim of the crime (EV)[93] , the Regulation of development of the Statute and the regulation of assistance offices[94] , the Royal Decree 1110/2015[95] and the articles of exercise of the criminal action of the Criminal Procedure Act (LECrim) (Which have been modified for the last time in 2021 arts. 109 *bis* and 110)[96] , since the EV distinguishes between direct victim and indirect victim, limiting the concept of indirect victim through an order of priority of relatives[97] , stipulating that the direct victim is the one who has suffered damage to his or her physical or moral person or assets; and the indirect victim is defined as the relatives and friends of the direct victim in the case of death or disappearance due to the commission of a criminal act. What is striking, among other questions[98] , is the order of preference set out in the following paragraph: *"2. In the absence of the above, to the other relatives in a straight line and their siblings, with preference, among them, to the one who holds the legal representation of the victim"*[99] .

Art. 4(k); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. BOE No. 99 of 24 April 1992; United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982. BOE No. 39 of 14 February 1997, pages 4966 to 505.

92 Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. OJ L 88/6 31.3.2017. Vid. art.24 paragraph 1 and 7, and art. 25; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims, and replacing Council Framework Decision 2002/628/JHA. OJ L 101/1, 15.4.2011; Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention No. 197), done at Warsaw on 16 May 2005. See: BOE No 219 of 10 September 2009, pages 76453 to 76471.

93 Law 4/2015, of 27 April, on the Statute of the Victims of Crime. BOE" no. 101, of 28/04/2015.

94 Royal Decree 1109/2015, of 11 December, which implements Law 4/2015, of 27 April, on the Statute of the Victims of Crime, and regulates the Offices for Assistance to Victims of Crime. BOE no. 312, of 30 December 2015, pages 123162 to 123181.

95 Royal Decree 1110/2015, of 11 December, which regulates the Central Register of Sex Offenders. BOE No. 312, 30 December 2015 Sec. I. P. 123182.

96 Amended by Law 4/2015, of 27 April. Ref. BOE-A-2015-4606.

97 See art.2 of Law 4/2015, of 27 April, on the Statute of the Victims of Crime. BOE" no. 101, of 28/04/2015.

98 Carrizo Gonzalez Castel, A. Luces y sombras en torno al ejercicio de la acción penal derivado de los artículos 109 y 109 bis de la Ley de Enjuiciamiento Criminal. La Ley, nº 8796. Ref. D-267, LA LEY. 2016.

99 Article 2 of the Crime Victims' Statute.

The differentiation made on the grounds of kinship raises at least some doubts as to its constitutionality insofar as it limits the exercise of criminal action, and therefore effective judicial protection, as well as contradicts the provisions of European legislation (see recitals 10, 11 and 22 of Directive 2012/29). Furthermore, it is worth highlighting the sentence set out in the Tribunal Supremo Judgment (Supreme Court) [100] in the case of a Spanish national victim whose brother disappeared, was tortured and murdered under the Syrian regime and whose family at the time of the events resided in Syria, who was denied access to jurisdiction based on the principle of universal jurisdiction for not having the status of victim, stating the following: *"…to claim the status of victim, something more than a subjective perception is needed. Mere awareness of one's own victimisation does not confer the status of a victim of crime. Nor does the psychological experience of injustice suffice. Conceptualisation as such cannot be derived from the emotional impact of the crime. Victimisation, even understood in its most historical dimension, must be understood as an objective condition, originating from a suffering directly linked to a punishable act"* (FJ 4º).

I do not intend to go further into the matter because it deserves a more detailed study, but the Court's pronouncement denotes that it is guided by a more political will in order not to get involved in the fight against the Syrian regime than in a conceptual one, A review of international instruments and the doctrine [101] suffices to determine that this decision restricts the right of access to victims insofar as "universal jurisdiction derives from an international obligation, a decision not to prosecute, based on considerations of expediency, constitutes a breach of that obligation" [102] .

Reflecting briefly on the case, it seems that the legislation grants victims levels of protection according to their kinship; the Public Prosecutor's Office does not file a complaint, although it must do so in order to defend the general interest and is, of course, empowered to do so; The aforementioned Directive is applicable to the European Union, which means that the order of priority will always be applicable when an action is intended to be brought within the territory of the European Union, regardless of the origin or provenance of the victim, however, they apply this regulation to limit access to justice when the rest of the victims are within Syrian territory in an armed conflict, therefore it is absolutely impossible to bring a criminal action and only the action of the victim who is in Spain can be brought. What cannot be allowed is that in a case such as this, the victims have been left without effective judicial protection.

---

100 Judgment 139/2019 of the Criminal Division of the Supreme Court, of 13 March 2019 (FJ.4º).

101 See the study by Diaz Cabiale, J./Cueto Moreno, C. 2022,p.27) Víctimas, ofendidos y perjudicados: concepto tras la LO 8/21. Electronic Journal of Criminal Science and Criminology. 2022, núm. 24-04.

102 Pigrau, A. La Jurisdicción Universal y su aplicación en España: la persecución del genocidio, los crímenes de guerra y los crímenes contra la humanidad por los tribunales nacionales. Barcelona: Oficina de Promoción de la Paz y de los Derechos Humanos, Generalitat de Cataluña (Recerca x Drets Humans, 3), 2009, p.59.

3.4. Procedural constraints

The limits that we refer to as procedural are specifically so because they apply in general to all cases, and condition the admissibility and admissibility of the criminal action. By this, I am referring to the requirements regulated in sections 5 and 6 of Article 23 of the Organic Law of the Judiciary. The first of these provides for lis pendens, which prevents the possibility of initiating proceedings if another State is hearing the same facts. On the other hand, reference is made to the principle of subsidiarity with which the principle of universal jurisdiction is configured, foreseeing that in the existence of concurrent jurisdictions where another principle of extension of jurisdiction is applied, it will have a subsidiary nature, with the other principle being applied first. However, the principle of passive personality as such is not provided for in the Organic Law of the Judiciary and, given the subsidiarity and complexity of its regulation, its application will not be viable in the majority of cases.

Paragraph 6 stipulates that a complaint by the victim of the crime or the Public Prosecutor's Office must be filed in order for proceedings to be initiated, and this cannot be done by means of a complaint or by means of the exercise of popular action. This paragraph does nothing more than "bury universal justice even more if possible"[103] and burden the victim with a legislative framework and with the economic costs that such compliance confers on them, which hinders their access to jurisdiction.

4. CONCLUSIONS

The conclusions reached in this paper are set out in the respective sections of the study, although the following are worth highlighting:

The principle of universal jurisdiction has two purposes that should not be forgotten by international society. On the one hand, it guarantees the right to effective judicial protection through access to the jurisdiction of a state other than the one in which the criminal act was committed. On the other hand, as a legal mechanism to avoid impunity, since it has preventive, dissuasive and retributive effects.

In relation to access to justice, this party considers that in order to overcome the deficiencies that affect the justice administration system and to achieve a more efficient system, it must be taken into account that we find ourselves in a more humane society, which demands a justice system that is close, fast, accessible, among others. Thus, the integration of elements of quality, administration,

103 Esteve Moltó, Elias. *La Ley Orgánica 1/2014 de reforma de la jurisdicción universal: entre el progresivo avance de la globalización comercial y de la deuda y la no interjerencia en los asuntos internos de China.* Spanish Yearbook of International Law. Vol.30, 2014.

institution and responsibility are defended within the sphere of the right to effective judicial protection.

As for the application of the principle of universal jurisdiction, as a mechanism for the protection of rights violated by the commission of certain criminal acts and with the aim of safeguarding international peace and security, it cannot be configured in the way it is currently envisaged in our Organic Law of the Judiciary. The existence of procedural prerequisites, as well as the framework of crimes and conditions to be fulfilled, make it practically inapplicable.

Linked to the above, the non-application of a system of universal jurisdiction in a globalised society such as today's, leads us to run the risk of falling into impunity of a juridical-material and, in the long term, structural nature.

This has led this party to question the inexistence of global impunity, or rather, to claim the existence of a type of global impunity, which is effectively generated when neither internal nor external instruments allow citizens access to jurisdiction in defence of their violated rights.

Regarding to the second aim, the conceptualisation of direct and indirect victims in Spain, the interpretation of case law, and its relationship with the exercise of criminal action, have led this party to frustration regarding the true existence of the right to effective judicial protection of the victims of a criminal act committed abroad. Likewise, the wording chosen by the legislator to grant a citizen the concept of victim is incomprehensible to this party, as it does so, firstly, by restricting the provisions of European and international law, and secondly, because it determines that on the basis of the criminal offence, the nationality or family status of the victim must be taken into account, the nationality or family relationship with the victim who has died or disappeared, you will be granted more or less protection of the injured right by the judicial bodies, which leads to a violation of the right of access to justice through the principle of universal jurisdiction.

As a final reflection on the above, I would like to say that society is becoming more and more globalised, it is intercultural and connected practically in real time, thanks to technology. However, despite this, it seems that society is lacking in collective action for the protection of both individual and collective rights and interests; or at least the laws reflect this. We should not let ourselves fall into such individualism because it will only lead to a more unjust society.

BIBLIOGRAPHY

Ambos, Kai. *Impunity and International Criminal Law*. Ad-Hoc, 1999.

Añón, Maria José. "El derecho de acceso como garantía de justicia", in García-Pascual, Cristina *Acceso a la justicia y garantía de los derechos en tiempos de crisis: de los procedimientos tradicionales a los mecanismos alternativos*. Tirant lo Blanch, 2018.

Berdugo Gómez de la Torre, Ignacio. "Acerca de la Internacionalización del Derecho Penal", in *El principio de Justicia Universal: Fundamentos y límites*. Tirant Lo Blanch. 2012. p. 23-32.

Blázquez Peinado, Mª D. "La Directiva 2012/29/UE ¿Un paso adelante en materia de protección a las víctimas de la Unión Europea?" Revista de Derecho Comunitario Europeo. Madrid September/December.

Diaz Cabiale, J./Cueto Moreno, C. 2022,p.27. Víctimas, ofendidos y perjudicados: concepto tras la LO 8/21. Electronic Journal of Criminal Science and Criminology. 2022, núm. 24-04.

Carrizo Gonzalez Castel, Adán. *Luces y sombras en torno al ejercicio de la acción penal derivado de los artículos 109 y 109 bis de la Ley de Enjuiciamiento Criminal*. La Ley, nº 8796. Ref. D-267, LA LEY. 2016.

Cherif Bassiouni, Mahmud. *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*. Virginia Journal of International Law Association. 2001, 42 Va. J. Int'l. L. 81.

Corneloup,S./Verhellen,Jinske. "SDG 16: Peace,Justice and Strong Institutions", in *The private side of transforming our World.UN Sustainable Development Goals 2030 and The Role of Private International Law.*Intersentia, 2021, p. 505-539.

De Lucchi López-Tapia, Yolanda, *Las personas con discapacidad: el derecho fundamental de acceso a la misma en condiciones de igualdad*. Revista de Estudios Europeos, n.º Extraordinario monográfico, 2023, p.156-181.

Gutiérrez Romero, F.M. "Estatuto de la víctima del delito: algunos comentarios a la Ley 4/2015" Revista Aranzadi Doctrinal num.7/2015 parte Estudios. Editorial Aranzadi, S.A.U., Cizur Menor.2015.

De Vattel, Emer. *The Law of Nations*. Liberty Fund, 1797.

Esteve Moltó, Elias. *La Ley Orgánica 1/2014 de reforma de la jurisdicción universal: entre el progresivo avance de la globalización comercial y de la deuda y la no interjerencia en los asuntos internos de China*. Spanish Yearbook of International Law. Vol.30, 2014.

Francioni, Francesco. "The Rights of Access to Justice under Customary International Law", in Francioni, Francesco, *Access to Justice as a Human Right*. Oxford University Press, Academy of European Law, European University Insitute, 2007.

García Añon, J. "El acceso a la justicia como garantía de los derechos humanos: apuntes sobre su evolución", in De Lucas Martín, Javier; Vidal Gil, Ernesto; Fernández Ruiz-Gálvez, Encarnación; Bellver Capella, Vicente (coord.).*Pensar el tiempo presente Homenaje al profesor Jesús Ballesteros Llompart*. Tirant lo Blanch.2018,p.663-676.

Grocio, H. *De iure belli ac pacis*. 1625. Translation: Arriaga Benitez, J.M. Annotated translation of Hugo Grotius' work De Iure belli ac pacis on the Ius ad bellum.2015.

Juan-Sánchez, Ricardo. "Calidad de la justicia, gestión de los tribunales y responsabilidades públicas: algunos estándares internacionales y otras buenas prácticas para favorecer el acceso a la justicia", in *Acceso a la justicia y garantía de los derechos en tiempos de crisis: de los procedimientos tradicionales a los mecanismos alternativos*. Tirant lo Blanch, 2018.

Martinez Alcañiz, Abraham. "El principio de justicia universal. In: El Principio de Justicia Universal y los Crímenes de Guerra. p.119 y ss. IUGM-UNED. Madrid, 2015.

Ollé Sesé, Manuel. *Universal Justice for International Crimes*. La Ley. 2008.

Ollé Sesé, Manuel. "La aplicación del derecho penal internacional por los Tribunales nacionales", in Gil Gil, Ailicia. Maculan, Elena. *Derecho Penal Internacional*. Dykinson. 2019.

Orihuela Calatayud, Esperanza. *Universal Jurisdiction in Spain*. Real Academia de Legislación y Jurisprudencia de la Región de Murcia, 2016.

Pigrau, A. *La Jurisdicción Universal y su aplicación en España: la persecución del genocidio, los crímenes de guerra y los crímenes contra la humanidad por los tribunales nacionales*. Barcelona: Office for the Promotion of Peace and Human Rights, Generalitat de Catalunya (Recerca x Drets Humans, 3), 2009.

Reifarth Muñoz, Walter. *La tutela colectiva de los derechos fundamentales*. Aranzadi, 2023.

Remiro Brotóns, Antonio. *La persecución de los crímenes internacionales por los tribunales estatales: el principio de universalidad*. Tirant lo Blanch, 2007.

Sanz Hermida, Ágata. "El concepto de víctima" La situación jurídica de la víctima en el proceso penal. Tirant lo Blanch. Valencia 2008.

Saavedra Alessandri, Pablo. "La respuesta de la jurisprudencia de la Corte Interamericana a las diversas formas de impunidad en casos de graves violaciones de derechos humanos y sus consecuencias", in La Corte Interamericana de Derechos Humanos. Un Cuarto de Siglo: 1979-2004, San José de Costa Rica: Corte Interamericana de Derechos Humanos, 2005, p. 385-413.

Simón, J.M. *Universal jurisdiction. The public international law perspective*. Revista Electrónica de Estudios Internacionales, 2002.

Taruffo, Michele. *Páginas sobre justicia civil*. Marcial Pons, Madrid, 2009.

Taruffo, Michele. *Rationality and crisis of procedural law*. DOXA 22.1999.

Vázquez Serrano, Irene. *The principle of universal jurisdiction*. Revista Electrónica de Derecho Internacional Contemporáneo: REDIC, ISSN-e 2618-303X, Vol. 1, Nº. 1, 2018.

PART III
CROSS-BORDER LITIGATION: PROCEEDINGS AND JURISPRUDENCE

The international child abduction regime in the Brussels II ter regulation and its main modifications

Dra. María González Marimón

Profesora Ayudante Doctora de Derecho Internacional privado en la Universidad de Valencia

1. INTRODUCTION

Nowadays, international child abduction is deemed to be a paradigmatic example of the complexity of cross-border cases involving children, in which, in addition, there are multi-faced realities[1].

The legal response to international child abduction in the EU shows a complicated and fragmented landscape of a plurality of legal sources, which seek to discourage this phenomenon. It is mainly a tripartite legal framework which consists of the interplay between the Brussels II bis – now ter- Regulation and the 1980 Hague Convention, which is complemented by the punctual interaction of the 1996 Haya Convention.

The EU legislator, aware of the complexity and difficulties of the Brussels II bis international child abduction rules application, has tried to improve and refine the response provided in the new 2019 text[2]. The new international

1 For an overview of international child abduction, vine. A.L. Calvo Caravaca y J. Carrascosa González: "Sustracción internacional de menores: una visión general", en Y. Gamarra Chopo: *El discurso civilizador en Derecho Internacional: cinco estudios y tres comentarios*, Universidad de Murcia, 2011. Se ha realizado un estudio sobre los efectos a largo plazo de la sustracción internacional de menores. En este sentido, vid. EUROPEAN PARLIAMENT: "The Child Perspective in the Context of the 1980 Hague Convention", *Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies*, 2020. Versión *on line* disponible en https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659819/IPOL_IDA(2020)659819_EN.pdf, último acceso el 28.11.2021. Igualmente, sobre los efectos negativos de la sustracción internacional de menores vid., entre otros, I. Lorente Martínez: *Sustracción internacional de menores. Estudio jurisprudencial, práctico y crítico*, Dykinson – Universidad de Murcia, Madrid, 2019, pp. 14 y ss.

2 For an overall analysis of the main new features of the Brussels II b Regulation, inter alia, A. Borrás: "Bruselas II, Bruselas II bis, Bruselas II ter…", *Revista Electrónica de Estudios Internacionales*, n.º 38, 2019, pp. 1-5; M. Herranz Ballesteros: "El Reglamento (UE) 2019/1111 relativo a la competencia, el reconocimiento y la ejecución de resoluciones en materia matrimonial y de responsabilidad parental y sobre la sustracción internacional de menores (versión refundida): principales novedades", *Revista Española de Derecho Internacional*, v. 73, n. 2, pp. 229-260; S. Corneloup y T. Kruger: "Le règlement 2019/1111,

child abduction rules strike a better balance, both as regards the allocation of competences between the Member State with competence on the substance of the matter and the Member State in which the child is wrongfully located, as well as in relation to the assumption of the principle of the best interests of the child and the interplay between the child's immediate return and its exceptions.

2. THE INTERNATIONAL CHILD ABDUCTION FRAMEWORK

Nowadays, international child abduction is deemed to be a paradigmatic example of the complexity of cross-border cases involving children, in which, in addition, there are multi-faced realities.

In general, in the event of a wrongful removal or retention of a child to another State -in our case, within the EU- in breach of custody rights, it is understood that what best corresponds to his or her best interests is, precisely, his or her immediate return to the place of previous habitual residence. However, although this premiss remains true in most cases, the answer must be weighted in the light of the circumstances of the particular case, in which the interests of the child involved may not be identified with that immediate return. This idea is even more relevant at a time when a redefinition of the international child abduction framework is suggested, as well as a clarification of its sources and interaction.

Focusing on the first issue, nowadays, a necessary redefinition of the legal framework of international child abduction is suggested, seeking to adapt it to new realities and nuances. In this line, it is outlined the need to face the profound social changes of recent decades, reflected in the consolidation of different family models, or in the already targeted greater children rights centred approach, over his or her parents' rights[3].

As a manifestation of this trend, particularly relevant is the increasing awareness of how to deal with cases where domestic or gender-based violence is alleged as a ground of denial of the return of the child. In this regard, beyond the

---

Bruxelles II: la protection des enfants gagne du ter(rain)", *Revue Critique de Droit International Privé*, n.º 2, 2020, pp. 215-245.

3 Thus, there is talk of the need to face the profound social changes of recent decades, reflected in the consolidation of different family models, or in the greater centrality of the rights of the child and his or her best interests, as opposed to those of his or her parents. In this regard, see, among others, EUROPEAN PARLIAMENT: "40 Years of The Hague Convention on Child Abduction: Legal and Societal Changes in the Rights of a Child", *Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies*, 2020. *Online* version https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/660559/IPOL_IDA(2020)660559_EN.pdf, last access 28.11.2021; R. Schuz: "The Hague Child Abduction Convention in a Changing World", en G. Douglas, M. Murch, y V. Stephens (eds.): *International and National Perspectives on child and Family Law. Essays in Honour of Nigel Lowe*, Intersentia, Cambridge -Antwerp -Porland, 2018, pp. 315-328; J. Forcada Miranda: "Complejidad, carencias y necesidades de la sustracción internacional de menores en el siglo XXI y un nuevo marco legal en España", *Anuario Español de Derecho Internacional Privado*, t. XVI, 2016, pp. 699-743.

strict immediate return of the child, his or her protection, as well as the mother's, should be guaranteed, either through the refusal of the return, or through his or her "safe return" accompanied by the necessary protective measures.

In addition, secondly, the debate on the delicate nature of the legal framework – especially as regards the 1980 Hague Convention and the Brussels II bis Regulation- is addressed. An issue is maximised by the problematic overriding mechanism.

The legal response to international child abduction in the EU shows a complicated and fragmented landscape of a plurality of legal sources, which seek to discourage this phenomenon. It is mainly a tripartite legal framework which consists of the interplay between the Brussels II bis Regulation and the 1980 Hague Convention, which is complemented by the punctual interaction of the 1996 Haya Convention[4].

The EU legislator, at the time, opted for a peculiar regulation of international child abduction, which consists of the Brussels II bis Regulation remission to the 1980 Hague Convention, but making certain amendments. This legislative technique requires the application of both texts together. More precisely, the Brussels II bis Regulation, within its scope of application, complements the legal framework established by the 1980 Convention for the purposes of enhancing its functioning. Mainly, the changes affect the procedural articulation of the 1980 Hague Convention return system. Therefore, this system, in which two instruments with different origin and scope coexist, poses practical difficulties in its interpretation and application.

A first challenge for legal operators is the overlapping definitions contained in both international instruments; we insist, of different origin and scope. Particularly relevant are those definitions directly related to the concept of wrongful removal or retention, such as custody and access rights, as well as the child's habitual residence. Despite the similarity in their terminology, the autonomous interpretation of these concepts, not only with respect to the 1980 Hague Convention but also with respect to national laws, adds complexity in the practical application of the model.

Nevertheless, the most problematic element of both the 1980 Hague Convention and the Brussels II bis Regulation is the mechanism for the return of the child[5]. Generally, the primary purpose of this Convention is given to secure the prompt return of the child, but the balance with the child's interest in the particular case is also sought through a system of exceptions to the return.

---

4 For a study on the evolution of the system of vine sources, by all, A. Borrás: "La sustracción internacional de menores: del Convenio de La Haya de 1980 al Reglamento Bruselas II ter", en AA.VV.: *El Derecho Internacional privado entre la tradición y la innovación. Libro homenaje al Profesor Doctor José María Espinar Vicente*, Iprolex, Madrid, 2020, pp. 159-174.

5 See E. Rodríguez Pineau: "La oposición al retorno del menor secuestrado: movimientos en Bruselas y La Haya", *Revista Electrónica de Estudios Internacionales*, n.º 35, 2018, pp. 1- 31.

Regarding this system, the Brussels II bis Regulation restricted severely its return exceptions by introducing the so-called overriding mechanism. Following this mechanism, the last word in relation to the return of the child is held by the court having jurisdiction under the Regulation, which will normally be the one of the former child's habitual residence – Member State of origin-. This mechanism has the dual function of both reinforcing the system in favour of the Member State of origin, as well as strengthening the immediate return of the child, even more than the 1980 Hague Convention.

3. THE MAIN IMPROVEMENTS IN THE RETURN PROCEDURE

The EU legislator, aware of the complexity and difficulties of the Brussels II bis international child abduction rules application, has tried to improve and refine the response provided in the new 2019 text. As an obvious first sign of improvement, at least from a structural point of view, a completely new Chapter -III- has been introduced specifically for international child abduction cases. This structural change is accompanied by a welcomed clarification in the delimitation of the relationship between the new text and the 1980 Hague Convention.

Additionally, regarding the return procedure, the Brussels II ter Regulation introduces certain advances for its practical functioning, but from a moderate approach. Notably, we could point out the measures aimed at reducing the lack of efficiency: such as the new, more realistic period of time of 18 weeks. Moreover, and despite the fact that the Commission, in its 2016 proposal, proposed the harmonisation of some measures, such as the concentration of jurisdiction or the limitation to one appeal, finally in the new text they have been merely reflected in a Recital, perhaps once again, as a sign of the reluctance of EU Countries to harmonise their national laws.

A further group of modifications included in the Brussels II ter Regulation reflects the EU legislator's clear commitment to adapting international child abduction rules to new social realities and, in particular, to emphasise children's rights. In this regard, it is worth noting, in particular: the clarification on the age of the child; the reinforcement of the child's right to express his or her views in return proceedings; the new faculty for the court to ensure the contact of the child with the parent requesting the return; or the promotion of the child's "safe return", thanks to the power of the courts of the Member State in which the child is wrongfully located to issue provisional and interim measures with extraterritorial effectiveness. And, last but not least, the introduction of mediation or any other alternative dispute resolution figure to solve the dispute.

3.1. The clarification of the legal framework of intra-EU child abduction cases

The legal framework articulated by the European legislator in relation to international child abduction in the Brussels II bis Regulation is characterised by its extreme complexity and problematic application. The reason can be found both in the autonomous solutions designed and in their interaction with the 1980 and 1996 Hague Convention. In the new Brussels II ter text, the legislator has tried to improve and refine the response provided.

The changes are both structural and substantive. From a strictly formal perspective, one of the main novelties of the Brussels II ter Regulation is the introduction of a Chapter – Chapter III – dedicated exclusively to international child abduction. In this way, the procedure for returning the child, which was previously regulated only in Article 11 of the Brussels II bis Regulation, is now fully developed in a Chapter of the new Regulation. Predictably, this new structure will improve the reading of the Regulation and its correct understanding and application by legal operators.[6]

In addition, one of the main novelties of the reform on international child abduction is the attempt to clarify the relationship between the Brussels II bis Regulation and the 1980 Hague Convention.

In this regard, it is well known that the introduction of rules on international child abduction in the Brussels II bis Regulation was not a peaceful matter[7], on the contrary, it was the result of a complex process that generated widespread controversy[8]. The compromise policy solution adopted, consisting essentially of the inclusion in the

6 The singularity of the problem and the greater attention of the EU legislator to this phenomenon is also deduced from its express inclusion in the title of the regulatory text itself, which is now called: Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, and international child abduction.

7 We should take into account that the decision of the EU legislator to legislate on international child abduction does not go back to the beginnings of EU legislation on parental responsibility. Regulation (EC) No. Council Regulation 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility in respect of children of the community, D.O. No L 160 of 30 June 2000 referred directly, without further ado, to the 1980 Hague Convention on International Child Abduction (see Recital 13 and Article 3 of Regulation 1347/2000).

8 The question of whether to regulate international child abduction from the EU led to arduous negotiations between member states. A clear division arose between those – France, Italy or Spain – who wished to introduce substantive rules that would improve the 1980 Hague Convention and those other Member States – Germany, the Netherlands or the United Kingdom, for example – who considered that no legislative intervention was necessary, since the Hague Convention of 1980 was sufficient to resolve these conflicts. For an analysis of the negotiation process, see P. Mceleavy, "The new Child Abduction Regime in the European Union: Symbolic Relationship or Forced Partnership?", *Journal of Private International Law*, v. 1, no. 1, 2005, pp. 5-34.

Regulation of certain rules complementing the 1980 Hague Convention, raised some doubts about the relationship between the two instruments.[9]

The core of the coordination between the two models designed in the Brussels II bis Regulation and the 1980 Hague Convention is found in Article 11 of the regulatory text. Mainly, the Brussels II bis Regulation partially alters the procedural structure of the decision ordering the immediate return provided for in the 1980 Hague Convention. It should be recalled that this Convention is committed to cooperation between authorities without providing an answer on the competence of the latter or on the effectiveness abroad of the decisions that may be issued by them.[10] These modifications, which are relevant, constitute a series of guarantees that must be added to the provisions of the 1980 Hague Convention itself.[11]

In this regard, within the EU, once an unlawful retention or removal has taken place, Article 11 of the Brussels II bis Regulation regulates the process for th return of the child. Thus, in the event that the return of the child is requested from the authorities of the Member State where the child has been unlawfully removed or retained, in accordance with the 1980 Hague Convention, it must be applied in accordance with Article 11 of the Brussels II bis Regulation.

The Brussels II bis Regulation itself mentions the relationship with the 1980 Hague Convention in its Recital 17, as well as in Articles 60 and 62.2 thereof, designing the aforementioned relationship of complementarity that we have already pointed out[12]. However, notwithstanding such a relationship, understood as meaning that the Brussels II bis Regulation modulates certain provisions of the Hague Convention as regards their application between the Member States of the European Union, Article 60 of the regulatory text also refers to the preferential

9 In words of Mceleavy: "This unorthodox partnership of regional and international instruments was not the intention of either of the institutions or of the Member States involved in the negociation process, it was quite simply a political solution to what had become an embarrassing stand-off between two equally powerful and motivated blocs". P. Mceleavy: "The new Child Abduction Regime in the European Union…", *cit.*, p. 6. Also in this sense K. Lenaerts: "The Best Interest of the Child Always Come First: the Brussels II *bis* Regulation and the European Court of Justice", *Jurisprudencija/Jurisprudence*, v. 20, n.º 4, 2013, p. 1312.

10 See I. Reig Fabado: "Incidencia del Reglamento 2201/2003 en materia de sustracción internacional de menores: interacción con el Convenio de La Haya de 1980", en P. Llória García (dir.): *Secuestro de menores en el ámbito familiar: un estudio interdisciplinar*, Iustel, Madrid, 2008, p. 220.

11 *Ibid.*, p. 229.

12 An issue that already occurs in other European instruments, mainly with respect to other texts of the Hague Conference on private international law. Recall the Conventions on the Law Applicable to Road Traffic Accidents, signed at The Hague on 4 May 1971, BOE of 4.11.1987 and on the Law Applicable to Product Liability, signed at The Hague on 2 October 1973, *BOE* of 25.1.1989. and Regulation (EC) No 864/2007 of the European Parliament and of the Council, of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ* L 199/40, 31.7.2007; or the 2007 Hague Protocol on Maintenance and Regulation 4/2009.

application of the regulation, which may give rise to some confusion as regards the relationship between the two instruments.[13]

While Article 11 of the Brussels II bis Regulation appears to indicate the complementarity between the two legislative instruments, Article 60 of the same text indicates the primacy of the Brussels II bis Regulation over the 1980 Hague Convention. Thus, the question arises as to whether the relationship between the two texts was indeed one of complementarity or, on the contrary, of prevalence. And in any case, the articulation of both normative realities was complex.

These doubts are now being dispelled by the reform of the Regulation, by means of various references both in the articles and in the Recitals relating to the relationship between the new regulatory text and the 1980 Hague Convention. Thus, Recital 40 of the Brussels II ter Regulation points out the complementarity between the two texts, stating that, where there is an unlawful removal or retention of a child, the 1980 Hague Convention, "*complemented*" by the Brussels II ter Regulation, and in particular by Chapter III thereof, "*should continue to apply*". In the articles of the new Regulation, specifically in Chapter VIII relating to relations with other instruments, a precept is introduced devoted exclusively to the relationship between the new Regulation and the 1980 Hague Convention. In this regard, Article 96 of the Brussels II ter Regulation provides that, in the event of unlawful abduction from one Member State to another, "*the provisions of the 1980 Hague Convention shall continue to apply as complemented by the provisions of Chapters III and VI of this Regulation. Where a decision ordering the return of the child pursuant to the 1980 Hague Convention which was given in a Member State has to be recognised and enforced in another Member State following a further wrongful removal or retention of the child, Chapter IV shall apply*".

That provision also provides an interesting clarification by stating that the rules on recognition and enforcement of the Regulation may apply where a Member State issues a decision to return the child in accordance with the 1980 Hague Convention. This is despite the fact that this procedure is not considered to be a procedure on the substance, as recalled in Recital 16 of the new regulatory text. This solution was not clear under the previous regime, precisely because they were not decisions on the merits of the case. These assertions are reiterated in Article 1.3 of the Brussels II ter Regulation, concerning the scope of application: "*Chapters III and VI of this Regulation apply where the wrongful removal or retention of a child concerns more than one Member State, complementing the 1980 Hague Convention. Chapter IV of this Regulation applies to decisions ordering the return of a child to another Member State pursuant to the 1980 Hague Convention which have to be enforced in a Member State other than the Member State where the decision was given.*"

13 The European Commission, in its Practical Guide to the Implementation of the Brussels II bis Regulation, clarifies the relationship between the two instruments. (See European Commission: "Practical guide for the application of the new "Brussels II bis Regulation", *cit.*, p. 49).

In short, Chapter III of the Brussels II ter Regulation regulates the procedure for return following an unlawful retention or removal from one EU Member State to another, complementing the provisions of the 1980 Hague Convention. This new Chapter expands and regulates the rules previously contained in Article 11 of the Brussels II bis Regulation, but without changing their objective.[14]

3.2. The main improvements on the return procedure

3.2.1. The clarification of the age of the child

Article 22 of the new Brussels II ter Regulation, in line with the 1980 Hague Convention, clarifies that the return of the child "*under the 1980 Hague Convention*" can only be requested if the child is under sixteen years of age. With this provision, the Regulation is aligned with the provisions of the 1980 Hague Convention, an issue that in the previous regime could have been doubtful, since the Brussels II bis Regulation does not include a concept of the child.

The provision is clear in this regard that Articles 23 to 29 and Chapter VI of this Regulation "*Where a person, institution or other body alleging a breach of rights of custody applies, either directly or with the assistance of a Central Authority, to the court in a Member State for a decision on the basis of the 1980 Hague Convention ordering the return of a child under 16 years that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, Articles 23 to 29, and Chapter VI, of this Regulation shall apply and complement the 1980 Hague Convention.*"[15].

3.2.2. The partial harmonization of procedural rules to improve efficacity: expeditious court proceedings

One of the key priorities in proceedings relating to the unlawful removal or retention of a child is the speedy resolution of the case. For this reason, the Hague Convention of 1980 includes the general rule of the immediate return of the child, accompanied by guidance for the resolution of the case within a maximum period of 6 weeks[16]. This time limit was introduced by the Brussels II bis Regulation as an obligation for the courts of the Member States. However, the EU legislator, in the Commission's 2016 Recast Proposal, identified the return procedure and its lack of effectiveness as one of the main shortcomings in terms of parental responsibility[17]. In response to this problem, the Commission proposed

14 A. Borrás: "La sustracción internacional de menores: del Convenio de La Haya de 1980 al Reglamento Bruselas II ter", en AA.VV.: *El Derecho Internacional privado entre la tradición y la innovación. Libro homenaje al Profesor Doctor José María Espinar Vicente*, Iprolex, Madrid, 2020, p. 173.

15 Art. 22 Brussels II ter Regulation.

16 See art. 11 1980 Hague Convention.

17 Vid. European Commission: "Propuesta…", *cit.*, p. 3.

a number of measures to improve the effectiveness of the child return procedure in practice.

A) The concentration of the competence

One of the measures introduced to improve the efficiency of child return procedures is the concentration of jurisdiction in the field of international child abduction. The aim is to ensure greater efficiency and speed up of the proceedings, guaranteed by the greater experience that the competent judges will have in return procedures. Thus, along with the concentration, there is a corresponding commitment to the specialization of the courts.

Recital 41 of the Brussels II ter Regulation reflects the EU legislator's recommendation to Member States to consider concentrating jurisdiction over child return proceedings under the 1980 Hague Convention, in a manner consistent with the structure of their national courts. The wording is clear:

"*In order to conclude the return proceedings under the 1980 Hague Convention as quickly as possible, Member States should, in coherence with their national court structure, consider concentrating jurisdiction for those proceedings upon as limited a number of courts as possible. Jurisdiction for child abduction cases could be concentrated in one single court for the whole country or in a limited number of courts, using, for example, the number of appellate courts as point of departure and concentrating jurisdiction for international child abduction cases upon one court of first instance within each district of a court of appeal.*"

Thus, compared to the partial harmonisation measure proposed by the Commission in 2016, it has finally been incorporated as a mere recommendation in the form of a Recital, with a dubious legal value. It remains to be seen whether the Member States will incorporate this measure into their national legislation. For the time being, this inclusion in the preamble to the Regulation has been accepted by the majority as positive by legal scholars.[18] as well as by the EU institutions themselves[19]. In fact, it is one of the recommendations made by the Hague Conference[20]. And, in the specific case of Spain, the Spanish reform of

18 E. Rodríguez Pineau: "La refundición del Reglamento Bruselas II bis: de nuevo sobre la función del Derecho Internacional privado europeo", *Revista Española de Derecho Internacional*, v. 69, n.º 1, 2017, p. 143; M. A. Gandía Sellens: "La responsabilidad parental y la sustracción de menores en la propuesta de la Comisión para modificar el RB II bis: algunos avances, retrocesos y ausencias", *Anuario Español de Derecho Internacional Privado*, t. XVII, 2017, pp. 801 y 802; P. Beaumont, , L. Walker, y J. Holliday: "Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings", *University of Aberdeen, Working Paper 6*, 2016. O*n line* version https://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2016_6_revised.pdf, último acceso el 7.4.2020, pp. 2-3; J. Forcada Miranda: *Comentarios prácticos al Reglamento (UE) 2019/1111. Competencia, Reconocimiento y Ejecución de Resoluciones en materia Matrimonial, Responsabilidad Parental y Sustracción Internacional de Menores*, Sepín, Madrid, 2020, p. 208.

19 See Opinion of the European Economic and Social Committee on the proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility and on international child abduction (recast) [COM (2016) 411 final – 2016/0190 (CNS)], parr. 2.13.

20 See Guide to Good Practice under the 1980 Hague Convention on Civil Aspects of Child Abduction. Part II: Implementing measures, 2003, point 5.

2015 on international child abduction already introduces the specialization of the courts and the concentration of jurisdiction[21].

B) Searching celerity in return proceedings

A second set of additional measures to speed up procedures in the field of international child abduction are those related to limiting the duration of the procedure for the return of the child. In particular, through the formulation of two fundamental actions: the establishment of a defined time limit for the resolution of the procedure and the limitation of the appeal to one.[22]

i) With regard to the duration of the procedure, both the 1980 Hague Convention, as a guideline, and the Brussels II bis Regulation, as a guideline, establish a period of six weeks for the resolution of the procedure on the return of the child. [23] Despite the existence of this deadline, the statistics seem to show that return procedures in practice suffer significant delays, exceeding the six-week time period[24]. In addition, there are questions about the scope of the six-week period provided for in the current regulation. In particular, doubts have arisen as to whether the six-week period is for all instances or only for the first.

Taking into account all these issues that have arisen in practice, from a more realistic perspective, the EU legislator has chosen to incorporate a longer period of six weeks for each instance, setting a design of a maximum of eighteen weeks. The new Article 24 of the Brussels II ter Regulation, under the heading "*Expeditious court proceedings*", provides that:

> " A court to which an application for the return of a child referred to in Article 22 is made shall act expeditiously in proceedings on the application, using the most expeditious procedures available under national law"[25]

That mandate is set out in paragraphs 2 and 3 of that provision, which establish a period of six weeks for the decision of the first and second instances, except in exceptional circumstances. To these twelve weeks, Article 28.2 of the Brussels II ter Regulation adds a further six weeks for the judicial enforcement process. In the event that enforcement is not effected within that period, the party which requested enforcement or the central authority of the executing Member

21 See Art. 778 *quater* LEC.

22 These measures were already proposed by the Commission in its 2016 Proposal, and have finally been incorporated into the final text of the Brussels II ter Regulation. European Commission: "Proposal...", *cit.*, art. 23.1 and 32.4.

23 See Article 11 of the 1980 Hague Convention and Article 11.3 of the Brussels II bis Regulation.

24 In fact, the Commission's 2016 proposal states that the average duration for the resolution of return procedures is 165 days. European Commission: "Propuesta…", *cit.*, p. 14. Also see. N. Lowe y V. Stephens: "Part I- A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the civil aspects of International Child Abduction- Global Report", *The Seventh Meeting of the Special Commision on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, HCCH*, octubre de 2017. *on line* version https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf, last access 23.10.2021.

25 Art. 24.1 Brussels II ter Regulation.

State shall have the right to ask the competent enforcement authority for the reasons for the delay.[26] In addition, and continuing in the place of enforcement, and again, seeking a more effective resolution of return procedures, Article 27.6 of the Brussels II ter Regulation allows for the provisional enforcement of return orders, even if an appeal is pending, provided that it responds to the best interests of the child.

In order to ensure the speediest resolution of cases of international child abduction, in addition to introducing judicial measures, it is also essential to pay attention to the preliminary administrative phase, and in particular, to the work of the central authorities. In accordance with Article 23 of the Brussels II ter Regulation, the requested central authority must act as a matter of urgency "*in processing an application, based on the 1980 Hague Convention, as referred to in Article 22*" of the Regulation[27]. Moreover, when the Central Authority of the requested Member State receives an application referred to in Article 22 of the Regulation "*it shall, within five working days from the date of receipt of the application, acknowledge receipt. It shall, without undue delay, inform the Central Authority of the requesting Member State or the applicant, as appropriate, what initial steps have been or will be taken to deal with the application, and may request any further necessary documents and information.*"[28]. However, there is no maximum deadline for the resolution of this administrative phase, which was provided for in the Commission's 2016 proposal. This last deadline addressed to the central authorities was a novelty with respect to the current regulation, guaranteeing speed in an essential phase of the return procedure[29].

In general, the doctrine sees the extension of the six-week deadline as a pragmatic response to the shortcomings identified in practice[30]. However, and without prejudice to the above, the lack of consequences derived from the possible non-observance of the deadline in the different instances has been highlighted, taking into account, in addition, that the obligation to inform is required only for the enforcement procedure[31]. At the same time, another doctrinal sector has criticized the extension of the deadlines, since they are not considered to guarantee greater effectiveness or speed. On the contrary, it is understood that this extension will ease the tension of the judges, which will lead to a failure to comply with the new deadlines provided for[32].

---

26 However, the obligation for Member States to provide information on the number of cases that are not implemented within the six-week period, as set out in the Commission's 2016 proposal, has not been introduced. European Commission: "Proposal...", *cit.*, art. 79.2 letter b.

27 Art. 23.1 Brussels II ter Regulation.

28 Art. 23.2 Brussels II ter Regulation.

29 See European Commission, "Proposal...", *cit.*, Article 63(1)(g).

30 In this sense E. Rodríguez Pineau: "La refundición del Reglamento Bruselas II bis…", *cit.*, p. 143; M. A. Gandía Sellens: "La responsabilidad parental y la sustracción…", *cit.*, pp. 801 y 802; P. Beaumont, L. Walker, y J. Holliday: "Parental Responsibility and International Child Abduction in the proposed recast …", *cit.*, p. 3.

31 See M. A. Gandía Sellens: "La responsabilidad parental y la sustracción…", *cit.*, p. 808.

32 J. Forcada Miranda: *Comentarios prácticos al Reglamento (UE) 2019/1111…*, *cit.*, pp. 219 y ss.

ii) A second measure aimed at speeding up the final decision on the return of the child relates to the limitation to a single appeal against the decision granting or refusing the return of a child under the 1980 Hague Convention. Once again, the procedure for amending the Regulation led to significant changes. Thus, while in the Commission's 2016 Proposal the limitation to a remedy was included in the article relating to the procedure for the return of the child, this proposal has finally been placed in the Recitals of the Regulation[33]. Recital 42 in fine of the Brussels II ter Regulation merely states that "*Member States should also consider limiting the number of appeals possible against a decision granting or refusing the return of a child under the 1980 Hague Convention to one.*"

Consequently, with the new Regulation, it will be in the hands of the Member States to limit or not the appeals, although, at least, it has been possible to harmonize the maximum deadlines for resolution of each judicial instance. This measure, when included in the Commission's 2016 Proposal, had received a positive assessment by legal scholars, despite warning about the lack of clarity of the precept as it does not specify whether or not the appeal in cassation is included[34].

3.3. The novelties in the modifications of the 1980 Hague Convention procedure for the return of the child

3.3.1. Right of the child to express his or her views in return proceedings

A first issue to be addressed is that of the right of the child to express his or her views. The right of the child to express his or her opinions, in accordance with his age and maturity, constitutes one of the greatest exponents of the new conception of children as right holders. However, despite the importance of this right, recognised both at the international and national level, the practice of the Brussels II bis Regulation has shown that its regulation has very important limitations which are now being addressed in the Brussels II ter text[35].

The new Brussels II ter Regulation incorporates a firm commitment to ensuring that children are heard in proceedings affecting them. A commitment

33 Article 25.4 of the 2016 Proposed Recast made it clear that "*only one appeal shall be lodged against the decision ordering or refusing to return the child*".

34 In this sense M. A. Gandía Sellens: "La responsabilidad parental y la sustracción…", *cit.*, pp. 807-808; GEDIP: *Resolution on the Commission Proposal for a recast of the Brussels IIa Regulation, concerning parental responsibility and child abduction*, Milán, 16-18 septiembre de 2016, apartado II. O*nline* version https://www.gedip-egpil.eu/documents/Milan%202016/Bx2b-ResPar-ENG-Final2.pdf, last access 7.10.2021; Subgrupo Nacionalidad del GEDIP: *Comments on the Commission Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (COM (2016) 411 final)*, párr. 14. O*nline* version https://www.gedip-egpil.eu/reunionstravail/Reunion%2026/Annexe%20I.pdf, last access 7.10.2021.

35 See, in this regard, article 11.2, relating to the procedure for the return of minors; Article 23(b) on a ground for refusal to recognise and enforce decisions on parental responsibility: Recital 20 of the Brussels IIa Regulation.

that is reflected in the existence of a generic solution for all processes in the field of parental responsibility, set out in Article 21 of Regulation 2019/1111. And another refers specifically to cases of child abduction[36].

In relation to the latter, Chapter III of the Brussels II ter Regulation, on international child abduction, refers again to the hearing of the child specifically for return proceedings. In this regard, Article 26 of the new Regulation provides that Article 21 of the same text, which relates to the right of the child to express his or her views, will be fully applicable to return proceedings under the 1980 Hague Convention. In addition, the Brussels II ter Regulation significantly improves and corrects the system of certificates in terms of monitoring compliance with the minor's right to a hearing[37]. This enhanced control is intended to prevent future situations such as the one that arose in the factual situation that gave rise to the well-known CJEU judgment of 22 December 2010, in case C-491/10 PPU, *Aguirre Zárraga.*[38]

3.3.2. The contact of the child with the left-behind parent

Secondly, and this time in a novel way, Article 27(2) of the Brussels II ter Regulation refers to the possibility for the court to examine, at any stage of the return procedure, whether contact between the child and the person requesting return must be ensured, a possibility conditional, of course, to the full satisfaction of their best interests. This is a measure that is highly demanded by certain sectors and, however, had not been introduced in the Commission's 2016 Proposal, being incorporated later, during the negotiation process.

The purpose of the measure is obvious. Efforts are made to mitigate the detrimental effects of the passage of time in this type of procedure, ensuring the continuity of the bond between the child and the person requesting return. This avoids the interruption of the child's emotional bond with the other parent, preventing potential traumatic situations in the event of return after a long period of time in which contact with the parent has foreseeably been lost.

---

36 It should be recalled the importance of the child's opposition as a ground for exception to return, articulated in article 13 of the 1980 Hague Convention. On the problems in relation to the same vine, by all, A.L. Calvo Caravaca y J. Carrascosa González: "Convenio de La Haya de 25 octubre 1980 y sustracción internacional de menores. algunas cuestiones controvertidas", en AA.VV.: *El Derecho Internacional privado entre la tradición y la innovación. Libro homenaje al Profesor Doctor José María Espinar Vicente*, Iprolex, Madrid, 2020, pp. 198 y ss.

37 See Annexes IV, V. VI Brussels II ter Regulation.

38 ECLI:EU:C:2010:828. In relation to the decision, and among many others, see M. Herranz Ballesteros: "El control del Juez de origen de las decisiones dictadas en aplicación del artículo 42 del Reglamento (CE) n. 2201/2003: el asunto Aguirre Pelz", Revista General de Derecho Europeo, n.º 24, 2011, pp. 1-39; S. Álvarez González: "STJ (Sala 1.a) de 22 de diciembre de 2010. Asunto C-491/10 Ppu, Aguirre Zárraga y Simone Pelz", Revista Española de Derecho Internacional, v. LXII, n.º 2, 2010, pp. 247-251; S. Álvarez González: "Desplazamiento de menores dentro de la UE. Supresión del exequátur y derechos del niño a ser oído", Diario La Ley, n. º 7578, 2011, pp. 1-11.

While it is true that such a measure could already be adopted by the court in accordance with its national law, its incorporation into the Brussels II ter Regulation must be regarded as a great success. With this type of measure, the regulatory text guarantees better protection of the child in the specific case, avoiding the harmful effects of international child abduction and rigid return procedures. This measure also has the added value of aligning the new Brussels II ter Regulation with the Convention on the Rights of the Child, and in particular with the right contained in Article 9 of that text, relating to the right of a child who is separated from one or both parents to maintain personal relations and direct contact with them on a regular basis. unless it is contrary to your best interests.

3.3.3. Looking for the child's "safe return"

In recent decades, there has been growing concern about the question of guaranteeing not only the return of the child, but, above all, ensuring that the return is safe. This safe return constitutes a challenge for the current regulations on international child abduction, which focus on and are fundamentally based on automatic return mechanisms. In addition, the safe return of the child has become even more important, as awareness of certain social problems such as domestic and/or gender-based violence has increased in parallel[39].

Among the various aspects that should contribute to ensuring a safe return for the child, the EU legislator has stressed, within the procedure for the return of the child, to facilitate the adoption of protection measures, both by the Member State of origin and, as a great novelty, by the Member State in which the child is illegally staying.

A) The verification of the adoption of protection measures in the Member State of origin in cases of serious risk to the child.

Within the framework of the problem regarding the safe return of the minor, the procedural modification introduced at the time by Article 11.4 of the Brussels II teris Regulation, which is now included in Article 27.3 of the new Regulation, stands out. It should be recalled that Article 11.4 of the Brussels II bis Regulation incorporates the impediment to refusing the return of a child on the basis of

39 On the problem of international child abduction and gender-based violence, among others: M. Requejo Isidro: "Secuestro de menores y violencia de género en la Unión Europea", *Anuario Español de Derecho Internacional Privado*, t. VI, 2006, pp. 179-194; I. Reig Fabado: : "El traslado ilícito de menores en la Unión Europea: retorno vs. violencia familiar o doméstica", *Cuadernos de Derecho Transnacional*, v. 10, nº 1, 2018, p. 616; L.A. Pérez Martín: "Protección de los menores en el ámbito internacional: Reflexiones sobre la sustracción internacional de menores y la violencia de género en torno al caso de Juana Rivas", en R. López San Luis (dir.): *La protección del menor: Situación y cuestiones actuales*, Comares, Granada, 2019, pp. 73-88; C. Ruiz Sutil: "El menor sustraído ilícitamente en contextos internacionales de violencia machista", en M.C. García Garnica Y N. Marchal Escalona, (dirs.): *Aproximación interdisciplinar a los retos actuales de protección de la infancia dentro y fuera de la familia*, Aranzadi, Madrid, 2019, pp. 581-606; M.D. Ortiz Vidal: "Derecho de visita y violencia de género: el principio de mutuo reconocimiento y el interés superior del menor", en C. Esplugues Mota, P. Diago Diago, y P. Jiménez Blanco: *50 años de Derecho Internacional Privado de la Unión Europea en el diván*, Tirant Lo Blanch, Valencia, 2019, pp. 327-337.

Article 13.1.b) of the 1980 Hague Convention, provided that it is demonstrated that the relevant protection measures have been adopted in the Member State of the child's previous habitual residence to counteract such a situation of risk. Despite its novelty, this provision raised doubts about how to guarantee the effective protection of a minor exposed to a situation of risk.

For the sake of completeness, the EU legislator, in order to facilitate the application of this provision in practice, introduces in Recital 45 of the Brussels II ter Regulation certain examples of provisions considered to be adequate to ensure the protection of the child after his or her return. Textually, it states the following: "*a court order from that Member State prohibiting the applicant to come close to the child, 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. Which type of arrangement is adequate in the particular case should depend on the concrete grave risk to which the child is likely to be exposed by the return without such arrangements. The court seeking to establish whether adequate arrangements have been made should primarily rely on the parties and, where necessary and appropriate, request the assistance of Central Authorities or network judges, in particular within the European Judicial Network in civil and commercial matters, as established by Council Decision 2001/470/EC (8), and the International Hague Network of Judges.*"

B) Provisional and protective measures issued by the Member State in which the child is unlawfully present.

In the search for the safe return of the child in cases where there is a potential risk to the child in the event of return, one claim that has been raised in practice concerns the power of the court of the Member State in which the child is unlawfully present to order interim measures[40]. This limitation has led to an impairment of the protection of minors in cases of serious risk.

This option has now been included in the current Articles 27.5 and 15 of the Brussels II ter Regulation. As a novelty compared to the previous system, the courts of the Member State in which the child is unlawfully present will not only have jurisdiction to order protective measures issued in a situation of serious risk under Article 13(1)(b) of the 1980 Hague Convention. In addition, such measures may be recognised and enforced in other Member States, and in particular, as stated in Recital 30 of the Brussels II ter Regulation, these measures will remain in force until such time as a court in the Member State of the child's habitual residence takes such measures as it deems appropriate.

There are some authors who point to the positive nature of this measure, since it will undoubtedly make it possible to promote the return of the minor,

40 See M. González Marimón*: Menor y responsabilidad parental …, cit.*, pp. 409 y ss.

while strengthening the guarantees of protection of the minor[41]. In addition, these amendments are viewed favorably as they are aligned with the provisions of Article 11.2 of the 1996 Hague Convention[42]. Above all, the inclusion of provisional and precautionary measures in the recognition and enforcement regime is welcomed.

In short, the EU legislator has improved the existing regulation, responding to the growing concern to ensure more than the return of the child, a safe return that is as non-traumatic as possible[43]. With the new measures, it is expected that in practice it will be easier for the child to be protected by the Member State in which he or she is unlawfully present. However, there remains a pending challenge to deal with return procedures in which domestic and/or gender-based violence is alleged. While it is true that the amendments introduced will improve the response to this problem, there is perhaps a need for a more direct involvement of the EU legislator with a view to clarifying the application of the regulation on international child abduction to this type of case, a highly problematic and sensitive issue that raises problems in practice.

3.3.4. The introduction of mediation for abdcution cases

One of the major novelties introduced in the international child abduction rules is the express inclusion in the new Regulation of the possibility of resorting to alternative forms of dispute resolution[44]. Thus, Article 25 of the Brussels II ter Regulation states categorically that, "*As early as possible and at any stage of the proceedings, the court either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings.*"[45]

This option has certain limitations articulated by the European legislator itself in the aforementioned Article 24 of the Regulation. Thus, the use of mediation and other means of alternative dispute resolution is excepted, if this may be contrary to the best interests of the child, is not appropriate in the particular case or leads to an undue delay in the procedure. In addition to these cases, Recital 43

41 In this sense, E. Rodríguez Pineau: "La refundición del Reglamento Bruselas II bis…", *cit.*, p. 144.

42 See P. Beaumont, L. Walker, y J. Holliday: "Parental Responsibility and International Child Abduction in the proposed recast …", *cit.*, p. 11.

43 See A. J. Calzado Llamas: "Las medidas provisionales y cautelares en los procedimientos de restitución de menores: análisis del Reglamento (UE) 2019/1111 en conexión con el ordenamiento jurídico español", *Cuadernos de Derecho Transnacional*, v. 13, n.º 1, 2021, p. 108.

44 Regarding the use of mediation in cases of international child abduction, *by* all, M.C. Chéliz Inglés: *La sustracción internacional de menores y la mediación…*, *cit.*

45 C. Esplugues Mota: "El Reglamento Bruselas II ter y el recurso a los MASC en materia de responsabilidad parental y sustracción internacional de menores", *Cuadernos de Derecho Transnacional*, v. 13, n. 2, 2021, p. 159.

of the Brussels II ter Regulation reiterates that mediation may not be appropriate in all cases, mentioning, in particular, cases of violence against women.

In short, this provision is a didactic manifestation of the European legislator's desire to promote the use of ADR within the European Union[46]. Along these lines, the EU legislator, in a clear attempt to encourage mediation, points out in Recital 43 of the regulatory text that provision should be made for the possibility of extending jurisdiction in favour of the court hearing the return, so that it can give legal effect to the agreement not only in terms of the return of the child but, Also, in the area of parental responsibility[47].

Even those who welcome the call for mediation warn of the limited nature of its formulation in the new regulatory text, as it does not detail the procedure to be followed and the guarantees necessary for its development, perhaps due to the divergences between the Member States on the matter[48]. At the opposite end of the spectrum, the flexible and open nature of the regime introduced in the Brussels II ter Regulation is praised[49].

Beyond the perhaps not particularly sophisticated or appropriate formulation of the use of mediation introduced in the Brussels II ter Regulation, there is no doubt that the use of amicable methods of dispute resolution is generally increasing in family law both in Europe and beyond. In the EU, many authors have expressed the need to develop channels to facilitate the use of cross-border mediation in family disputes. Within the framework of this trend, the need to promote international mediation for cases of international child abduction has also been claimed[50].

---

46 Within the framework of a global trend in favour of exploring alternative avenues to the State Courts, the EU has for years maintained a position markedly favourable to the promotion of ADRs or ADRs as ways to resolve disputes that may arise in the legally integrated space that makes up the Union. In this sense, vid., by all, S. Barona y C. Esplugues: "ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends", en C. Esplugues y S. Barona: *Global Perspectives on ADR*, Intersentia, Cambridge, 2014, pp. 7-16; G. Palao Moreno: "Cross-border mediation in Spain", en J.J. Forner i Delaygua, C. González Beilfuss y R. Viñas Farré (coords.): *Entre Bruselas y La Haya: Estudios sobre la unificación internacional y regional del Derecho internacional privado. Liber amicorum Alegría Borrás*, Madrid, Marcial Pons, 2013, p. 641.

47 The introduction of mediation in cases of international child abduction is complementary to the central authority's obligation to facilitate the amicable resolution of disputes in matters of parental responsibility, set out in Article 79(g) of the Brussels II ter Regulation.

48 In this sense E. Rodríguez Pineau.: "La refundición del Reglamento Bruselas II bis…", *cit.*, p. 144; P. Beaumont, L. Walker, y J. Holliday: "Parental Responsibility and International Child Abduction in the proposed recast …", *cit.*, pp. 12-13; Subgrupo Nacionalidad del GEDIP: *Comments on the Commission Proposal…*, *cit.*, párr. 26; M. González Marimón: "El fomento de la mediación en casos de sustracción internacional de menores en el Reglamento Bruselas II ter", en S. Barona Vilar (Ed.): *Meditaciones sobre mediación (Med+)*, Tirant Lo Blanch, Valencia, 2022, pp. 399-418.

49 J. Forcada Miranda: *Comentarios prácticos al Reglamento (UE) 2019/1111…*, *cit.*, p. 231.

50 See H. Fulchiron: *Les enlèvements internationaux d'enfants*, Droit et Justice, Paris, 2005; C. Azcárraga Monzonís: "Sustracción internacional de menores: vías de actuación en el marco jurídico vigente", *Revista bolivariana de derecho*, n.º 20, julio 2015, pp. 192-213.

4. THE MAINTEINANCE OF THE "OVERRIDING MECHANISM" AS A MISSED OPPORTUNITY

Notwithstanding the mentioned progresses, the EU legislator has missed the opportunity to abolish the questionable "overriding mechanism"[51]. Having said that, the truth is that important nuances have been introduced in order to address the most controversial aspects identified in practice[52]. Following this mechanism, the last word in relation to the return of the child is held by the court having jurisdiction under the Regulation. To this end, the Brussels II bis Regulation articulates a system of division of powers in which a decision ordering the return of the child of the Member State of origin takes precedence over a previous decision of non-return adopted by the Member State were the child is staying after the wrongful removal or retention on the basis of one of the exceptional grounds under Article 13 of the 1980 Hague Convention. This priority is reinforced by the elimination of the *exequatur* without any ground of refusal of the return decision.

From a theoretical systematic point of view, this option could be seen as an important step forward in the process of harmonising the EU PIL rules, enabling an advanced degree of mutual trust between administrations of justice. However this may be true, the automatism of the designed model has proved to be too rigid in its practical projection[53]. To this problem, we should add the tensions caused between Member States, and the consequent affectation of mutual trust between justice administrations[54]. In particular, it has been acknowledged some problems relating

51 In detail about the mechanism of vid prevalence. C. Caamiña Domínguez: "La supresión del exequátur en el R. 2201/2003", *Cuadernos de Derecho Transnacional*, v. 3, n.º 1, 2011, pp. 63-83; M. González Marimón: "El "diálogo" entre el TJUE y el TEDH en torno a la eliminación del exequátur del mecanismo de retorno del Reglamento Bruselas II bis", en L. García Álvarez y J.M. Martín Rodríguez (Coords): *El mercado único en la Unión Europea. Balance y perspectivas jurídico-políticas*, Dykinson, Madrid, 2019, pp. 81-94.

52 Very critical of the elimination of the exequatur are M. López De Tejada Ruiz,: "La supresión del exequátur en el espacio judicial europeo". *Diario La Ley. Sección Tribuna*, n.º 776, 30 de diciembre 2011; R . Caro Gándara: "De la desconfianza recíproca al reconocimiento mutuo: una laboriosa transición (El Reglamento Bruselas II bis como banco de pruebas". *Diario La Ley. Sección Doctrina*, n.º 8395, 31 de mayo de 2011; R. Espinosa Calabuig: *Custodia y visita de menores en el espacio judicial europeo*, Marcial Pons, Madrid, 2007.

53 En relación con esta problemática vid. N. Marchal Escalona: "Supresión del exequátur en las resoluciones de restitución de menores vs. Derechos de defensa: ¿crónica de una muerte anunciada?", en E.M. Vázquez Gómez, M.D. Adam Muñoz y N. Cornago-Prieto (coord.): *El arreglo pacífico de las controversias internacionales: XXIV Jornadas de la Asociación Española de Profesores de Derecho internacional y Relaciones internacionales (AEPDIRI), Córdoba, 20-22 de octubre*, Tirant Lo Blanch, Valencia, 2013, pp. 631-640; M. González Marimón: "El "diálogo" entre el TJUE …", *cit.*, pp. 81-94.

54 Some authors who suggest hat the prevalence mechanism undermines the principle of mutual trust: P. Mceleavy: "Brussels II bis: Matrimonial matters, Parental Responsibility, Child Abduction and Mutual Recognition", *The International and Comparative Law Quarterly*, n.º 53, 2004, p. 510; B. Ancel y H. Muir Watt: .: "L'intérêt supérieur de l'enfant dans le concert des jurisdictions: le Reglèment Bruxelles II *bis*", *Revue Critique de Droit International privé*, v. 94, n.º 4, 2005, p. 602.; T. Kruger y L. Samyn: "Brussels II bis: successes and suggested improvements", *Journal of Private International Law*, v. 12, n.º 1, 2016, p. 158; R. Espinosa Calabuig: *Custodia y visita de menores…*, *cit.*, p. 223; E. Rodríguez Pineau: "La oposición al retorno…", *cit.*, p. 17. Sin embargo, no toda la doctrina es tan crítica con el mecanismo de prevalencia o de última palabra. Para una visión diferente vid. L. Carpaneto: "In-Depth Consideration of Family Life

to the effective protection of the best interests of the child in the particular case, evidenced by the analysis of the CJEU and the ECtHR case-law on this matter[55].

In the event of exceptional circumstances which questioned the convenience of the privileged decision enforcement, the Luxembourg Court has backed up the fidelity to the system[56]. This solution firmly contrasts with the more substantive approach of the ECtHR's case-law on international child abduction cases, which calls for the need to assess the best interests of the child concerned in the particular case[57]. Although both courts validated the elimination of the *exequatur* "in absolute terms", its enriching "dialogue" has made it possible to reflect on whether, from a children's rights point of view, and without prejudice to the decisive progress in the free movement of judgments within the EU, it would not be appropriate to leave some room, even in the place where enforcement is seized, for the assessment of substantive issues and, in particular, of the best interests of the child in the particular case[58].

In short, the combination of the desire to deepen the process of European legal integration and the willingness to protect the child in the particular case is

---

v. Immediate Return of the Child in Abduction Proceedings within the EU", *Rivista di diritto internazionale privato e processuale*, v. 50, n.º 4, 2014, pp. 931-958.

55 In this sense R. Espinosa Calabuig: "Traslado o retención ilícitos de menores tras la reforma de 2015: rapidez, especialización y… algunas ausencias". *Revista Española de Derecho Internacional*, Sección Foro, vol. 68, n.º 2, 2016, p. 352; J. Forcada Miranda: "El nuevo proceso español de restitución o retorno de menores en los supuestos de sustracción internacional: La decidida apuesta por la celeridad y la novedosa Circular de la Fiscalía 6/2015 (Parte I)". *Bitácora Millennium DIPr.*, n.º 3, 2016, p.32. Versión *on line* disponible en www.milleniumdipr.com, último acceso el 8.11.2021.

56 See, in particular, CJEU judgment of 22.12.2010, in Case C-491/10 PPU, *Aguirre Zárraga*, ECLI:EU:C:2010:828; CJEU of 5.10.2010, in Case C-400/10 PPU, *McB*, ECLI:EU:C:2010:582, I. Rodríguez-Uría Suárez: "STJ de 5 de octubre de 2010 (asunto c-400/10), *J. McB y L. E.*", *Revista Española de Derecho Internacional*, v. LXII, n.º 2, 2010, pp. 241-244; STJUE de 1.7.2010, en el asunto C-211/10 PPU, *Povse*, ECLI:EU:C:2010:400, N. Magallón Elósegui: "STJ (Sala 3.a) de 1 de julio de 2010. As. c-211/10. *D. Povse c. M. Alpago*", *Revista Española de Derecho Internacional*, v. LXII, n.º 2, 2010, pp. 235-238; CJEU judgment of 11.7.2008, in the case C-195/08 PPU, *Igna Rinau*, ECLI:EU:C:2008:406, vid. C. Caamiña Domínguez: "Las resoluciones de restitución de menores en la Unión Europea: el caso *Rinau*", *Cuadernos de Derecho Transnacional*, v. 2, n.º 2, 2010, pp. 222-235.

57 Basically, see ECHR Judgement 6.7.2010, case n.º 41615/07, *Neulinger y Shuruk c./ Suiza*, TOL2.640.774, http://hudoc.echr.coe.int/eng-press?i=003-3192833-3555735; ECHR Judgement 9.9.2010, case n.º 25437/08, *Raban c./ Rumania*, TOL2.644.403, http://hudoc.echr.coe.int/eng?i=001-101471; ECHR Judgement 12.7.2011, case n.º 14737/09, *Sneersone y Kampanella c./ Italia*, TOL2.646.980, http://hudoc.echr.coe.int/eng?i=001-147380; ECHR Judgement 15.5.2012, demanda no. 13420/12, *M.R y M.L c./ Estonia*, http://hudoc.echr.coe.int/eng?i=001-111198; ECHR Judgement 26.11.2013, case n.º 27853/09, *X c./ Letonia*, http://hudoc.echr.coe.int/eng?i=001-138939; ECHR Judgement 21.9.2017, case n.º 53661/15, *Severe c./ Austria*, TOL6.409.054, http://hudoc.echr.coe.int/eng?i=001-177079.

58 In relation to the issue between the CJEU and the ECtHR, vid. D. Porcheron: "La jurisprudence des deux Cours européennes (CEDH et CJUE) sur le déplacement illicite d'enfant : vers une relation de complémentarité?", *Journal du Droit International Lexinexis*, t. 142, Julliet- Août-Septembre 2015, 821-844; M. Herranz Ballesteros: "Los Tribunales de Estrasburgo y Luxemburgo ante la protección de los derechos fundamentales en supuestos de sustracción internacional de menores", *Revista de Derecho Europeo*, n.º 44, 2012, pp. 41-60; M. González Marimón: "El principio del interés superior del menor en supuestos de sustracción ilícita internacional: la jurisprudencia del TJUE y del TEDH", en M.C. García Garnica Y N. Marchal Escalona, (dirs.): *Aproximación interdisciplinar a los retos actuales de protección de la infancia dentro y fuera de la familia*, Aranzadi, Madrid, 2019, pp. 637-658.

reflected in the need to articulate a model that is both flexible and predictable. If we combine the two objectives, it can be concluded that the elimination of the *exequatur* for all decisions on parental responsibility, while maintaining certain safeguards at the enforcement procedure, which, in particular, leave some room for assessment of the best interests of the child in the particular case, strikes a delicate –but adequate– balance between the free movement of foreign judgments and the best interests of the child.

This is precisely the subtle equilibrium reflected in the Brussels II ter Regulation. In particular, it has been introduced the already mentioned correction of the elimination of *exequatur* "in absolute terms", thanks to the introduction of certain improvements[59]. The truth is that the automatism of this regime has been nuanced, in spite of the maintenance of the privileged regime for return decisions. Essentially, thanks to the possibility of modification and revocation of the certificate; as well as the application of a new cause of suspension – and even refusal – of the procedure[60].

Moreover that mechanism is structurally clarified, since it is now contained separately in Article 29 of the Brussels II ter Regulation, under the heading "*Procedure following a refusal to return the child under point (b) of Article 13(1) and Article 13(2) of the 1980 Hague Convention*". As stated in the first paragraph of that provision, the preemption mechanism is activated when a court of a Member State issues a decision refusing to return a child to another Member State solely on the basis of Article 13(1)(b) of the 1980 Hague Convention (serious risk to the child in the event of return) or Article 13(2) of that text (the child's firm opposition to return).

This amendment has a great relevance from the perspective of the debate between the elimination of *exequatur* and the adequate protection of children's fundamental rights, and of their best interests, when enforcement is seized. Regarding this, the new Regulation gives room to the assessment of the Judge of the requested Member State, both in the general and privileged regimes. By doing so, it can be said that the EU legislator deconstructs the model of elimination of the *exequatur* "in absolute terms".

However, we insist, despite its foreseeable advantages, the system is not free of doubts regarding its future application, with the subsistent doctrinal and jurisprudence interpretations and the risk of abuse in practice of the already mentioned "hidden clause" for suspension or even refusal.

In conclusion, notwithstanding the continuity of the overriding mechanism, the new international child abduction rules strike a better balance, both as regards the allocation of competences between the Member State with competence on the substance of the matter and the Member State in which the child is wrongfully located, as well as in relation to the assumption of the principle of the best interests

59 See Chapter IV of the Brussels II ter Regulation. In-depth information on the amendments to the recognition and enforcement regime in the Brussels II Regulation. M. González Marimón*: Menor y responsabilidad parental …, cit.*, pp. 331 y ss.

60 See Art. 56.4 and 56.6 Brussels II ter Regulation.

of the child and the interplay between the child's immediate return and its exceptions. We will see whether the new rules, accompanied by the reinforcement of communication and cooperation between the authorities involved, manages to achieve an adequate climate of trust between justice administrations which improves the protection of children involved in cross-border cases in the EU.

5. CONCLUSIONS

International child abduction is deemed to be a paradigmatic example of the complexity of cross-border cases involving children, in which, in addition, there are multi-faced realities. Nowadays, a necessary redefinition of the legal framework of international child abduction is suggested, seeking to adapt it to new realities and nuances.

The new Regulation assumes the controversial practice of the former Regulation Brussels II bis as regards child abduction cases. Its main goal is to improve the response provided, in an attempt to adapt the rules on international child abduction rules to new social realities emphasizing, at the same time, children's rights. Thus, in addition to the design of a completely new Chapter -III- devoted specifically to international child abduction cases, it clarifies the relationship between the new text and the 1980 Hague Convention or stresses the role of mediation and any other ADR mechanisms to solve this kind of disputes. Or reinforces the right of the child to express his or her views in return proceedings, sets forth the power of the judge to ensure the contact of the child with the parent requesting the return and the promotion of the child's "safe return", granting on the courts of the Member State in which the child is wrongfully located the power to issue provisional and interim measures with extraterritorial effectiveness. Additionally, regarding the return procedure, the Brussels II ter Regulation introduces certain –moderate- advances for its practical functioning.

Nevertheless, and despite all these "good news" the EU legislator seems to have missed the opportunity to be "radical" and to abolish the always questionable "overriding mechanism". Following this special procedure, the last word in relation to the return of the child is given to the court having jurisdiction under the Regulation. This decision takes precedence over a previous decision of non-return adopted by the court of another Member State on the basis of one of the exceptional grounds under Article 13 of the 1980 Hague Convention. This priority is reinforced by the elimination of the exequatur without any ground of refusal of the return decision.

An instrument subject to criticism that far from manifesting its apparent benefits it has been a source of headaches for legal operators and practitioners. That is why, the EU legislator has lost the opportunity to abolish this mechanism, however, the new Regulation tries to temper some of the most controversial aspects identified

in practice. Especially, the automatism of the model has proved to be too rigid in its practical projection. Essentially, thanks to the possibility of modification and revocation of the certificate; as well as the application of a surprisingly new cause of suspension – and even refusal – of the procedure of enforcement, precisely, in case of a exceptional change of circumstances linked to the best interest of the child.

The EU legislator advances towards a deeper level of cooperation in the context of the Private International Law harmonisation in Family Law, which will imply, undoubtedly, an improvement of transnational family's reality. From the Brussels II bis Regulation recast, it is possible to deduce some of the problems regarding this process, among them, the deeper degree of harmonisation of the domestic procedural and material rules which may result in an easier application of EU PIL instruments, as one of the mayor challenges in its future projection.

Additionally, a further challenge identified is the mutual trust principle, which is used as a base of the integration, but conversely, as the practice might imply, it is not always enhanced by the integration mechanisms themselves. And, consequently, form this apparent contradiction it could be deduced the need to stimulate and facilitate mutual trust, for instance, with a reinforcement of communication between authorities, or with the above-mentioned harmonisation of procedural and substantial rules, rather than taking it for granted, as the Brussels II bis Regulation might have done, an extreme which the Brussels II ter Regulation intends to overcome. Only will its future application tell us if this objective has been reached.

The second key challenge of the Brussels II bis Regulation recast is considered to be the harmonisation of the integration objectives with a better protection of children's rights and their best interests. In this sense, the new Brussels II ter Regulation evolves towards the recognition of a greater centrality of the child and his rights in resolving cross-border cases in the EU. It thereby constitutes a clear manifestation of the growing influence of the principle of the best interests of the child in all areas and issues affecting them, also from the perspective of Private International Law, as well as the tendency to accept greater influence of human rights in this discipline.

Overall, the Brussels II ter Regulation reflects a better, and greater, enhancement not only of the principle of the best interests of the child *in abstracto* and *in concreto*, but also in its triple dimension as a substantive right, an inspiring principle, and as a procedural rule. First, as the child's subjective right to have his or her best interests as a primary consideration in all cross-border matters of parental responsibility in the EU. Secondly, as an inspiring principle of the Regulation, both in the drafting of its PIL rules and in its subsequent application by the national courts and by the CJEU. Thirdly, as a procedural rule, which in this area is identified with the existence of effective mechanisms, but also with flexible clauses, both in jurisdiction rules and in recognition and enforcement. Pointing out, within this approach, the importance to require the fulfilment of the right of the child to be heard also in cross-border matters.

The "trial resulting in the decision" as an autonomous concept of EU Law for the purposes of the european arrest warrant

Dra. Patricia Llopis Nadal

Associate Professor of Procedural Law at University of Valencia

1. INTRODUCTION

According to the European arrest warrant regulation, decisions that have been rendered following a trial at which the person did not appear in person could justify the non-execution of the warrant. Thus, when faced with a decision adopted *in absentia* of the interested person, the requested Member State could refuse to execute the European arrest warrant, unless one of the four provided situations that guarantee the respect of the defense rights is met. In order to determine whether the person was not present at the proceedings -and, if so, whether any of the situations precluding the refusal is fulfilled, the requested judicial authority needs to know beforehand which is exactly the trial resulting in the decision that shall be taken into consideration.

However, despite art. 4a.1 of the European arrest warrant regulation requires considering the "trial resulting in the decision" before deciding on the execution or the refusal, the EU legislator has not defined this concept in the wording of the Framework Decision governing the warrant, nor has it made an express reference to the national law of the Member States in order to determine its meaning and scope. This justifies the fact that, in recent years, national courts have referred to the Court of Justice of the European Union (hereinafter ECJ) several questions for a preliminary ruling concerning that concept. In an effort to ensure the uniform application of EU Law by the courts of the different Member States, the Luxembourg judges have given a uniform interpretation to the expression "trial resulting in the decision", considering it an autonomous concept of EU Law.

This research work is aimed at analyzing in detail the interpretation given by the ECJ to the autonomous concept of EU Law "trial resulting in the decision" for the purposes of the European arrest warrant. To this effect, after explaining the

legal framework where this concept can be found and the structure of art. 4a.1 of the European arrest warrant regulation, this paper focuses on the ECJ case-law rendered since 2017 in order to define what shall or shall not be considered as the "trial resulting in the decision" [1].

2. THE EUROPEAN ARREST WARRANT AND DECISIONS RENDERED IN ABSENTIA: AN AMENDED REGULATION THAT REQUIRES RECOGNIZING "THE TRIAL RESULTING IN THE DECISION"

When the European arrest warrant was first adopted in June 2002[2], the regulation of the execution of a warrant issued for the purposes of executing a custodial sentence or a detention order imposed by means of a decision rendered *in absentia* was governed by art. 5 of the Framework Decision[3]. According to art. 5.1 of the original wording of Framework Decision 2002/584, when the executing judicial authority received a European arrest warrant rendered to execute a custodial sentence or a detention order imposed by a decision adopted *in absentia*, it was allowed to make the execution of the warrant contingent on a set of requirements. Thus, if the requested person had neither been summoned in person, nor informed of the date and place of the hearing by any other means, the execution of the warrant -it is, the surrender of the person, could be subjected to the fact that the issuing Member State provided an adequate guarantee to ensure that the person would have a chance to request for a retrial of the case in that Member State as well as a chance to be present during the judgment -exercising the rights of the defense.

Therefore, under art. 5.1 of Framework Decision 2002/584 before its 2009 amendment, it was clear that, after receiving the request to execute a European arrest warrant issued based on a decision that had been rendered despite the interested person was *in absentia*, the executing judicial authority had to verify whether in the issuing Member State the requested person had the opportunity to apply for a new trial concerning the same facts. If he or she had the chance

1 This book chapter takes as starting point a previous research work on the European arrest warrant and *in absentia* proceedings published in Spanish [Llopis Nadal, P., "La orden de detención europea y los juicios celebrados en rebeldía: análisis del art. 4.bis de la Decisión Marco 2002/584/JAI a la luz de la jurisprudencia del TJUE", Juan Sánchez, R. and Armengot Vilaplana, A. (editors), *Justicia Penal y sus reformas: Los retos de la eficiencia, la seguridad y las garantías procesales*, ed. Tirant lo Blanch, Valencia, 2021, pp. [395] a 440]. However, this paper's focus is exclusively dedicated to the autonomous concept of EU law "trial resulting in the decision", examining in detail and updating the ECJ case-law on the topic.

2 For the original version, *vid.*, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal of the European Union, L 190, 18th of July 2002, p. 1-19.

3 It was part of the article regulating the "Guarantees to be given by the issuing Member State in particular cases" and it was neither included among the "Grounds for mandatory non-execution of the European arrest warrant" (provided in detail under art. 3), nor among the "Grounds for optional non-execution of the European arrest warrant" (regulated in detail by art. 4).

of a retrial and the right to be present at the hearing -it is, if the issuing judicial authority gave enough guarantees of that possibility, the European arrest warrant had to be executed as the requirements were fulfilled -not being possible to deny its execution, irrespective of the implementation of the Framework Decision made by each Member State into their national law.

The above explained regulation remained until the amendments introduced by means of Framework Decision 2009/299[4]. This regulation, adopted seven years after the entry into force of the European arrest warrant, was aimed at allowing the application of the principle of mutual recognition to judicial decisions adopted *in absentia* of the interested person, while guaranteeing the full respect of the defense rights. To achieve that purpose of the EU legislator, up to five previously adopted Framework Decisions were amended by introducing -or clarifying, the common grounds for non-recognition of decisions rendered despite the person concerned was not present. Among the Framework Decisions that were amended, the one governing the European arrest warrant was included[5], consequently, the original art. 5.1 was replaced by new art. 4a, which contains a more detailed regulation[6].

In this manner, by significantly increasing the wording length of previous art. 5.1, art. 4a exclusively focuses in "Decisions rendered following a trial at which the person did not appear in person"[7] and clearly distinguishes two cases regarding the European arrest warrants issued based on custodial sentences or detention orders adopted *in absentia* of the interested person at the trial resulting in the decision. In the first case, art. 4a recognizes the power to refuse the execution of the European arrest warrant when the requested person has remained in default at the criminal proceedings. Nevertheless, the second case shows that this ability to deny the execution is not the general rule, but an exception, as art. 4a sets out the four statements -also referred as conditions, in which it is mandatory to

4 Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, Official Journal of the European Union, L 81, 27th of March 2009, p. 24-36.

5 This amendment was made by art. 2 of 2009/299 Framework Decision. Therefore, according to its art. 8, the application of this new regulation started the 28th of March 2011 -which was the date provided for its implementation. Nevertheless, Member States were allowed to declare difficulties to comply with the new provision, in which case, the application could be delayed until the 1st of January 2014 at the latest.

6 For a version of the consolidated text of 2002/584 Framework Decision after the 2009 amendment, *vid.*: https://eur-lex.europa.eu/eli/dec_framw/2002/584/2009-03-28 (last access, 24th of September 2023).

7 Even though this art. 4a also contains one ground for optional non-execution -when the decision has been adopted *in absentia* of the requested person and none of the four statements that make the execution mandatory is met, it is important to highlight that we are in front of a legal provision that is different and shall be independent from art. 4 of 2002/584 Framework Decision -where other grounds for optional non-execution of the European arrest warrant are defined, but there is no reference to the execution of warrants in case of a custodial sentence or a detention order rendered despite the person concerned did not appear in person at the trial resulting in the decision.

execute the European arrest warrant despite the absence of the interested person at the trial[8].

Therefore, irrespective of the implementation of the Framework Decision made by each Member State into their national law, when the requirements provided in one of these four statements are met, it is not possible to refuse the execution of the European arrest warrant and the principle of mutual recognition must be respected by the requested judicial authority. To properly explain how, by widening the situations in which the execution is mandatory, the denial of executing the European arrest warrant in case of *in absentia* proceedings has become the exception, it seems proper to reverse the order of art. 4a and start analyzing individually and in detail these four statements that could be met when the defendant did not appear in person at the trial resulting in the decision.

According to the first statement, provided in art. 4a.1(a), the execution of the European arrest warrant cannot be refused if respecting sufficient notice -it is, well in advance, to enable the exercise of the defense rights, the defendant was served with the summons, informed of the scheduled date and place of the trial and warned about the possibility of rendering a decision despite his or her non-appearance. The same will apply if, in due time, the defendant received by other means official information concerning the date and place of the trial -for instance, when he or she was summoned by giving the information to a third person, however, it is required that these means allow to unequivocally affirm that the defendant was aware of the scheduled trial[9].

Under art. 4a.1(b), the second statement states that the execution of the European arrest warrant cannot not be refused if the defendant, being aware of the scheduled trial, not only gave a mandate to an attorney to defend him or her before the Court, but was also actually defended by this attorney during the trial that led to the judicial decision. In that situation, the execution will be mandatory,

8 An idea that was defended by the ECJ in *Melloni* case-law: "[art. 4.a] restricts the opportunities for refusing to execute such a warrant by setting out, as indicated in recital 6 of Framework Decision 2009/299, 'conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused'" [Judgment of 26th February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 41]. And an idea that has been maintained by the ECJ since then "[art. 4a] restricts the possibility of refusing to execute the European arrest warrant by listing, in a precise and uniform manner, the conditions under which the recognition and enforcement of a decision rendered following a trial in which the person concerned did not appear in person may not be refused" [Judgment of 17th December 2020, *Generalstaatsanwaltschaft Hamburg*, C-416/20 PPU, EU:C:2020:1042, paragraph 36].

9 For the purposes of applying art. 4a, the ECJ has already clarified the terms "summons in person" and "official notification by other means" as autonomous concepts of EU law -interpreting both uniformly since art. 4a.1(a) does not contain a reference to the national law of the Member States [*vid.,* Judgment of 24th May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346, paragraphs 45 to 49]. In that sense, the ECJ has deemed it necessary to leave proof in the European arrest warrant form of the fact that the interested person received the information concerning the scheduled date and place of the trial as well as the moment when that information was effectively communicated to the defendant.

irrespective of whether the legal counsellor that acted at the criminal proceedings was appointed -and paid, by the defendant or by the State[10].

Regarding the third statement as regulated in art. 4a.1(c), the execution of the European arrest warrant cannot not be refused when the person convicted has expressly said that he or she does not want to challenge the judicial decision, the same applies when the person convicted has not respected the procedural deadlines to request a new trial or to submit an appeal. Nevertheless, the application of this rule requires that, previously, the decision had been served to the person convicted, informing him or her not only about the possibility of requesting a new trial or submitting an appeal, but also about his or her right to participate -even introducing new evidence, and to reverse the first decision with a re-examination of the merits of the case.

Finally, art. 4a.1(d) covers under the fourth statement those situations in which the European arrest warrant is issued despite the judicial decision has not been personally served to the person convicted. To guarantee the application of the principle of mutual recognition, the EU legislator has stated that, even in those situations, the execution of the warrant cannot be refused if the issuing Member State undertakes to notify the decision right after the surrender. For that, a set of additional requirements shall be met, the person convicted must be served personally with the decision and must be informed about the possibility of requesting a new trial, or submitting an appeal, as well as about the deadlines to do so. Besides, in the proceedings to solve this new trial or appeal, the person convicted must have the right to participate, to bring evidence and to reverse the decision that led to the conviction[11].

As has been pointed out, when the requirements provided in one of these statements are met it is mandatory to execute the European arrest warrant. Nevertheless, there is a question that needs to be solved in advanced by the executing judicial authority: which is, exactly and for each case, the trial resulting in the decision. As provided under art. 4a.1, the starting point is to have a warrant issued to execute a custodial sentence or a detention order that has been rendered despite the person concerned did not appear in person at the trial resulting in the decision. Once the executing Member State knows that the judicial decision -custodial sentence or detention order, used as the basis for the European arrest warrant was adopted being the defendant *in absentia* during the trial, the next step will be to verify whether it is possible to apply one of these four alternative statements.

10 Concerning the type of mandate that must be given by the defendant, further interpretations by the ECJ could be necessary in cases when the attorney is appointed by the State, it is, clarifying whether the express acceptance by the defendant of the court-appointed lawyer is required.

11 It is important to note that there is no relation between current art. 4a and the repealed art. 5.1. Thus, as far as the latter was replaced by the former, when any of the statements provided by art. 4.a.1(a) to (d) is met, the European arrest warrant execution could not be subject to the possibility of reviewing the judicial decision by means of a new trial in presence of the interested person.

Even though recognizing "the trial resulting in the decision" may seem an easy task for the executing judicial authority, it is not always the case. Criminal matters could go through different instances before the adoption of the final decision. Besides, once a final conviction has been rendered, the penalty imposed could be subject to changes by modifying its nature or amount, its form of execution or by annulling its previously granted suspension. For each instance, for a penalty amendment or for changes in the execution, the competent courts -depending on their criminal procedural law, could hold a different trial that will result in a decision. The preliminary questions brought before the ECJ show that, sometimes, the differences between national criminal proceedings make it difficult to know, beforehand, which is exactly the trial that should be considered by the executing Member State to decide on the execution or the refusal of the European arrest warrant.

3. THE "TRIAL RESULTING IN THE DECISION" AS AN AUTONOMOUS CONCEPT OF EUROPEAN UNION LAW INTERPRETED UNIFORMLY BY THE EUROPEAN COURT OF JUSTICE

Since 2017, by providing answers to the different preliminary questions referred by national courts, the ECJ has been making efforts to interpret the terms "trial resulting in the decision" for the purposes of art. 4a.1 of the European arrest warrant regulation. In *Tupikas* case, faced for the first time with a question concerning this expression, the ECJ remembered that, in order to guarantee both, the uniform application of EU Law and the principle of equality, when a provision adopted by the EU legislator does not refer expressly to the national law to determine its meaning and scope, it must receive an autonomous and uniform interpretation for the whole European Union. After maintaining that Framework Decision 2002/584, and its art. 4a.1, contained some express references to the law of the Member States, the ECJ confirmed that it was not the case of the concept "trial resulting in the decision"[12]. As a result, the Luxembourg judges concluded that this expression "must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union, irrespective of the classifications in the Member States"[13].

The same idea was maintained four months later in *Ardic* case, adding that the autonomous and uniform interpretation of the concept "trial resulting in the decision" within the European Union must be done "independently of the classification and substantive and procedure rules in criminal matters, which by nature diverge in the various Member States"[14]. In the recent case *Minister for*

12 Judgment of 10th August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 65 and 66.
13 Judgment of 10th August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 67.
14 Judgment of 22nd December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 63.

Justice and Equality, the ECJ has defended a strict interpretation of the autonomous concept "trial resulting in the decision" considering, on the one hand, that the strict interpretation is in line with the scheme of the European arrest warrant, since art. 4a.1 "is an exception to the rule requiring the executing judicial authority to surrender the requested person to the issuing Member States"[15], and, on the other hand, that the strict interpretation guarantees the objective of facilitating and accelerating judicial cooperation "by avoiding conferring to the executing judicial authority a general function of reviewing all procedural decisions adopted by the issuing Member State"[16] -nontheless, as explained further in this paper, driven by the need of not rendering that provision ineffective, the ECJ offered a more comprehensive intepretation in its *Minister for Justice and Equality* Judgement.

According to the ECJ, it is not possible to define with accuracy the term "trial resulting in the decision" on the only basis of the wording of art. 4a.1, for that reason, "the scope of the concept […] must be determined by placing it in context"[17] -which requires taking into consideration the other provisions of Framework Decision 2002/584 as well as the circumstances characterizing the main proceedings in which the preliminary question has arisen[18]. To interpret this autonomous concept of EU Law, the Luxembourg judges have rendered up to four judgments replying to preliminary questions and determining, in different situations and under specific circumstances, the criminal proceedings that shall be considered -or not, when verifying whether the interested person appeared to the trial resulting in the decision that was decisive for the issue of the European arrest warrant[19]. This ECJ case-law is analyzed in detail in the following sections.

3.1. The ordinary appeal proceedings are the only instance to be considered as the "trial resulting in the decision"

On 10th August 2017, the ECJ rendered two different judgments interpreting the concept "trial resulting in the decision" for the purposes of Framework Decision 2002/584. Both judgments, *Tupikas* and *Zdziaszek*, were based on preliminary rulings requested by Amsterdam District Court, were dealt with

15 Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraph 55.

16 Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraph 56.

17 Judgment of 10th August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 70.

18 In *Tupikas* case, it is possible to observe how the ECJ puts into context the concept "trial resulting in the decision" with a detailed introduction reviewing the general regimen of the European arrest warrant, the most significant case-law, the system of art. 4a.1 and the objectives of Framework Decision 2009/299. The Luxembourg judges conclude this overview stating "The Court will interpret, in the light of those considerations, the concept if 'trial resulting in the decision', within the meaning of Article 4a(1) of Framework Decision 2002/584, in the context of the situation referred to in paragraph 48 of the present judgment [that is, the circumstances of the main proceedings described by the referring court]" [Judgment of 10th August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 49 to 64].

19 Furthermore, another preliminary ruling was pending before the ECJ when this paper was submitted to the editor, a footnote below contains a reference to the question posed by the referring court.

under the urgent preliminary ruling procedure and the proceedings that led to the European arrest warrant included a number of trials as well as a number of judicial decisions. Notwithstanding, the "trial resulting in the decision" that had to be considered in each case, and that gave rise to the questions referred, had different characteristics. The first one, that will be analyzed in this section, concerned the treatment that shall be given to appeal proceedings, while the second one, that will be analyzed in the following section, dealt with decisions handing down a cumulative sentence -even though in *Zdziaszek* the referring court also made a question concerning the appeal proceedings.

In *Tupikas* case, the question was whether appeal proceedings in which the merits of the case are examined shall be considered as the "trial resulting in the decision" regardless of their outcome -it is, irrespective of whether they confirm the previous sentence or result in a different one. In the main proceedings, the requested person appeared in person at the trial in first instance and submitted an appeal against the decision adopted by the District Court, the appeal was dismissed by the Regional Court, confirming the sentence in first instance -that is, the original conviction was not amended. However, based on the information included in the European arrest warrant by the issuing Member State, the executing judicial authority did not know if the requested person was *in absentia* during the appeal proceedings or if any of the statements provided by art. 4.a.1 (a) to (d) was met[20]. The ECJ answer is paramount for the referring court because, if the concept "trial resulting in the decision" applies only to first instance proceedings, the requested person has to be surrendered, however, if this concept also includes appeal proceedings, additional details need to be provided and, depending on that information, the execution of the warrant could be refused[21].

In the reply provided by the ECJ it is clear that, even though a criminal proceeding may involve different instances -and, as a result of that, a number of judicial decisions, only one of them is to be considered as the "trial resulting in the decision" for the purposes of art. 4a.1 of Framework Decision 2002/584. In order to know which is the instance that shall be taken into account, the executing judicial authority should pay attention to the final nature of the decision. To do so, it is important that the decision rendered at the end of that instance, after re-examining the merits of the case in fact and in law, finally rules on the guilt of the person and imposes a penalty on him or her[22]. The fact that this instance leads to a final decision that disposes of the case on the merits implies that, according to the procedural rules of the issuing Member State, no further ordinary appeals can be submitted against that decision[23].

20 Judgment of 10th August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 27 to 29.

21 Judgment of 10th August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 30 to 32.

22 Judgment of 10th August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 98.

23 Judgment of 10th August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 82. The same idea is defended by the Luxembourg judges when focusing specifically in the case at issue in the main proceedings "With regard […] to a case […] in which the trial took place at two successive instances,

The ECJ held the same interpretation in *Zdziaszek* case-law, however, precision in this second judgment seems to be greater because there is an express reference to the appeal proceedings as the only ones that shall be considered as the "trial resulting in the decision"[24]. Furthermore, based on the circumstances of the main proceedings, the Luxembourg judges went a step further in *Zdziaszek* adding that the concept "trial resulting in the decision" includes the appeal proceedings that led to a final decision ruling on the guilt of the person and imposing a penalty after a new examination of the merits of the case, in fact and in law, "even though the sentence handed down was amended by a subsequent decision"[25] -the treatment that shall be given to those subsequent decisions handing down a cumulative sentence is covered in the next section.

Analyzing Tupikas case-law in depth, three additional ideas should be highlighted. The first one concerns the importance given to the final nature of the decision that shall be considered by the executing judicial authority. For the ECJ, the concept "trial resulting in the decision" refers to "the proceeding that led to the judicial decision which finally sentenced the person"[26]. To establish which is the decision containing that final sentence, the Luxembourg judges turn to the Strasbourg case-law on the term "conviction" and conclude that it is made up of two aspects, on the one hand, the finding of guilt -after confirming that a crime has been committed, on the other hand, the imposition of a penalty -or any other measure of deprivation of liberty. Based on that, for the ECJ it will be essential that the decision considered for the purposes of art. 4a.1 of Framework Decision 2002/584 rules on the guilt of the person concerned and imposes a penalty on him or her.

The second idea concerns the evaluation of the merits of the case that could be performed by the competent court during the appeal proceedings. According to the ECJ, when examining again the case based on the submission of an appeal, the court should be able to carry out "an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned"[27]. In other words, to consider that instance as the "trial resulting in the decision" it is required that

---

namely a first instance followed by appeal proceedings, it is the instance which led to the decision on appeal which is therefore solely relevant […] provided that those proceedings led to the final decision which is no longer subject to an ordinary appeal and which, accordingly, finally disposes of the case on the merits" [paragraph 90].

24 "[…] for the purposes of the application of Article 4a(1) of Framework Decision 2002/584, the concept of 'trial resulting in the decision' must be interpreted as referring, in the case where the proceedings have taken place over several instances which have given rise to successive decisions, at least one of which was handed down in absentia, to only the appeal proceedings, in so far as the decision handed down at the end of those proceedings has finally found the person concerned guilty and determined the penalty, such as a custodial sentence, after a further examination of the merits of the case in fact and in law" [Judgment of 10th August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 76].

25 Judgment of 10th August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 82.

26 Judgment of 10th August 2017, *Tupikas,* C-270/17 PPU, EU:C:2017:628, paragraph 74.

27 Judgment of 10th August 2017, *Tupikas,* C-270/17 PPU, EU:C:2017:628, paragraph 81.

the court renders the judgment solving an ordinary appeal in which the merits of the case could be re-examined in fact and in law. Consequently, when the appeal allows exclusively for the re-examination of the legal questions -meaning that, according to the procedural rules, the court is limited to an assessment in law, the proceedings leading to the judicial decision cannot be included within the concept "trial resulting in the decision" and attention should be paid to the immediately previous instance and decision ruling on the guilt of the person, and imposing a penalty, after examining the merits of the case in fact and in law.

The third and last idea concerns the relation between the first instance and the second instance. It has already been explained that, according to the ECJ interpretation, the concept "trial resulting in the decision" includes exclusively the instance that led to a decision ruling on the guilt of the person and imposing a penalty on him or her after re-examining, in fact and in law, the merits of the case. When that takes place in the second instance, the rights of the defense must also be fully respected, a requirement that shall be verified and met irrespective of the result of these appeal proceedings -that is, regardless of whether the decision adopted in the first instance is upheld or amended when solving the appeal.

This relation between both instances may lead to two different situations. On the one hand, when the defense rights have not been fully respected at first instance, it could be remedied in the second instance by allowing the defendant exercise completely his or her rights before the court. Therefore, if the defendant was *in absentia* at first instance, but was present during the appeal proceedings, art. 4a.1 cannot be applied as this situation does not fall into its scope -because the second instance is the "trial resulting in the decision" that shall be considered by the executing judicial authority and the person concerned appeared in person at these proceedings. On the other hand, when the defense rights have been fully respected at the first instance, but the person concerned was *in absentia* during the appeal proceedings, art. 4a.1 shall be applied. In that case, the second instance is the "trial resulting in the decision" to which the person concerned did not appeared in person, therefore, before deciding on the European arrest warrant the executing judicial authority shall verify whether any of the statements provided by art. 4.a.1(a) to (d) is fulfilled[28].

3.2. The concept "trial resulting in the decision" covers the decision finally amending the quantum of the initial penalty provided the competent authority had certain discretion

Rendered the same day as the Judgment *Tupikas*, in *Zdziaszek* Judgement the Luxembourg judges not only had the chance of reaffirming, and even clarifying, their case-law on the appeal proceedings -as explained in the previous section, but they also developed the interpretation of the concept "trial resulting in the

28 Judgment of 10th August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 84 to 86.

decision" by concluding that it covers subsequent proceedings that lead to a final decision amending the level of the penalty initially imposed provided the competent authority had certain discretion in that regard. Nevertheless, the ECJ maintains that, when faced with a decision adopted as a result of appeal proceedings -in accordance with *Tupikas* case-law, and with a subsequent decision amending the level of the penalty imposed -in which the competent authority enjoyed discretion, both decisions must be considered for the purposes of art. 4a.1 of Framework Decision 2002/584 -that is, both proceedings leading to the adoption of those decisions shall be taken into account as the "trial resulting in the decision"[29].

In the main proceedings the European arrest warrant was issued based on a decision handing down a cumulative sentence rendered *ex officio* by the competent court. According to the Law of the issuing Member State in the proceedings that lead to the adoption of this kind of decision there is no debate about the subject matter of the case, the basis of these proceedings are the sentences imposed by a previous judicial decision, the decision rendered only concerns the combination of different sentences and the possibility of deducting the time already served from the cumulative sentence, besides the person convicted always benefits from this decision as the quantum of the sentence that has to be finally executed is shortened[30]. Consequently, the decision handing down a cumulative sentence is characterized by the fact that it does not imply a re-examination of the guilt of the person convicted, but it could involve an amendment on the initial sentences by reducing the penalties previously imposed.

In its answer to the first question made by the referring court, the ECJ remembers the the European Court of Human Rights (hereinafter ECtHR) case-law already used in *Tupikas* Judgment to maintain the idea that both, the finding of guilt and the determination of the sentence, are equally relevant when it comes to respecting the right to a fair trial. For that reason, the right of the person previously found guilty to be present at the trial resulting in the adoption of a decision that modifies the quantum of the penalty must be respected. The obligation of guaranteeing the defense rights remains even though these proceedings will necessarily lead to a sentence that is more favorable than the initially imposed -for instance, when on the basis of a new legislation the penalty is reduced or when combining a number of sentences the result is a cumulative sentence with a lower penalty than the sum of the individual sentences imposed[31]. Therefore, despite the court no longer examines the guilt of the person convicted, the decision handing down a cumulative sentence can also be taken into consideration for the purposes of art. 4a.1 of Framework Decision 2002/584 as long as it contains the final determination of the penalty -that is, one of the two aspects of the conviction.

29 Judgment of 10th August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 93.
30 Judgment of 10th August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 34.
31 Judgment of 10th August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 86 y 87.

Nevertheless, the ECJ adds an additional requirement to consider that proceedings leading to the decision handing down a cumulative sentence can be included within the concept "trial resulting in the decision": it is necessary that the competent authority enjoys certain discretion when adopting the decision. To define the margin of discretion required the Luxembourg judges turn again to the Strasbourg case-law, stating that the proceedings cannot be "a purely formal and arithmetic exercise" and concretizing that, among other aspects, they shall allow the competent authority to take account "of the situation or personality of the person concerned, or of mitigating and aggravating circumstances"[32]. When as a result of proceedings that fulfill those characteristics, a decision finally determining the sentence is rendered, this decision shall be taken into account together with the previous one finally ruling on the person's guilt -that is, in spite of having been dissociated, both final decisions are relevant for the purposes of art. 4a.1 of the European arrest warrant regulation[33].

Therefore, in contrast with *Tupikas* case-law, where only one instance and one decision were to be taken into consideration as the "trial resulting in the decision", in *Zdziaszek* Judgement the ECJ states that, when applying art. 4a.1, the executing judicial authority must necessarily verify two different proceedings hold before the courts of the issuing Member State. On the one hand, the proceeding that led to a decision in which the guilt of the person was finally determined after examining the merits of the case, depending on the circumstances, this could be the appeal proceedings or, when an appeal requesting for a re-examination of the merits of the case has not been submitted, the proceeding leading to the decision rendered in first and only instance. On the other hand, the proceeding that led to the decision handing down a cumulative sentence shall also be verified by the executing Member State, provided the competent authority to render that decision had a margin of discretion when determining the final sentence.

Finally, two complementary statements made by the ECJ in *Zdziaszek* case-law should be highlighted. The first one concerns the insignificance of the fact that the decision handing down a cumulative sentence will always benefit the person convicted by reducing the penalty initially imposed -it is also irrelevant whether the competent authority has jurisdiction to increase the initial sentence. For the Luxembourg judges, if the above-mentioned requirement is met -that is, when the competent authority enjoys a margin of discretion, it is necessary to bear in mind that "the level of the sentence is not determined in advanced",

32 Judgment of 10th August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 88.

33 When this paper was submitted to the editor, a preliminary ruling concerning the treatment that shall be given to proceedings for the determination of a cumulative sentence was pending before the ECJ. The question referred by the Higher Regional Court of Berlin was whether those proceedings shall also be considered as the "trial resulting in the decision" for the purposes of art. 4a.1 of Framework Decision 2002/584 when the decision is adopted by means of a judgement after holding a hearing, but in that judgment it is not possible to review the finding of guilt or to amend the sentence imposed for the different crimes [Pending case, C-396/22].

conversely, the outcome of these proceedings -and therefore, the quantum of the new sentence to be served, "depends on the assessment of the facts of the case by the competent authority"[34]. In other words, when the exam is not limited to mathematical calculations and the decision is adopted after verifying the particular circumstances, the penalty reduction is not pre-determined, and an active participation of the person convicted could make a difference with regard to the final sentence -being able to obtain a bigger decrease of the penalty if the defense rights are properly exercised in the framework of that proceeding.

The second complementary statement that shall be highlighted concerns the difference pointed out by the ECJ between decisions that modified the quantum of a penalty previously imposed and decisions relating to the methods of execution of a custodial sentence. Even though the Luxembourg judges will have the chance of examining in detail the treatment that shall be given to the second type of decisions in *Ardic* Judgment and in *Minister for Justice and Equality* Judgment -which are covered in the subsequent sections, it is relevant to note that in *Zdziaszek*, and based on the ECtHR case-law, they already maintained that the need to respect the right to a fair trial "does not apply to questions concerning the methods for executing a sentence, in particular those relating to provisional release"[35] -by extension, proceedings that lead to a decision relating to the methods of execution of a custodial sentence cannot be included within the concept "trial resulting in the decision" for the purposes of art. 4a.1 of Framework Decision 2002/584.

3.3. The concept "trial resulting in the decision" does not include proceedings leading to a decision revoking the suspension of the execution of a sentence unless it amends the nature or the quantum of the initial penalty

The decisions revoking the suspension of a sentence have been twice analyzed by the ECJ. The first Judgment concerning those decisions was rendered on 22nd December 2017 when replying to the question referred in case *Ardic*, five years and a half later, in *Minister for Justice and Equality* Judgment, rendered on 23rd March 2023, the Luxembourg judges have reaffirmed, and even clarified, their interpretation of the concept "trial resulting in the decision" with regards to decision revoking the suspension of a sentence. As the main proceedings in both cases differ significantly, and the preliminary rulings in the second judgment entail additional aspects that deserve special attention, in this paper they will be examined in different sections.

The dispute in *Ardic* main proceedings involved different proceedings before the German courts. The person whose arrest and surrender was sought with the European arrest warrant had been convicted to two custodial sentences imposed

34 Judgment of 10th August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 89 and 92.
35 Judgment of 10th August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 85.

by final judgments, these decisions were not rendered *in absentia* as the person convicted appeared in person at the different trials, hence it was not possible to apply art. 4a.1 as the facts did not fall within its scope. After having served part of the sentences, the German courts decided to suspend their execution, this suspension was subject to certain conditions that had to be respected. The person convicted infringed those conditions during the probationary period and, consequently, a decision was adopted revoking the suspension granted and ordering the execution of the remainder of the sentences, however, this decision was rendered *in absentia* of the person convicted and it was not clear whether art. 4a.1 could be applied -that is, if the proceedings leading to the decision revoking the suspension could be considered as the "trial resulting in the decision"[36].

To provide an answer to this question, the ECJ considers it paramount to analyze whether a decision revoking the suspension of the execution of a sentence can be considered, by its nature, equal to a decision finally ruling on the guilt of a person and imposing a penalty on him or her after an examination of the merits of the case in fact and in law[37] -an idea that is in line with its interpretation of the concept "trial resulting in the decision", as explained in the previous sections. Once again, the ECJ turns to the ECtHR case-law on the right to a fair trial, and, as a result, interprets autonomously the concept "decision" for the purposes of art. 4a.1 of Framework Decision 2002/584.

It is possible to deduce two significant consequences from the interpretation given by the ECJ. On the one hand, the Luxembourg judges consider that, on a general basis, a decision relating the execution or the application of a sentence that has been previously imposed is not included within the concept "decision". On the other hand, taking into consideration their case-law in Judgments *Tupikas* and *Zdziaszek*, they consider that this general rule has an exception provided two requirements are met: decisions on the execution or the application of a sentence previously imposed will be covered by the concept "decision" of art. 4a.1 if they modify the nature[38] or the quantum[39] of the sentence (first requirement) and the competent authorities enjoy discretion when adopting them (second requirement)[40]. This exception has been slightly qualified in recent Judgment *Minister for Justice and Equality*, adding that a decision relating to the execution or application of a sentence previously imposed will constitute a "decision" not only when the two above-mentioned requirements are met, but also "where it affects the finding of guilt"[41].

36 Judgment of 22nd December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraphs 32 to 34, and paragraphs 61 and 62.

37 Judgment of 22nd December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraphs 67 and 68.

38 Using an example based on the ECtHR case-law, the nature of the sentence previously imposed is amended when a prison sentence is replaced by an expulsion measure.

39 The quantum or the level of the initial sentence could be modified mitigating the penalty or imposing a lighter penalty.

40 Judgment of 22nd December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 77.

41 Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraph 53.

It should be highlighted that the ECJ refers to "a decision relating the execution or application of a custodial sentence previously imposed", broader terms that shall include, among others, the decisions revoking the suspension of the execution of a sentence previously imposed, as the one in the main proceedings. Regarding those decisions, despite the competent authority has a margin of discretion when deciding on revoking the suspension of the execution, the first requirement is not met because that decision -and that discretion, only concern whether the granted suspension should be revoked or maintained -and the same applies even if additional conditions need to be adopted by the competent authority to keep the suspension of the execution. Thus, proceedings that lead to a decision revoking the suspension of a sentence cannot be considered as the "trial resulting in the decision" for the purposes of art. 4a.1 of Framework Decision 2002/584, being irrelevant whether the competent authority enjoyed a margin of discretion and could have assessed personal circumstances of the person convicted to decide otherwise[42], because, as the ECJ has maintained later in case *Minister for Justice and Equality*, "that margin of discretion does not allow it to modify either the quantum or the nature of the custodial sentence"[43].

Just as in the decision handing down a cumulative sentence that was the focus of *Zdziaszek* Judgment, in the decision revoking the suspension of the execution of a sentence the merits of the case are not reviewed. After verifying that the person convicted failed to comply with the stipulated conditions during the probationary period, the jurisdiction of the competent authority is limited to decide whether the suspension shall be revoked due to the prescribed conditions' infringement and, consequently, to order the person convicted to serve the sentence initially imposed[44]. Nevertheless, unlike the decision handing down a cumulative sentence, the limited powers of the authority deciding on the revocation lead to the adoption of a decision in which neither the nature nor the quantum of the sentence initially imposed by means of a final decision are changed.

---

42 The question of the margin of discretion of the competent authority that decides on the revocation of the suspension also arose in *Ardic* case. Even though it was mandatory for the German courts to revoke the suspension when the person convicted did not respect the prescribed conditions or evaded the supervision and guidance of the probation officer, instead of revoking the suspension, they could increase the initial measures -for instance, adding new conditions or extending the probationary period. In the main proceedings, the competent authority considered that the second option was not sufficient and that revoking the suspension was a proportional measure. Nevertheless, the referring court highlights before the ECJ the margin of discretion of the German competent authority -which had been decisive in *Zdziaszek* Judgment, as an extra argument to defend the importance of the decision revoking the suspension of the execution of a sentence that leads to the deprivation of the liberty of the person concerned [Judgment of 22nd December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraphs 37 to 39, and paragraph 51].

43 Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraph 54.

44 Another example of infringement of the prescribed conditions can be found in *Minister for Justice and Equality* Judgment, where the suspension was annulled because of the commission of a new crime during the probation period -the breach of an objective condition that led to the revocation of the suspension [Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraph 53].

Finally, to reaffirm the idea that proceedings followed to revoke the suspension of the execution of a sentence cannot be considered the "trial resulting in the decision", in Judgment *Ardic* the ECJ emphasizes two additional features of the resulting decision. Firstly, that when the revocation of the suspension is granted, its "only effect […] is that the person concerned must at most serve the remainder of the sentence initially imposed"[45]. Secondly, that when there is a full revocation of the suspension, "the quantum of the sentence still remaining to be served is derived from a purely arithmetic operation"[46]. Thus, once the competent authority confirms that the conditions have not been respected and decides that the suspension cannot be kept, the quantum of the penalty left depends on objective criteria and the person convicted, even if present and participating actively in the proceedings, could not have influenced on the sentence remaining to be served. For that reason, it is irrelevant whether the person convicted was *in absentia* at the proceedings leading to the revocation of the suspension of the execution, as he or she was already aware of the initial sentence imposed and the penalty left to be served.

3.4. The concept "trial resulting in the decision" includes proceedings leading to a second criminal conviction that is decisive to issue the European arrest warrant based on the revocation of the suspension of a first sentence

As already mentioned, on 23rd March 2023 the ECJ rendered another Judgement concerning decisions revoking the suspension of a sentence. However, the main proceedings at *Minister for Justice and Equality* case involved a second criminal conviction that was decisive to annul the suspension and to issue a European arrest warrant. The Luxembourg judges, in their reply to the preliminary questions, reaffirm the idea that the decision revoking the suspension of the execution of a sentence cannot be included within the concept "decision" for the purposes of art. 4a.1 of Framework Decision 2002/584, but, at the same time, interpret that when the revocation is based on the commission of a new crime, the proceedings leading to the conviction for this second offence shall also be considered as "the trial resulting in the decision" when deciding on the execution of a European arrest warrant.

Minister for Justice and Equality Judgment takes as starting point two requests for a preliminary ruling made by the Irish Court of Appeal regarding two main proceedings with similar features that were joined by the ECJ. In both cases, the person concerned had been found guilty and sentenced for a crime commission, that first decision was adopted following a trial at which the interested person was present. Also in both cases, the execution of the sentence was suspended for

45 Judgment of 22nd December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 77.
46 Judgment of 22nd December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 77.

a probation period subject to some conditions, however, during the probation period both people committed other crimes the result being a second conviction following a trial that was held *in absentia* of the person concerned[47]. As the conditions for the suspension were not fulfilled because of the commission of a new crime, the competent authority decided to revoke the suspension of the execution of the sentence imposed by means of the first decision. Finally, it should be noted that in both cases the European arrest warrant was issued in order to execute the first conviction whose suspension had been invalidated -that is, to serve a sentence that was rendered in presence of the interested person[48].

Therefore, in both cases the second criminal conviction plays a key role for the issue of a European arrest warrant. As shown by the events, its role is decisive because it implies the infringement of an objective condition to which the suspension of the first sentence was subject: the commission of a new crime during the probation period. Even though it is true that the decision revoking the suspension of the execution of a sentence does not introduce any change on its nature or quantum, it is also true that without a prior decision finding the person guilty and imposing a penalty for a crime committed during the probation period, the suspension of the execution would not have been annulled -thus, ordering the enforcement of the first conviction and giving grounds for the issue of the European arrest warrant. To this extend, it is irrelevant whether the competent authority was required or authorized to revoke the suspension -that is, whether it enjoyed a margin of discretion in that regard[49], because if the second criminal conviction had not been issued beforehand, there would have been no possibility of issuing a European arrest warrant[50].

Based on the decisive role played by the second criminal conviction for the issue of the European arrest warrant, the ECJ concludes that proceedings leading to that decision shall be considered as the "trial resulting in the decision" for the purposes of art. 4a.1 of Framework Decision 2002/584. Thus, when the suspension of the execution of a sentence was revoked because of the conviction for a new criminal offense and a European arrest warrant has been issued based

47 According to the referring court, in both cases the person concerned did not appear at the trial leading to the second conviction, besides, neither LU nor PH waived their right to be present at those proceedings [Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraph 27 (for LU's main proceedings) and paragraph 42 (for PH's main proceedings)].

48 Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraphs 17 to 26 [for LU's main proceedings] and paragraphs 35 to 40 [for PH's main proceedings].

49 While in LU's main proceedings it is not clear whether the authority that revoke the previous suspension was obliged or had a margin of discretion, in PH's main proceedings the competent authority did not enjoy a margin of discretion when ordering the enforcement of the suspended sentence [Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraph 20 (for LU's main proceedings) and paragraph 37 (for PH's main proceedings)].

50 Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraphs 53, 62 and 63.

on that revocation, in the event that this second criminal conviction was adopted *in absentia* of the person concerned, it falls within the concept "decision" that allows the application of Art. 4a.1 by the Member State requested to execute the warrant[51].

Furthermore, it should be highlighted that, according to the Luxembourg judges, the concept "trial resulting in the decision" could cover more than one proceeding provided they took place *in absentia* of the interested person. This does not seem to be the case in *Minister for Justice and Equality* main proceedings, however, the ECJ interprets the concept "decision" for the purposes of art. 4a.1 of Framework Decision 2002/584 as including both, the *in absentia* proceedings that led to the final conviction whose execution is sought by the European arrest warrant issued, as well as "any other *in absentia* proceedings leading to a criminal conviction without which such a warrant could not have been issued"[52].

Consequently, depending on the circumstances of the case, and provided the interested person did not appear at the trial, a number of proceedings and decisions could be considered by the executing Member State. Nevertheless, when it comes to determine which are the proceedings leading to a new criminal conviction decisive for the issue of the European arrest warrant, in line with case-law *Tupikas*, what is relevant is that, as a result of those proceedings, a decision finally ruling on the guilt of the person and imposing a sentence on him or her has been rendered -irrespective of whether it has been adopted in first instance or after a re-examination of the merits of the case, in fact and in law, through appeal proceedings.

Finally, despite being closely related, as in both cases the European arrest warrant was issued because of the adoption of a previous decision revoking the suspension of the execution of a sentence, the strict interpretation made by the Luxembourg judges in *Ardic* differs from the broad interpretation finally made in *Minister for Justice and Equality*. Thus, concerning specifically decisions to revoke the suspension of the execution previously imposed, in *Ardic* Judgment the ECJ considered that they could not be included within the concept "decision" of art. 4a.1 because their effect was not to modify the nature or quantum of the sentence, adding that "an interpretation […] broader than that […] would risk undermining the effectiveness of the European arrest warrant mechanism"[53].

However, regarding the new criminal conviction that was the objective condition giving grounds for the revocation of the suspension of the sentence -and, in more general terms with regards to any *in absentia* proceedings leading to a criminal conviction that is decisive for the issue of the European arrest

51 Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraphs 67 and 68.

52 Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraphs 65 and 66.

53 Judgment of 22nd December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 87.

warrant, in *Minister for Justice and Equality* Judgment the ECJ considered that they have to be included within the concept "decision" of art. 4a.1, because otherwise, this provision could "be rendered largely ineffective" [54]. One more time, the Luxembourg judges reinforce these ideas by turning to the Strasbourg case-law, according to which, while art. 6 of the European Convention on Human Rights does not apply to questions relating the execution or application of a sentence, proceedings leading to a final decision convicting a person cannot elude the respect of the right to a fair trial as interpreted by the ECtHR[55].

4. FINDINGS

This paper has shown the efforts made by the ECJ to provide an autonomous interpretation of the concept "trial resulting in the decision" for the purposes of art. 4a.1 of Framework Decision 2002/584 -as amended by Framework Decision 2009/299. From the four preliminary questions solved by the Luxembourg judges over the last years, it is possible to conclude that, to guarantee the application of the principle of mutual recognition of judicial decisions in criminal matters, this autonomous concept of EU Law needs to be subject to a strict interpretation. However, art. 4a.1 concerns decisions adopted following a trial at which the interested person did not appear in person, hence the defense rights and, consequently, the fundamental right to a fair trial, could be at stake, for that reason, in order to avoid the ineffectiveness of that provision, the ECJ has included within this concept decisions other than the first instance conviction.

Thus, the autonomous concept "trial resulting in the decision" that allows for the application of art. 4a.1 of Framework Decision 2002/584 -and enables the optional refusal of the European arrest warrant when none of the statements provided by art. 4.a.1(a) to (d) is met, has been interpreted as including the following proceedings and decisions.

Firstly, the ordinary appeal proceedings that lead to a decision finally ruling on the guilt of the person, and imposing a penalty on him or her, after re-examining the merits of the case in fact and in law. In the event that the appeal proceedings fulfill those characteristics, they will be the only ones to be taken into consideration as the "trial resulting in the decision" -regardless of the proceedings that led to a first instance conviction.

Secondly, the proceedings that lead to a decision finally amending the quantum -level, of the sentences initially imposed, however, they will only be

54 Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraph 65.

55 Judgment of 22nd December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026, paragraph 75, Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235, paragraph 59.

considered as the "trial resulting in the decision" if the competent authority had a margin of discretion when adopting the decision. In the event that the decision handing down a cumulative sentence fulfills those characteristics, it will be taken into consideration together with any preceding decisions that finally determined the guilt of the person -and imposed the initial penalties, provided they were rendered *in absentia* of the person concerned.

Thirdly, when the suspension of the execution of sentence has been revoked due to the commission of a new crime, proceedings that lead to the second criminal conviction could be considered as the "trial resulting in the decision", the additional requirement in order to include them within the scope of application of art. 4a of Framework Decision 2002/584 is that the decision finally adopted as a result of those proceedings has been decisive to issue the European arrest warrant. In the event that this second conviction turns out to be determining for the revocation of the previously granted suspension, it will be taken into consideration together with the preceding decision that serves as a basis for the European arrest warrant.

Notwithstanding, the decision revoking the suspension of the execution of the sentence previously imposed will not be considered as the "trial resulting in the decision", therefore, despite being adopted *in absentia* of the person concerned, it does not enable the application of art. 4a.1 of Framework Decision 2002/584. The only exception being the cases where the decision relating the execution or application of a custodial sentence previously imposed amends the nature or the quantum of the initial penalty and the competent authority enjoys certain discretion when adopting it.

5. CITED CASE-LAW OF THE EUROPEAN COURT OF JUSTICE.

Judgment of 23rd March 2023, *Minister for Justice and Equality (Levée du sursis)*, C-514/21 and C-515/21, EU:C:2023:235.

Judgment of 17th December 2020, *Generalstaatsanwaltschaft Hamburg*, C-416/20 PPU, EU:C:2020:1042.

Judgment of 22nd December 2017, *Ardic*, C-571/17 PPU, EU:C:2017:1026.

Judgment of 10th August 2017, *Tupikas,* C-270/17 PPU, EU:C:2017:628.

Judgment of 10th August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629.

Judgment of 24th May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346.

Judgment of 26th February 2013, *Melloni*, C-399/11, EU:C:2013:107.

The obligation of consistent interpretation and the validity of domestic procedural law: an unsolved riddle?*

Dr. Pedro Manuel Quesada López

Associate Professor of Procedural Law
Universidad de Jaén

1. INTRODUCTION

In this chapter, we will proceed with an analysis of the very useful implications of the principle of consistent interpretation in the respective domestic procedural law. Doubts about the conformity of domestic procedural law with European Union law are becoming more frequent, and the complexity of compatibility is becoming so specific that it requires the application of very specialized knowledge in both Union law and domestic procedural law, generating grey areas of dubious scope.

Consistent interpretation of national legislation is the task of national courts, not the CJEU. Consistent interpretation lies at the core of the relationship between an EU directive (or other Union legislative act) and provisions of national law that fall within the directive's scope. Case law of domestic courts is regularly preoccupied with the question of how far a court can stretch national legislation to achieve consistency with a directive.

In this work, we will consider some limits and effects of the application of the principle of consistent interpretation, both for the CJEU and for domestic courts, especially in light of the principles of effectiveness, procedural autonomy, and the rule of reason. We will also explore various interpretative criteria to avoid the collision of norms in the context of the most recent European case law.

2. THE PRINCIPLE OF EFFECTIVENESS IN EUROPEAN UNION LAW: FUNDAMENTAL CHARACTERISTICS

Scholarly doctrine has discerned various dimensions of the principle of effectiveness[1]. One can consider the effectiveness of specific normative or legislative provisions of European Union law (which would be safeguarded through mechanisms like direct effect or consistent interpretation, for instance); effectiveness in the pursuit of the Union's objectives and the protection of its fundamental values; effectiveness in the allocation of competences; or effectiveness in the functioning of processes and procedures. These dimensions of the effectiveness procedure naturally and logically intertwine with each other[2].

In particular, the principle of effectiveness can be conceptualized within domestic procedural regulations to ensure compliance with European law. This involves the synergy of the effectiveness of normative or legislative provisions of European law, to which, depending on the corresponding legal act, the effects, scope, and binding implications of Article 288 TFEU would be attributed[3]. This, in itself, generates binding effects for the Member States. Simultaneously, it addresses the effectiveness in the functioning of various processes regulated in diverse domestic legal systems.

In a negative conception, it is directed at rules of national procedural law that may hinder effective protection for the rights of individuals arising from the direct effect of Union law[4]. Indeed, the fundamental importance of this approach is underscored by the manner in which it gives effect to Union law, prompting some doctrinal perspectives to assert that consistent interpretation takes precedence over direct effect[5].

The case law of the Court of Justice, in addressing the amalgamation of the scope of consumer protection offered by Directive 93/13 with the diverse civil procedural laws of the Member States, has chosen to enhance the consumer's legal

1 Vid., by way of example, the differentiation of Sarmiento Ramírez-Escudero, D., *El control de proporcionalidad de la actividad administrativa*, Valencia, Tirant lo Blanch, 2004, pp. 661-663. In the author's opinion, the first group would include the evaluation of the conformity of national procedural rules with Community law (procedural effectiveness). This would include the actual possibility of exercising Community subjective rights, and national procedural rules are judged. The second group would include the substantive rules that would accompany Community rights, and effectiveness would be aimed at preventing national substantive rules from distorting the guarantees of Union law; and finally, when fundamental rights come into play.

2 Ortino, M., «A reading of the EU constitutional legal system through the meta-principle of effectiveness», *Cahiers de droit europeen*, vol. 52, 1, 2016 p. 101.

3 This would encompass everything that would make the Union's normative provisions possible: interpretation, application, implementation and enforcement in order to achieve full and effective force and effect. It would also include consistent interpretation, useful effect, direct effect, or direct applicability.

4 Quesada López, P. M., *El principio de efectividad del Derecho de la Unión Europea y su impacto en el Derecho procesal nacional*, Madrid, Iustel, 2019, pp. 100-101.

5 Betlem, G., «The Doctrine of Consistent Interpretation», en Prinssen, J. y Schrauwen, A. (coords.) *Direct effect. Rethinking a classic of EC legal doctrine*, Europa Law Publishing, Groningen, 2002, p. 103.

position concerning domestic procedural regulations. This stance undermines their impermeability in various acts, formalities, or phases that might otherwise impede the full application of the Directive.

Specifically, two provisions of Directive 93/13 have given rise to an abundance of case law from the Court of Justice reinterpreting the principle of effectiveness from the perspective of consumer law: Article 6(1), stating that "*Member States shall provide that unfair terms in a contract concluded between a consumer and a seller or supplier shall not bind the consumer under the conditions laid down by their national law and shall provide that the contract remains binding on the parties on the same terms, if it can continue to be performed without the unfair terms*", and Article 7(1), stating that "*Member States shall ensure that, in the interests of consumers and professional competitors, adequate and effective means exist to put an end to the use of unfair terms in contracts concluded between professionals and consumers*". The expression "adequate and effective means" is so broad that it can encompass all types of procedures, if not all, in which the State must guarantee this prerequisite of Union law (non-binding of unfair terms on the consumer), finding its primary domain in domestic procedural law.

The consumer law enshrined in Directive 93/13 constitutes a rule of Community public policy[6], as explicitly stated in paragraph 38 of the Mostaza Claro judgment (First Chamber Judgment of 26 October 2006, Case C-168/05).

The impact of European consumer law under Directive 93/13, as a rule of public policy, implies that it functions as a mandatory provision (see p. 36 of Mostaza Claro). This effect holds significant procedural importance, compelling the national judge to act *ex officio* and even initiate such a discussion at an early stage of the proceedings[7].

3. THE IMPERATIVE OF INTEGRATING DOMESTIC PROCEDURAL NORMS THROUGH CONSISTENT INTERPRETATION

After summarizing the content of the principle of effectiveness, it becomes necessary to determine the content and scope of the consequences of its infringement. As emphasized by legal doctrine, a breach of the principle of effectiveness requires the national court to exert greater effort for its adjustment. The rationale behind this is that the principle seeks to rectify domestic procedural rules that impede or obstruct the exercise of rights conferred by European Union

6 Pérez Daudí, V., *La protección procesal del consumidor y el orden público comunitario*, Barcelona, Atelier, 2018, pp. 63 et seq., Quesada López, P. M., *El principio de efectividad del Derecho de la Unión Europea y su impacto en el Derecho procesal nacional*, cit., p. 165.

7 As warned by Cabrera Mercado, R., «Ejecución hipotecaria y control de oficio por el juez español de las cláusulas abusivas», en Murga Fernánez, J.P. y Tomás Tomás, S. (coords.) *Il diritto patrimoniale di fronte alla crisi economica in Italia e in Spagna*, Milano, Wolters Kluwer CEDAM, 2014, p. 292. 292, who states that postponing the ex officio control to a moment after the admission of the claim in a mortgage foreclosure process would mean ignoring the guarantee of public order protected by Directive 93/13.

law, whether applicable to European or national subjective rights or the holders of such rights[8].

Taking into account the above, the principle of effectiveness may entail a broad spectrum of consequences: either the interpretation of national procedural rules in conformity with Union law, the non-application of domestic procedural law, or even the creation of a new procedural rule or conduct to provide adequate judicial protection for the claimed European right[9].

Legal doctrine underscores the necessity of employing a hybrid methodology in rendering judgments on consistent interpretation, grounded in a relationship between both European and national rules and principles. In any case, consistent interpretation impacts national methods of legal interpretation to the extent that it may require judges to depart from traditional principles of construction, thereby extending the limits of the judicial function accepted in domestic law[10].

The duty of conforming interpretation need not inherently contradict the principle of procedural autonomy of the Member States. As pointed out by legal doctrine, it allows for differentiation and the need to weigh arguments in the specific context in which they are invoked. It also establishes limits and provides a common framework or language that enables us to assess whether the divergent approaches can be considered coherent[11].

While consistent interpretation implies selecting from among multiple interpretative options the one that is most respectful of Union law (involving minimal or almost non-existent interference in the discipline of procedural law), the non-application and creation of a new rule involve more invasive conduct in terms of domestic procedural law. This principle was established in the judgment of June 19, 1990, Case C-213/89, Factortame, where the Court of Justice concluded that the application of a rule of national law, the only obstacle preventing the national court from granting interim measures in protection of Union law in the specific case, must be excluded. The national procedural provision (in the Factortame I case, English national law) conflicting with the full effectiveness of EU law would become inapplicable. This is to the extent that it would compel the court to almost create a new legal channel that does not exist

8 Sarmiento Ramírez-Escudero, D., *El Derecho de la Unión Europea*, Madrid, Marcial Pons, 2018, p. 444.

9 Carratta, A., «Libertà fondamentali del Trattato dell'Unione Europea e processo civile», *Rivista di Diritto processuale*, vol. 70, 6, 2015, p. 1406. For this reason, and because it allows for a last resort to the non-application of national law, it is considered to be a criterion of lesser impact on national law, vid. Macrory, R.; Madner, V. y Mayr, S., «Consistent Interpretation of EU Environmental Law», en Jans, J.H., Macrory, R. y Moreno Molina, A.M. (coords.) *National Courts and EU Environmental Law*, Groningen, Europa Law Publishing, 2013, p. 557.

10 Brenncke, M., «Hybrid Methodology for the EU Principle of Consistent Interpretation», *Statute Law Review*, vol. 39, 2, 2018, pp. 153-154.

11 Haket, S., «Coherence in the Application of the Duty of Consistent Interpretation in EU Law», *Review of European Administrative Law*, vol. 8, 2, 2015, p. 245.

in national procedural law[12], or, so to speak, to act *contra legem nationalis* (which would be a clear limit, as inferred from the Popławski case, C-537/17) [13]. In any event, the interpretation that allows the preservation of the substantive content provided for in Union law shall take precedence[14].

The outcome of consistent interpretation, as emphasized by qualified doctrine, would be the implementation of the substantive content of Union law in the national legal order[15]. However, in the case of the remediable version of consistent interpretation (where national law is not in line with EU law), the legislator will still be obligated to align the objective national law with EU law by amending the domestic rule through domestic legal channels. Therefore, consistent interpretation does not shield the State against potential Treaty infringement proceedings by the European Commission. As a result of consistent interpretation, Union law would *de facto* apply, and even if Union law has been infringed in a formal sense, no damage will have been caused by that infringement.

The case law of the CJEU allows the national court to disapply the national rule without having to seek a preliminary ruling. Such is the case in the Judgment of the Grand Chamber of the CJEU dated January 19, 2010, Case C-555/07, Kücükdeveci case. Point 53 of the judgment expressly states that the national court, when confronted with a national provision falling within the scope of application of EU law that it deems incompatible with EU principles (in this case, the principle of non-discrimination) and when interpretation in accordance with that principle proves impossible, must refrain from applying that provision. Importantly, the national court is not obliged to seek a prior reference to the Court of Justice for a preliminary ruling and is not prevented from doing so[16].

To this end, we consider the need for an analysis of the domestic procedural order under the procedural rule of reason to be of particular relevance[17]. Additionally, a preliminary attempt at consistent interpretation of the national

12 Accetto, M. y Zleptnig, S., «The Principle of Effectiveness: Rethinking Its Role in Community Law», *European Public Law*, vol. 11, 3, 2005, p. 390. Another sector of the doctrine interpreted, with nuances, that the main effect of Factortame was not so much to harmonise or create a new legal channel, but to authorise the creation of a legal channel to be applied in each state. Harlow, C., «A Common European Law of Remedies?», en Kilpatrick, C., Novitz, T. y Skidmore, P. (coords.) *The Future of Remedies in Europe*, Oxford, Hart Publishing, 2000, p. 80.

13 Schumann Barragán, G., «Derecho europeo de consumo y tutela judicial efectiva. La tutela de los consumidores y usuarios en la jurisprudencia del Tribunal Constitucional», en Romero de Pradas, M.I. (coord.) *Hacia una tutela efectiva de consumidores y usuarios*, Tirant lo Blanch, 2022, pp. 251 et seq.

14 Klip, A., «Interpretation of Union Law», en *European Criminal Law. An integrative approach*, Cambridge, Intersentia, 2016, p. 148.

15 Jans, J. H. y Verhoeven, M. J. M., «Europeanisation via Consistent Interpretation and Direct Effect», en Jans, J.H., Prechal, S. y Widdershoven, R.J.G.M. (coords.) *Europeanisation of Public Law*, 2, Groningen, Europa Law Publishing, 2015, p. 129.

16 Quesada López, P. M., *El principio de efectividad del Derecho de la Unión Europea y su impacto en el Derecho procesal nacional*, cit., p. 123.

17 Widdershoven, R., «National Procedural Autonomy and General EU Law Limits», *Review of European Administrative Law*, vol. 12, 2, 2019, p. 33, Prechal, S., «Community law in national courts: the lessons from Van Schijndel», *Common Market Law Review*, vol. 35, 1998, pp. 690 et. Seq.

procedural rule under debate for its incompatibility is deemed essential before concluding the non-application of the national procedural rule by virtue of the principle of effectiveness. It is noteworthy that the CJEU, in its Grand Chamber Judgment of October 5, 2004, Joined Cases C-397/01 to C-403/01, Pfeiffer and others, expressly states that when a domestic court hears a dispute exclusively between private individuals, it must, within its competence and considering all the rules of national law, do everything possible to ensure the full effectiveness of Union law (pp. 118 and 119) [18]. In this way, as the authoritative doctrine points out, interpretation in conformity is established as an obligation, not a mere power, falling on the national body responsible for applying the European rule to safeguard national law rather than declaring it incompatible with Union law, with an obligation of interpretation taking precedence over other application techniques[19].

Corollary to the above, as the best doctrine points out, although consistent interpretation does not require a contra legem interpretation, it is sufficiently forceful and may require deviation from the normal canons of national legal interpretation given the nature of the obligations that may be imposed on individuals[20].

Thus, the principle of consistent interpretation must be applied first[21], leading to the search for an interpretation of national procedural law that allows, as closely

18 Consistent interpretation would have two limits defined in the doctrine. On the one hand (1) that there are no rules on the matter in the national law in force which would make it possible to achieve the result envisaged in Union law or, if they exist, they cannot be interpreted in the sense of the legislative act. This is exemplified by the judgment of the Court of Justice of 19 November 1991 in the Andrea Francovich case, Joined Cases C-6/90 and C-9/90, in which it was held that the rights under Directive 80/987 cannot be invoked against the State before the national courts in the absence of implementing measures adopted within the prescribed time-limit. In other words, an interpretation in conformity cannot entail a contra legem interpretation of national law, as held in the judgment of the Grand Chamber of 16 June 2005, Case C-105/03, Pupino case (p. 47), and 2) that the principles of criminal legality, legal certainty and retroactivity are respected, as highlighted in the judgment of the Court of Justice (Sixth Chamber) of 8 October 1987, Case C-80/86, Kolpinghuis Nijmegen case (p. 13). Vid. Mangas Martín, A., «Los principios del Derecho de la Unión Europea en sus relaciones con los ordenamientos internos (I)», en Mangas Martín, A. y Liñán Nogueras, D.J. (coords.) *Instituciones y Derecho de la Unión Europea*, Madrid, Tecnos, 2010, pp. 382-385.

19 Sarmiento Ramírez-Escudero, D., *El Derecho de la Unión Europea*, cit. p. 287. The author points out that this obligation of consistent interpretation does not only refer to the national rules adopted specifically to give effect to the European rule applicable to the case. For this purpose, all national law, prior or subsequent to the European rule, must be taken into consideration. This would mean, on the one hand, that the court responsible for applying the domestic rule must make use of the entire national legal system and all national techniques of interpretation and application of rules in order to ensure that the Union rule fits correctly into domestic law, in the light of the letter and purpose of Union law, in order to achieve the result envisaged therein (Judgment of the Sixth Chamber of the CJEU of 13 November 1990, Case C-106/89, Marleasing case). On the other hand, and as the author cited in the Marleasing (p. 8) and Pfeiffer (p. 116) judgments cited above emphasises, it would mean that the court would have all the methods of interpretation recognised in national law (such as analogy, hierarchy of norms, equity or other criteria).

20 Craig, P., «The Legal Effect of Directives: Policy, Rules and Exceptions», *European Law Review*, vol. 3, 2009, p. 360.

21 Matteucci, S. C., «Obbligo di interpretazione conforme al diritto UE e principio di autonomia procedurale in relazione al diritto amministrativo nazionale», *Rivista italiana di diritto pubblico comunitario*,

as possible, for the unimpeded application of European law by the national court (and therefore more respectful of national law). Only if it is not possible in the last resort to disapply the procedural rule in question by virtue of the effects of the principle of effectiveness of EU law in the domestic legal procedural system (either by the national court's power to disapply the domestic rule or by an interpretation of the incompatibility of national law with European law by the CJEU). In fact, in support of this doctrinal opinion, it can be pointed out that there is CJEU doctrine in which what is declared to be contrary to EU law is a jurisprudential interpretation of the national courts, rather than the national rule itself[22].

In any event, the requirement of consistent interpretation includes the obligation of national courts to change, if necessary, their settled case-law if it is based on an interpretation of national law that is incompatible with the objectives of EU law, as clarified by the judgments of the Grand Chamber of the CJEU on April 19, 2016, Case C-441/14, Dansk Industri (pp. 33-34), and on April 17, 2018, Case C-414/16, Vera Egenberger (pp. 72-73).

If there is a possible interpretative option, the Spanish legal system would mandate its consideration in the corresponding sense. In this regard, Article 4 bis (1) of the Spanish Organic Law of the Judiciary can be cited, which stipulates that "*Judges and Courts shall apply European Union law in accordance with the case law of the Court of Justice of the European Union.*"

If there were a possible interpretative option, the Spanish legal system would oblige it to be taken in the corresponding sense. To this effect, Article 4 bis (1) of the Spanish Organic Law of the Judiciary can be cited, by virtue of which "*the Judges and Courts shall apply European Union law in accordance with the case law of the Court of Justice of the European Union*".

4. THE SCOPE OF INTERPRETATION OF NATIONAL PROCEDURAL LAW: ADHERENCE AND CONTRADICTION WITH UNION LAW IN RECENT CASE LAW

Having analyzed the above, it can be deduced that the principle of consistent interpretation constitutes a clear criterion in the application of domestic law, especially in conjunction with the rule of reason. It represents an analysis that should lead to the most consonant interpretation of domestic procedural law; otherwise, the principle of effectiveness will apply to its full extent.

In recent years, the principle of consistent interpretation has been a key parameter in its application by the Court of Justice of the European Union.

---

vol. 5, 2014, pp. 1177-1178; and equally Lenaerts, K.; Maselis, I. y Gutman, K., *EU Procedural law*, Oxford, Oxford University Press, 2014, p. 131.

22 E.g. Lucchini (Judgment of 18 July 2007, Case C-119/05) and Banco Primus (Judgment of 26 January 2017, Case C-421/14).

An example of this is found in the so-called effectiveness of procedural activity in a different procedure[23], a matter discussed in the Judgment of the Court (First Chamber) dated January 12, 2023, Case C-132/21, BE. In that case, the dispute revolved around whether Hungarian procedural law, in its regulation of the exercise of rights under Articles 77 to 79 of Regulation 2016/679, was in conformity with EU law[24]. This was due to a procedure for requesting access to information requested by the shareholder of a company, where an action was brought before the civil courts (under Article 79(1) of the Regulation) against the decision of the data controller. Simultaneously, a second parallel action was brought on the grounds that the controller had infringed Mr. BE's right of access to his personal data under Article 78 of the Regulation.

The Hungarian referring court indicated that, under its domestic procedural law, the Administrative Court is not bound by the final judgment delivered by the civil court that ruled on the appeal brought by BE based on Article 79(1) of Regulation 2016/679 (p. 28 of the BE case). This clarification about the application of interpretation was essential. Therefore, it ultimately ruled that Hungarian procedural law allowed for a concurrent and independent exercise of the remedies provided for by both Articles 77-1 and 78-1 and by Article 79-1. It was also held that it was for the Member States, in accordance with the principle of procedural autonomy, to determine the manner in which these remedies should be organized to safeguard the effectiveness of the protection of the rights guaranteed by that regulation, ensuring the consistent and homogeneous application of its provisions and the right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights.

On the other hand, the Court of Justice has held that national procedural law may not be compatible with EU law even if reintroduced by way of interpretation. This is evident in the judgment of the Court of Justice (Fourth Chamber) dated March 27, 2019, Case C-545/17, Mariusz Pawlak.

This case originated from a claim made by an agricultural professional against the Agricultural Social Welfare Fund for an accident at work. His claim being rejected, he turned to the courts. The Poznan Regional Court dismissed the challenge as out of time. According to that court's perspective, it was irrelevant that the postmark on the postal item, deposited with an operator other than the designated operator, was dated June 20, 2016, the last day of the time limit for bringing an action. This was because Article 165(2) of the KPC (Polish Code of Civil Procedure) considers only the lodging of a procedural document with the court concerned to be equivalent to the lodging of the document through the designated operator, even if it is carried out by ordinary post.

23 In this sense vid. Querzola, L., *L'efficacia dell'attività processuale in un diverso giudizio*, Bologna, Bononia University Press, 2016.

24 On the data protection obligations of the Member States vid. Pérez-Luño Robledo, E. C., *El procedimiento de habeas data. El derecho procesal ante las nuevas tecnologías*, Madrid, Dykinson, 2017.

In the complaint before the Polish Supreme Court, doubts were raised about the conformity of that Polish procedural provision with European Union law. This was due to the fact that the content of Article 165 of the Polish Code of Procedure did not fall within the scope of Article 7(1) (which specifies the services that Member States may reserve to the universal service provider(s), including the clearance, sorting, transport, and delivery of items of domestic correspondence, without providing for other types of services) and 8(1) (on the right of Member States to organize the installation of letter boxes on the public highway, the issue of postage stamps, and the registered mail service used in connection with judicial or administrative proceedings in accordance with their national law) of Directive 97/67 on common rules for the development of the internal market of Community postal services. Particularly, under Polish domestic procedural law, only the lodging of a procedural document at a post office of a designated operator, i.e., an operator obliged to provide the universal postal service, was equivalent to the lodging of that document with the court. This provision excluded from that effect the lodging of a procedural document at a national post office of another postal operator providing universal postal services but not being a "designated operator."

According to the Court of Justice in the Pawlak case, consistent interpretation is limited by the general principles of EU law, especially the principle of legal certainty. It cannot serve as a basis for a contra legem interpretation of national law (p. 85). For that reason, an interpretation in conformity with Article 165-2 of the Polish Code of Procedure in conjunction with Article 7(1) and 8(1) of the Directive would lead to an interpretation contra legem of that provision of national law. Such consistent interpretation could interfere with the application of the rules of national law on time limits for bringing proceedings, the purpose of which is to ensure legal certainty. This issue, in the Court's view, constitutes a limit to the requirement of an interpretation of national law that complies with EU law (p. 88 of Pawlak).

It would seem to follow from the above that where domestic law establishes categories expressly not permitted by areas expressly governed by Union law (such as the use of post offices as a mechanism to be used in the framework of judicial proceedings in which the time limit and content are certified), it can also derive no advantage from such a breach of Union law (p. 89 of Pawlak). This would constitute a red line concerning the conformity of domestic procedural law with Union law.

Consistent interpretation takes on a very special nuance when dealing with European consumer law, particularly Directive 93/13 on unfair terms in consumer contracts. As argued above, Articles 6(1) and 7(1) of this directive have been considered of Community public policy. It is in this category of subjective right that the Judgment of the Court (Eighth Chamber) dated June 26, 2019, Case C-407/18, Kuhar case, was delivered. This procedure originated from the

enforcement of a directly enforceable notarial deed, involving a loan secured by a mortgage under Slovak law (even though the loan was agreed in Swiss francs). The court of appeal noted that under the Slovak Enforcement and Interim Measures Act, the enforcement judge had no effective possibility of interrupting or suspending enforcement (at the debtor's request or ex officio) until a final decision on the merits had been taken at the end of declaratory proceedings initiated by the debtor as a consumer. This limitation was conceived by the Slovakian Maribor Court of Appeal as possibly being contrary to Directive 93/13.

The Kuhar case may be contradictory, but it is, above all, a paradigm in the study of the consistent interpretation of domestic procedural law. This is because, to our surprise, the Court of Justice first judged the contravention of the principle of effectiveness of national law and then ruled on consistent interpretation. For the Court of Justice (pp. 61 and 62 of Kuhar), it is contradictory per se that the review of the possibly unfair nature of the terms contained in a mortgage credit agreement concluded between a professional and a consumer may be carried out not by the court hearing the application for enforcement of such an agreement but exclusively, subsequently, and if necessary, by the substantive court before which the consumer has brought the action for the nullity of such unfair terms. In the opinion of the Eighth Chamber, if the judge hearing the mortgage enforcement action cannot suspend it on the grounds that the mortgage loan agreement contains an unfair term, it is likely that the enforcement of the mortgaged real estate property will take place before the decision of the judge on the merits declaring, if appropriate, the nullity of such term due to its unfair nature and, consequently, of the proceeding. This is in a similar way to the Aziz case, C-415/11, March 14, 2013, p. 61 of which stated that Spanish procedural law was at odds with EU law as the means or remedies made available to the consumer were not adequate to prevent the definitive and irreversible loss of his or her home.

However, the case in the Kuhar case is different from the Aziz case, precisely in the element of consistent interpretation. As stated in Kuhar, p. 64, Slovak national law could be interpreted in a manner consistent with European Union law, allowing the court hearing an enforcement action to assess of its own motion whether a term in a mortgage credit agreement concluded by notarial deed is unfair and, on that basis, to suspend the enforcement (Article 55 of the Slovak Civil Procedure Act on opposition to enforcement and Article 71 of the Act on Enforcement and Preventive Measures on the suspension of enforcement). It is, therefore, strange that the Eighth Chamber interpreted Slovak procedural law as being contrary to EU law, thereby *de facto* refraining from applying the rule of reason, which must be a clearly inspiring criterion when applying such a disproportionate legal consequence as a declaration of non-conformity of national law with EU law. And all this despite the general statement that "it is for the referring court to examine whether the national legislation at issue in

the main proceedings is indeed capable of being interpreted in accordance with Directive 93/13 and, if so, to draw the appropriate legal consequences" (p. 67 of Kuhar).

In our opinion, the Kuhar case is an example of the need, which we have already highlighted, for the Grand Chamber or the Plenary of the Court of Justice to determine uniform criteria for, on the one hand, in which cases a national process or concatenated set of processes undermine the effectiveness of the protection that Directive 93/13 seeks to guarantee (especially when said process is or derives from an execution on a property secured by mortgage in judicial or extrajudicial proceedings, and where the consumer can raise arguments with intra-procedural effectiveness or where the court must act *ex officio*) and when such proceedings are independent or not of a legal consumer relationship under the terms of Directive 93/13 itself. Particularly, whether the consumer has effective mechanisms available to him to make allegations, oppose, and suspend the enforcement process while the compatibility or otherwise of the terms of the contract with the requirements of Directive 93/13 is being elucidated[25].

The Court of Justice seems, in a group of decisions (such as Kuhar, Banesto, C-618/10, p.54 or Aziz), to specify an abstract risk of the consumer regardless of the diligence in formulating allegations or remedies or not. Another line from which it follows is that the effectiveness of the European law invoked by the consumer will depend on the consumer exercising the corresponding action or allegations within the time limits or procedural moments regulated by domestic procedural law (as in the case of Asturcom, C-40/80, p. 40). Another line from which it follows is that the effectiveness of the European law invoked by the consumer will depend on the consumer exercising the corresponding action or allegations within the time limits or procedural moments regulated by domestic procedural law (as in the case of Asturcom, C-40/80, p. 40, or Banco Santander, C-40/80, p. 40). And in this sense, we consider it more than necessary and justifiable to clarify the effect of consistent interpretation in the recognition of the principle of effectiveness, especially in the light of the rule of reason.

Special consideration should be given to the judgment of the Ninth Chamber of 22 September 2022, case C-215/21, case Servicios Prescriptor y Medios de Pagos EFC v Zulima. The complexity arising from Case C-215/21 may be summarized in the following problem: determining to what extent Spanish domestic procedural law is compatible with the principle of effectiveness in matters of consumer law enshrined in EU law in Articles 6(1) and 7(1) of Council Directive 93/13 on unfair terms in consumer contracts, and in particular the power of the Court to order the professional to pay the costs or not in cases of termination of the proceedings due to extra-procedural satisfaction or lack of subject-matter.

25 Quesada López, P. M., *Desencuentros entre el Derecho europeo y la ejecución hipotecaria española: ¿Una relación imposible?*, Cizur Menor, Aranzadi, 2020, p. 170.

The origin of the proceedings lies in a revolving consumer credit contract. This contract contained unfair terms determining the interest, the repayment of which was sought in the civil proceedings. For the purposes of Article 2 of Directive 93/13, one party to the contract was the consumer and the other the seller.

During the civil proceedings, the defendant (professional banker) deposited the amount claimed in the judgment and requested the termination of the proceedings due to a loss of subject matter. Thus, the applicant consumer claimed that the application to discontinue the proceedings was unfounded because not all of the claims in the complaint had been satisfied, in particular the payment of the costs of the proceedings. The applicant emphasized that under Spanish procedural law, she had requested the defendant before filing the lawsuit to cancel the credit agreement and return the amounts paid in interest to avoid having to go to court (as the banker ultimately did by not returning the amounts), which could be included in the criteria for awarding costs for procedural bad faith to the defendant for acquiescing to the claim under art. 395.1 paragraph 2 of the Spanish Civil Procedure Act (by virtue of which "*if, before the claim was filed, the defendant had been sent a reliable and justified request for payment*", as she had done).

According to the strict and subjective interpretation of the Court of First Instance of Las Palmas[26], the national legislation in question (Art. 22 1 and 2 of the Spanish Code of Civil Procedure) led to the conclusion that costs could not be awarded if extra-procedural satisfaction was granted. For this reason, the Court asked for a preliminary ruling on the doubts as to the conformity of the provisions of Art. 22 1 and 2 of the LEC with the principle of effectiveness in matters of European consumer law established in Articles 6(1) and 7(1) of Directive 93/13.

In the Zulima case, the Court of Justice assumed that, in accordance with its case-law, the costs and expenses of the proceedings may come to constitute, de facto, a specific feature of the judicial process which, under the criterion laid down in the case-law of the Court of Justice, may be interpreted as an element that may affect the legal protection which consumers must enjoy under the provisions of Directive 93/13[27]. In spite of this, and taking into consideration the interpretative doubts that could arise in the Zulima case[28], in the observations submitted by the

26 The obligation to perform a consistent interpretation is absolute, and applies regardless of what the referring court might feel is possible or not under national law, vid. Franklin, C., «Limits to the limits of the principle of consistent interpretation? Commentary on the Court's decision in Spedition Welter», *European Law Review*, vol. 40, 6, 2015, online.

27 Judgment of the Fourth Chamber of the CJEU of 4 June 2009, Pannon GSM case, Case C-243/08, p. 34.

28 Vid. Quesada López, P. M., «La delicada compatibilidad con el Derecho europeo de la condena en costas en supuestos de satisfacción extraprocesal en materia de consumidores», *La Ley Unión Europea*, vol. 2022, 108. Spanish case law is controversial as to whether the claim for payment of costs can be included in order to be understood as complete satisfaction for the purposes of resolving the incident of extraprocedural satisfaction or supervening loss of purpose. Two lines of case law can be identified in favour and against recognising the request for an order for costs or their payment as a legitimate interest

Spanish Government to the Court of Justice, it held that Article 22 of the Spanish LEC can be interpreted in a manner consistent with the requirements deriving from this principle (p. 42). In his opinion, this article could be interpreted as meaning that it is for the national court to take into account the possible bad faith of the professional and, if necessary, to order him to pay the costs of the legal proceedings. For that reason, the Court held that Spanish procedural law could be interpreted in conformity with EU law, considering that domestic procedural law allowed an interpretation compatible with the principle of effectiveness, insofar as it did not allow consumers to be deterred from exercising the rights conferred on them by Directive 93/13. Thus, as in the Kuhar case, it was determined that it would be up to the referring court to verify whether such an interpretation could be made in accordance with EU law (pp. 43 and 44 of Zulima).

It should be emphasized that there is no uniform ruling in the Zulima and Kuhar cases. In both cases, it was established in the preliminary ruling procedure that, despite the existence of doubt as to the interpretation of the Slovak and Spanish domestic procedural laws in the face of different problems relating to compliance with European consumer law (Articles 6(1) and 7(1) of Directive 93/13), those domestic laws allowed for an interpretation both in accordance and not in accordance with EU law in those problems. For this reason, the criterion that led the ECJ to declare that Slovak procedural law could not be interpreted in conformity with EU law, whereas Spanish procedural law could, cannot be understood. Thus, and as will be emphasized in the conclusions, a revision in this respect is necessary.

The doctrine has, for several years now, stressed that the interpretative obligation of consistent interpretation remains somewhat uncertain. In part, this is unavoidable, as the technique works to resolve conflicts between incompatible rules. However, legal uncertainty could be reduced if the ECJ were prepared to provide more extensive reasoning in its judgments[29].

In outlining possible future lines of application, the judgment of the Grand Chamber on 8 November 2022, in case C-873/19, Deutsche Umwelthilfe eV, could be crucial. In this case, the adequacy of the rules on standing (under German

sufficient to provoke the holding of the hearing provided for in art. 22. 2 of the LEC: in favor, represented by the Provincial Courts of Barcelona (Judgment of the 11th Section, no. 279/2014, of 19 June) and Tarragona, (Judgment of the 3rd Section, no. 232/2005 of 15 April); and against, of the Provincial Court of Madrid (Order of the 14th Section, no. 253/2012, of 4 December. For an important sector of the doctrine, the termination of the procedure would involve a legal loophole in this sense, vid. Gascón Inchausti, F., *La terminación anticipada del proceso por desaparición sobrevenida del interés*, Madrid, Civitas, 2003, p. 424; Flores Prada, I., «Terminación anticipada por satisfacción extraprocesal o carencia sobrevenida del objeto», en Noya Ferreiro, M.L., Rodríguez Álvarez, A. y Castillejo Manzanares, R. (coords.) *Tratado sobre la disposición del proceso civil*, Valencia, Tirant lo Blanch, 2017, online. For another sector, if the ruling on them could be otherwise, it would have to be based on the assessment of the conduct of the defendant, which would require an assessment by the Court, vid. Herrero Perezagua, J. F., *Reglas, excepciones y problemas del pronunciamiento sobre costas*, Las Rozas, Madrid, Wolters Kluwer, 2019, p. 197.

29 Betlem, G., «The Doctrine of Consistent Interpretation», cit., p. 103.

domestic procedural law, particularly Article 42 of the Law on Administrative Jurisdiction) of an environmental protection association to challenge the German domestic EC type-approval regulations in relation to vehicles produced by the car manufacturer Volkswagen AG, equipped with a diesel engine of the Euro 5 generation, was debated. The Grand Chamber interpreted Article 9(3) of the Aarhus Convention, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, as precluding a domestic procedural law such as German law, which prevented actions before national courts to challenge rules on the basis of that EU law, since a consistent interpretation with EU law was impossible in that case (p. 77 of Deutsche Umwelthilfe eV).[30].

5. CONCLUSION. RECONCILING DOMESTIC PROCEDURAL LAW WITH THE PRINCIPLE OF CONSISTENT INTERPRETATION: IMPLICATIONS, CHALLENGES, AND JURISPRUDENTIAL REFLECTIONS IN EUROPEAN UNION CONTEXT

In assessing the compatibility of a Member State's domestic procedural law with Union law, the obligation of consistent interpretation emerges as a pivotal criterion. This becomes particularly salient when hinging on the transposition of a directive or the application of the principle of effectiveness, notably in areas where questions of Community public policy, such as consumer law or competition law, come to the fore.

The obligation of consistent interpretation extends beyond national rules expressly adopted to give effect to the applicable European rule. In this regard, all national laws, whether preceding or subsequent to the European rule, must be considered in line with the rule of reason. This entails that the court responsible for applying the domestic rule must utilize the entire national legal system and all national techniques of interpretation and application to ensure seamless integration of the Union rule into domestic law, aligning with the letter and purpose of Union law. National courts are empowered to employ all methods of interpretation recognized in national law, including analogy, hierarchy of norms, equity, or other criteria. Although consistent interpretation does not mandate a *contra legem* interpretation, it is binding enough to potentially deviate from normal canons of national legal interpretation due to the nature of the obligations imposed on individuals.

Thus, the principle of consistent interpretation first demands the pursuit of an interpretation of national procedural law that allows for the unimpeded application of European law by the national court, respecting national law to

30 On the current jurisdictional remedies for obtaining effective judicial protection of the right to an environment vid. Spada Jiménez, A., *Justicia climática y eficiencia procesal*, Thomson Reuters Aranzadi, 2021.

the extent possible. Only if, as a last resort, it becomes impossible to disapply the procedural rule in question due to the effects of the principle of effectiveness of EU law within the domestic legal procedural system should the principle be invoked. This could occur through the power of the national court to disapply the domestic rule or through an interpretation of the incompatibility of national law with European law by the CJEU. Notably, there is CJEU doctrine, such as in the Lucchini and Banco Primus cases, where what is deemed contrary to EU law is a jurisprudential interpretation of the national courts rather than the national rule itself. In any event, the requirement of conformity of interpretation includes the obligation of national courts to change or overrule, if necessary, their settled case law if it is based on an interpretation of national law that is incompatible with the objectives of EU law.

The principle of consistent interpretation has wielded significant influence on the compatibility of domestic procedural provisions in diverse areas, including the effects of one proceeding on another, procedural time limits, the filing of pleadings, or the possibility of an order for costs. The overarching demand is always that the legal system must allow for the interpretation of domestic law in a manner compliant with the obligations of European Union law.

It is crucial to highlight the existence of contradictory case law within the Court of Justice, notably in the application of the principle of consistent interpretation in accordance with the law contained in Articles 6(1) and 7(1) in the Kuhar and Zulima cases. In both instances, domestic procedural law, albeit with uncertainties, allowed for an interpretation in conformity with EU law. The ambiguity surrounding the Court of Justice's criteria in the Kuhar case, declaring Slovak procedural law contrary to EU law, and in the Zulima case, declaring Spanish procedural law in conformity with EU law, underscores the potential utilization of interpretation in conformity as a "double standard." This should compel judges to refine their interpretation in a strengthened manner, justifying a review by the Grand Chamber of the Court of Justice to unify its own doctrine in light of both cases.

In conclusion, these circumstances exemplify the oscillating case law interpreting the content and extent of the principle of effectiveness in consumer matters as a rule of Community public policy guaranteed by Directive 93/13. This is particularly pertinent in processes arising from the execution on a property secured by mortgage in judicial or extrajudicial proceedings. Here, consumers may raise arguments with intra-procedural effectiveness, or the court must act ex officio, whether these proceedings are independent or not of a legal consumer relationship under the terms of Directive 93/13 itself.

BIBLIOGRAPHY

Accetto, M.; y Zleptnig, S., «The Principle of Effectiveness: Rethinking Its Role in Community Law», *European Public Law*, vol. 11, n.º 3, 2005, pp. 375-403.

Betlem, G., «The Doctrine of Consistent Interpretation», en Prinssen, J. y Schrauwen, A. (coords.) *Direct effect. Rethinking a classic of EC legal doctrine*, Europa Law Publishing, Groningen, 2002, pp. 79-104.

Brenncke, M., «Hybrid Methodology for the EU Principle of Consistent Interpretation», *Statute Law Review*, vol. 39, n.º 2, 2018, pp. 134-154.

Cabrera Mercado, R., «Ejecución hipotecaria y control de oficio por el juez español de las cláusulas abusivas», en Murga Fernánez, J.P. y Tomás Tomás, S. (coords.) *Il diritto patrimoniale di fronte alla crisi economica in Italia e in Spagna*, Milano, Wolters Kluwer CEDAM, 2014, pp. 285-294.

Carratta, A., «Libertà fondamentali del Trattato dell'Unione Europea e processo civile», *Rivista di Diritto processuale*, vol. 70, n.º 6, 2015, pp. 1400-1422.

Flores Prada, I., «Terminación anticipada por satisfacción extraprocesal o carencia sobrevenida del objeto», en Noya Ferreiro, M.L., Rodríguez Álvarez, A. y Castillejo Manzanares, R. (coords.) *Tratado sobre la disposición del proceso civil*, Valencia, Tirant lo Blanch, 2017, pp. 603-658.

Franklin, C., «Limits to the limits of the principle of consistent interpretation? Commentary on the Court's decision in Spedition Welter», *European Law Review*, vol. 40, n.º 6, 2015, pp. 910-924.

Gascón Inchausti, F., *La terminación anticipada del proceso por desaparición sobrevenida del interés*, Madrid, Civitas, 2003.

Haket, S., «Coherence in the Application of the Duty of Consistent Interpretation in EU Law», *Review of European Administrative Law*, vol. 8, n.º 2, 2015, pp. 215-246.

Harlow, C., «A Common European Law of Remedies?», en Kilpatrick, C., Novitz, T. y Skidmore, P. (coords.) *The Future of Remedies in Europe*, Oxford, Hart Publishing, 2000, pp. 69-83.

Herrero Perezagua, J. F., *Reglas, excepciones y problemas del pronunciamiento sobre costas*, Las Rozas, Madrid, Wolters Kluwer, 2019.

Jans, J. H.; y Verhoeven, M. J. M., «Europeanisation via Consistent Interpretation and Direct Effect», en Jans, J.H., Prechal, S. y Widdershoven, R.J.G.M. (coords.) *Europeanisation of Public Law*, 2, Groningen, Europa Law Publishing, 2015, pp. 73-132.

Klip, A., «Interpretation of Union Law», en *European Criminal Law. An integrative approach*, Cambridge, Intersentia, 2016, pp. 133-172.

Lenaerts, K.; Maselis, I.; y Gutman, K., *EU Procedural law*, Oxford, Oxford University Press, 2014.

Macrory, R.; Madner, V.; y Mayr, S., «Consistent Interpretation of EU Environmental Law», en Jans, J.H., Macrory, R. y Moreno Molina, A.M. (coords.) *National Courts and EU Environmental Law*, Groningen, Europa Law Publishing, 2013, pp. 30-50.

Mangas Martín, A., «Los principios del Derecho de la Unión Europea en sus relaciones con los ordenamientos internos (I)», en Mangas Martín, A. y

Liñán Nogueras, D.J. (coords.) *Instituciones y Derecho de la Unión Europea*, Madrid, Tecnos, 2010, pp. 363-385.

Matteucci, S. C., «Obbligo di interpretazione conforme al diritto UE e principio di autonomia procedurale in relazione al diritto amministrativo nazionale», *Rivista italiana di diritto pubblico comunitario*, vol. 5, 2014, pp. 1175-1203.

Ortino, M., «A reading of the EU constitutional legal system through the meta-principle of effectiveness», *Cahiers de droit europeen*, vol. 52, n.º 1, 2016, pp. 91-114.

Pérez Daudí, V., *La protección procesal del consumidor y el orden público comunitario*, Barcelona, Atelier, 2018.

Pérez-Luño Robledo, E. C., *El procedimiento de habeas data. El derecho procesal ante las nuevas tecnologías*, Madrid, Dykinson, 2017.

Prechal, S., «Community law in national courts: the lessons from Van Schijndel», *Common Market Law Review*, vol. 35, 1998, pp. 681-706.

Querzola, L., *L'efficacia dell'attività processuale in un diverso giudizio*, Bologna, Bononia University Press, 2016.

Quesada López, P. M., *Desencuentros entre el Derecho europeo y la ejecución hipotecaria española: ¿Una relación imposible?*, Cizur Menor, Aranzadi, 2020.

Quesada López, P. M., *El principio de efectividad del Derecho de la Unión Europea y su impacto en el Derecho procesal nacional*, Madrid, Iustel, 2019.

Quesada López, P. M., «La delicada compatibilidad con el Derecho europeo de la condena en costas en supuestos de satisfacción extraprocesal en materia de consumidores», *La Ley Unión Europea*, vol. 2022, n.º 108.

Sarmiento Ramírez-Escudero, D., *El control de proporcionalidad de la actividad administrativa*, Valencia, Tirant lo Blanch, 2004.

Sarmiento Ramírez-Escudero, D., *El Derecho de la Unión Europea*, Madrid, Marcial Pons, 2018.

Schumann Barragán, G., «Derecho europeo de consumo y tutela judicial efectiva. La tutela de los consumidores y usuarios en la jurisprudencia del Tribunal Constitucional», en Romero de Pradas, M.I. (coord.) *Hacia una tutela efectiva de consumidores y usuarios*, Tirant lo Blanch, 2022, pp. 249-264.

Spada Jiménez, A., *Justicia climática y eficiencia procesal*, Thomson Reuters Aranzadi, 2021.

Widdershoven, R., «National Procedural Autonomy and General EU Law Limits», *Review of European Administrative Law*, vol. 12, n.º 2, 2019, pp. 5-34.

The right to enforce an arbitral award within the framework of the European Convention on Human Rights

Dr. José Caro Catalán

Profesor Sustituto Interino de Derecho Procesal

1. INTRODUCTION

In recent times the case law of the Spanish Constitutional Court –Tribunal Constitucional (hereinafter, TC)– has captured the attention of the arbitration community. In barely two years, the TC has ruled several decisions on the infringement of public order as a cause for annulment of arbitral awards and its projection on the right to effective judicial protection (art. 24 CE), putting an end, at least for the time being, to a dangerous tendency to overreach in the jurisdictional control of the award[1]. However, this jurisprudential milestone should not overshadow other judicial decisions being taken outside our borders.

The European Court of Human Rights (hereinafter, ECtHR) has created a remarkable body of case law on arbitration that must be taken into account by arbitration academics and practitioners[2]. Although ECtHR has been issuing important decisions for the arbitration discipline since its creation, in recent years the relevance of its arbitration case law has increased exponentially, both in quantitative and qualitative terms.

Particularly significant cases are Mutu and Pechstein v. Switzerland (no. 40575/10 and 67474/10) 2 October 2018, and the more recent S.P.A. v. Italy (no. 5312/11) 20 May 2021. In these rulings, the ECtHR rules, among other things, on the relationship between the right to a fair trial, recognised in art. 6 European Convention of Human Rights (hereinafter, ECHR) and arbitration, adopting a somewhat surprising position. In a few lines, the ECtHR considers that the right of access to a court, implicitly recognised in Art. 6 ECHR, does not prevent the establishment of arbitral tribunals for the resolution of disputes. Traditionally,

1 *vid.* AA. VV., *El proceso arbitral en España a la luz de la doctrina del Tribunal Constitucional,* (coord. José Carlos Fernández Rozas), Wolters Kluwer, Madrid, 2021.

2 *Vid.* my paper "Arbitraje y Derechos Humanos: Una aproximación a la jurisprudencia del Tribunal Europeo de Derechos Humanos", *Revista General de Derecho Europeo,* núm. 51, 2020, pp. 174-210.

it had started from the idea that, in the case of voluntary arbitration, in which consent had been freely given by the parties, art. 6 ECHR was not relevant, insofar as submission to arbitration implies a waiver of these procedural rights. However, in the latter rulings, the ECtHR has made it clear that the signing of an arbitration agreement does not imply an automatic waiver of all the guarantees provided for in this article. In other words, even in voluntary arbitration, the parties, unless waived *ex post*, retain their right to an impartial and independent tribunal, among others[3].

But the relevance of the ECHR and, therefore, of the case law of the ECtHR is not limited to the declaratory phase of arbitration. Very recently, in the decision Holding, A.S. v. Slovakia, (no. 55617/17) of 30 June 2022, a sometimes overlooked reality has come to light: the human rights relevance of the procedure for recognition and enforcement of an arbitral award.

Regarding the judicial process, the ECtHR considers that art. 6 ECHR includes the right to enforce "final and binding" judicial decisions. Without this one, the other rights and guarantees recognised in this article would be deprived of any useful effect. In fact, to satisfy this right the enforcement should be done within a reasonable period of time. Obviously, this requirement must be assessed in the light of its complexity, the behaviour of the plaintiff, as well as the amount and nature of the sum ordered by the judge[4].

The above reasoning also applies to arbitration and, by extension, to arbitral awards. As we have mentioned, the case law of the ECtHR, under certain circumstances, considers that the rights and guarantees of Art. 6 ECHR are applicable to arbitration, so it must be understood that Art. 6.1 ECHR also incorporates the right to recognition and enforcement of the arbitral award.

As we will analyse in this article, the case BTS Holding, A.S. v. Slovakia, (no. 55617/17) of 30 June 2022 points in this direction, setting a very important precedent, especially for international arbitration -commercial and investment arbitration-. In this paper, we will carry out an analysis of this decision with the purpose of carrying out a general reflection on the right to enforce an arbitral award.

2. BTS HOLDING, A.S. V. SLOVAKIA, (NO. 55617/17)

2.1. The facts

This judgment is in response to a claim brought on 28 July 2017 by a privately owned company (BTS Holding), incorporated under Slovak law, against the

3 *S.P.A v. Italia* (nº 5312/11) of 20 may 2021.

4 *Bourdov v. Russie* (n.º 59498/00) of 7 may 2002.

Slovak State. The application alleges a possible violation of Art. 1 of Protocol No. 1 to the ECHR, due to the non-enforcement of an arbitral award rendered in an arbitration held at the International Chamber of Commerce in Paris against the National Property Fund of Slovakia (hereinafter NPF), a public state agency whose task is to privatize certain public goods and services in Slovakia.

To get a full picture of the case, we must go back to the origin of the conflict. In 2006 BTS Holding acquired, through a public auction, the majority of the shares of the Bratislava Airport during its privatization process. In order to carry out this transaction, BTS Holding entered into a share purchase agreement with the NPF - the competent body for carrying out privatization processes - in which a clause on submission to ICC arbitration was incorporated.

Due to the economic significance of the transaction, the final execution of the agreement was subject to the approval of the Slovak market and competition supervisory agency, for which a deadline was set in the agreement. In the absence of compliance with what was agreed, the NPF opted to terminate the contract and return to BTS the amount of the first payment it had made. Shortly thereafter, the parties, together with the Minister of Finance, concluded an agreement in which they acknowledged the validity of the termination of the contract and agreed on the date from which it became effective. However, issues relating to the repayment of the price and interest were excluded from the scope of the agreement. Shortly thereafter, NPF made a further payment to BTS Holding to settle the outstanding interest.

Despite this, in June 2011, BTS Holding filed a request for arbitration before the ICC, claiming from NPF the difference between what it had paid and what, according to its calculations, it actually should have paid under a different interpretation of the imputation of payments. Finally, the ICC upheld BTS Holding's claims and ordered NPF to pay a substantial amount of money (€1,894,597.52, plus interest). On 19 December 2012, the ICC secretary general certified that the award had been notified to the parties. In the absence of voluntary compliance, on 4 February 2013 BTS Holding requested to the Slovak courts for enforcement of the award.

The Bratislava court of first instance granted the application, appointed a judicial officer to enforce the award, issued a notice of enforcement. However, NPF raised its opposition to enforcement, claiming the non-existence of the arbitration agreement under which the arbitration was celebrated. According to NPF, the agreement the parties reached on the termination of the initial contract did not include an arbitration clause. The only arbitration clause was included in the initial contract, which, according to NPF, was "replaced" by this agreement.

The opposition was upheld by the court of first instance and subsequently by the court of second instance, albeit on different grounds. The first court adopted NPF's argument in its entirety, taking the view that the original contract - with the arbitration clause - was replaced by the subsequent agreement. The latter, on the

other hand, introduced "formal" arguments and considered that the award was contrary to public policy, inter alia, because it affected the interests of taxpayers and because at the origin of the conflict was a competition decision that sought to prevent market concentration. Accordingly, it issued a decision to terminate the enforcement proceedings.

Having exhausted any possibility of ordinary judicial remedy, BTS Holding brought an action before the Slovak Constitutional Court, alleging a possible infringement of its fundamental procedural rights, as well as of the right to private property. The applicant argued that in the proceedings for recognition and enforcement of the foreign award, no substantive issues could be discussed. It also objected to the various arguments put forward by the first instance and appellate courts to deny it. On 8 November 2016, the Constitutional Court rejected the application. It declared, on the one hand, that it did not have jurisdiction to rule on the decision adopted by the court of first instance by the principle of subsidiarity. On the other hand, it stated that no infringement of any fundamental right could be inferred from the decision of the court of second instance, insofar as it had exercised its jurisdiction within the scope of its powers, interpreting and applying the relevant legal rules in a constitutionally acceptable manner.

2.2. The law

After mentioning the relevant norms -the Slovak Arbitration Act and Code of Civil Procedure, the Convention on the Recognition and Enforcement of Arbitral and Foreign Arbitral Awards of New York (hereinafter CNY 1958) and the French Code of Civil Procedure-, the decision focuses on assessing whether there has been a violation of the right to the protection of private property. Although the plaintiff also alleged a violation of other rights ecognizes in the ECHR – Art. 6 and Art. 13 -, the EctHR, in considering that there had been a violation of the right to the protection of private property, declared that it was not necessary to make a specific pronouncement on the other claims of the plaintiff company, without prejudice to their admissibility under the arguments expressed in the judgment[5]. For this reason, as we will comment below, the decision overlooks some procedural arguments that, in our opinion, should also have been incorporated.

The decision is based on the following key ideas:

- An award may be considered an "asset" for ECHR

According to the case law of the EctHR, there are many different manifestations of "property" that may fall within the scope of Art. 1 of Protocol No. 1. Judicial debts are one of them. For this reason, a claim duly ecognizes in a

5 This approach is supported by the Court's own case law. Specifically, *vid. Centre for legal resources on behalf of Calentin Campeanu v. Romania,* (n.º 47848/08) of 17 july 2014.

judicial title is a credit right that enjoys the protection of the ECHR, provided that the judicial debt is "final" and therefore enforceable[6].

Following this argument, the court considers that the arbitral award rendered by the ICC ecognizes a claim of BTS Holding against NPF that falls within the concept of "property" in Art. 1 of Protocol No. 1. To justify this decision, the court refers to two main arguments: (i) the award is final, as the annulment action provided for in the applicable law has not been brought before it; (ii) by CNY 1958, to which Slovakia is a party, foreign awards are enforceable in Slovakia. To reinforce this latter argument, the court emphasizes that the procedure established for the recognition and enforcement of the award is "purely executive" in nature. In other words, for the court, it is an important factor that Slovak law -and the NYC 1958- does not allow the enforcement judge to review of the merits of the award.

This makes perfect sense when connected to the general jurisprudence on Art. 1 of Protocol No. 1. When what is being protected is an "expectation" of recovery, as is the case here, the EctHR has been requiring that it be a "legitimate expectation". In other words, if the pecuniary interest relates to a claim, the interested party may be interpreted as having a legitimate expectation "if such an interest has a sufficient basis in domestic law, for example, when it is confirmed by the well-established case law of the courts"[7]. As far as our case is concerned, the potential enforcement of a foreign award before the courts of a State that is a party to the NYC 1958 – as is the case here – and thus without review on the merits, gives rise to more than reasonable expectations on the part of the interested party.

- Non-enforcement of an arbitral award constitutes an interference with the right to private property

The court had to specify what type of limitation on the right to private property took place in this case. More precisely, it had to clarify whether we were dealing with a deprivation of property or a measure of control of the right to property adopted by the State. The court, with good sense, considered that neither of these two categories coincided with the facts of the case. Therefore, following the established case law in art. 1, the general clause of Art. 1.1 should be applied[8], which establishes that: "[e]very natural or legal person has the right to respect for his property". For this reason, the judgment speaks of "interference" with property right and not of a deprivation or measure of control.

Having clarified this circumstance, the Court went on to assess the two conditions that, according to Article 1(1), must be met to consider that the interference was compatible with the Convention.

6 *Burdov v. Russia,* (n.º 59498/00), of 7 may 2002.

7 *Europa 7 S.R.L. y Di Stefano v. Italia,* (n.º 38433/09), of 7 june 2012.

8 *Sporrong and Lonnroth c. Sweden,* (n.º 7151/75; 7152/75).

- The interference was not lawful

The first condition -and the most relevant in this case- is the legality of the interference. We must not lose sight of the fact, as the judgment itself recalls, that when examining the conformity of the State's actions – in this case the courts' – with its domestic law, the EctHR's review function is limited to detecting possible cases of manifestly erroneous application of the law or the adoption of arbitrary decisions[9].

Starting from this idea, and anticipating that the actions of the Slovak courts give rise to serious doubts as to their legality, the judgment lists the five arguments used by the national courts to refuse to enforce the award and then goes on to dismantle them one by one. Specifically, it refers to the following arguments: (i) there was no arbitration clause legitimizing the arbitration; (ii) the award did not specify a time limit for its enforcement; (iii) the award included an award for a significant amount of money to be paid by the public coffers; (iv) before the award was rendered, the parties had waived their right to appeal; (v) the dispute to be resolved in arbitration concerns the protection of competition law.

Given the fragility of the arguments, the court does not invest much effort in assessing the legality of each of them. In the following, we set out the main arguments formulated in the judgment individually:

The judgment describes the lower court's decision on the non-existence of the arbitration clause as "arbitrary". In its opinion, the decision to declare the arbitration clause inserted in the SPA non-existent because it was allegedly removed by the conclusion of a subsequent agreement, without providing any reasoning in this regard, cannot be qualified in any other way. Even more so when it is accredited that both parties signed the "Terms of Reference" -art. 16 ICC Rules-, without formulating any objection as to the competence of the arbitrator. In other words, they concluded a tacit arbitration agreement.

(ii) Although the arbitral award did not set a time limit for the enforcement of the sentence, the ICC Rules -to which the parties submitted- and Slovak law did, so that, for the court, the argument used is the outcome of a manifestly erroneous application of the law.

(iii) On this argument, the judgment simply notes that, as it has observed in its case law, the "lack of funds cannot justify the State's failure to pay a judicial debt"[10].

(iv) This argument was introduced by the court of second instance *ex officio* and alluded, in essence, to the fact that the parties, by submitting to ICC arbitration, had made a sort of generic waiver to use any type of recourse[11]. A

9 *Beyeler v. Italia,* (n.º 33209/96), of 5 january 2000.

10 *Burdov v. Russia*, (n.º 59498/00), of 7 may 2002.

11 Art. 28 ICC arbitration rules 1998: "[e]very Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

circumstance that -surprisingly- was used to refuse enforcement of the award. The obtuse argument collapses on its own. As the judgment points out, the waiver provided for in that article of the regulation, as it specifies, is effective only "to the extent that it could be validly made".

(v) Something similar happens with the last of the arguments. Its vagueness facilitates the task of the court, which dispatches it, firstly, by clarifying that there was no decision on the transaction in question by the competition authority since the termination occurred precisely because of the latter's silence in response to the request for authorization. And, secondly, regardless of what this institution might say, the transaction was indeed terminated and the payment should therefore have taken place since it was not specified how its satisfaction could have affected free competition on the Slovak market.

After this review of the various legal arguments used by the Slovak courts to refuse recognition and enforcement of the award, the court, unsurprisingly, concluded that none of the grounds for refusal of enforcement of a foreign arbitral award under domestic law and NYC 1958 were present. Consequently, the "interference" with the property right was not lawful.

- No public interest has been demonstrated

Finally, the Court refers to the impossibility of assessing whether the limitation of the right was proportionate or not, insofar as the public interest referred to in Article 1 of Protocol 1 has not been accredited or delimited. The judgment criticizes the government for not arguing anything on this aspect and for focusing solely on reinforcing the public policy and procedural reasons that allegedly prevented the recognition and enforcement of the award.

For this reason, the EctHR ordered the Slovak State to compensate BTS Holding for the damage caused by the non-enforcement of the award, as well as for the legal costs arising from the claim.

3. AN ISOLATED CASE OR A CONSOLIDATED CASE LAW?

Before analyzing and commenting on the arguments set out above, it is necessary to clarify whether we are dealing with an isolated pronouncement or whether this is part of a line of jurisprudence drawn over time by the ECtHR. This is undoubtedly a circumstance that affects how we should approach this topic, as well as the scope and relevance of the conclusions that are formulated.

In the case law of the ECtHR, there is a multitude of pronouncements that support the idea that a credit right recognized in a judgment can be considered a property right for the Convention. For example, in the ECHR, Burdov v. Russia, (no. 59498/00) of 7 May 2002, the Court held that an enforceable judgment fixing the applicant's right to receive a certain amount from the State enjoyed the protection of art. 1 of Protocol No. 1.

The same judgments that equate the right to a claim recognized in a court decision with a property right establish that the applicant's inability to obtain enforcement of a judgment is an interference with her right to the peaceful enjoyment of property, as enshrined in Article 1 of Protocol No. 1. Thus, in the ECHR case, Jasiūnienė v. Lithuania, (No. 41510/98) of 6 March 2003, the Lithuanian State was condemned for non-enforcement of a judgment ordering a municipality to restore the applicant's right of ownership of a property[12].

Another common feature of the judgments that resolve this type of case is that they rule cumulatively on the violation of Art. 1.1 of Protocol I and Art. 6.1 ECHR. According to the case law of the ECtHR, if the authorities are obliged to act to enforce a judgment -we will see that the nature of this obligation may vary according to the circumstances- and they fail to do so, their inaction may, in certain circumstances, engage the responsibility of the state under both Art. 6 and Art. 1 of Protocol 1. This overlap, as we will discuss in the following section, raises some doubts which we will try to explain.

In any case, the right to the enforcement of court judgments and its protection under Art. 1 of Protocol 1 and Art. 6 ECHR is broadly recognized in ECtHR case law. However, the case Holding, A.S. v. Slovakia presents a particularity: the enforcement order is not a judgment, but a foreign arbitral award. In this case, the ECtHR sees no obstacle -it does not even openly raise the question- to extending this case law and, therefore, the protection afforded by Art. 1 of Protocol 1 and art. 6 ECHR to creditors who have a claim recognized in an arbitration award. From this point of view, Holding A.S. v. Slovakia may seem a novelty. However, we have identified four judgments that support this decision and which, for this reason, deserve to be highlighted.

3.1. Stran Greek Refineries and Stratis v. Greece (No. 13427/87)

Of the four judgments we are going to review, this is the only one cited in Holding, A.S. v. Slovakia, despite being, in our opinion, the least similar. In this case, the applicant -the company Stran Greek Ferineries- brought an action before the ECtHR for non-enforcement of an arbitration award by the Greek State[13]. The award, which followed a turbulent arbitration, ordered the state to pay several million dollars to Stran Greek for the termination of a major contract. However, the Greek state brought an action for annulment of the award. In the course of the appeal, already before the court of cassation -the third instance- the parliament passed a regulation to declare the arbitration clause under which the arbitration was held ineffective, which led to the nullity of the award.

Indeed, as can be seen, in this case, the claimant did not even have the opportunity to seek enforcement of the award. Nevertheless, the legal arguments in this judgment are very similar to those used in the case Holding, A.S. v. Slovakia (Art. 1 of the Slovakia (Art. 1 of Protocol 1 and Art. 6 ECHR). That is, a violation of Art. 1 Protocol I on the premise that the award was a property right for the Convention and that its non-enforcement prevented

12 *Jasiūnienė c. Lithuania,* (n.º 41510/98) of 6 march 2003.

13 *Marini v. Albania* (n.º 3738/02) of 18 december 2007.

its peaceful enjoyment. However, in this case, greater attention is paid to the violation of Art. 6.1 ECHR.

3.2. Marini v. Albania (n.º 3738/02)

This judgment stems from a claim filed by an Albanian citizen -Mr. Vlash Marini- alleging, among other things, a possible violation of his right to a fair trial and the right to private property due to the non-enforcement of an arbitration award. Without going into the details of the case, for this paper it is sufficient to note that the award, issued by the State Arbitration Commission, condemned the State for the unilateral termination of a joint venture contract to pay a certain amount in favor of the claimant and to continue the operation of the company.

The Albanian State complied with the first judgment. However, it disregarded the second judgment. The ECtHR, taking the view that it was established that the applicant had requested the competent authorities to enforce the award, considered that, given the years that had elapsed, the judicial officers or the competent administrative authorities had not taken the necessary measures to give effect to the decision. For that reason, it held, first, that there had been a breach of Article 6(1) ECHR and, second, that the failure to enforce the award had led to a breach of the applicant's right to the peaceful enjoyment of his property.

Although it is not a foreign award, there are many similarities in this judgment with the case of Holding, A.S. v. Slovakia. Slovakia. In both cases, the claimant's right is frustrated in the enforcement of the award, where the state does everything possible - and beyond - to frustrate it.

3.3. Regent Company v. Ucrania (n.º 773/03)

This judgment is in response to a claim brought by a company registered in the Seychelles against the Ukrainian State, alleging the non-enforcement of an award rendered in 1998 by the Commercial Arbitration Court of the Ukrainian Chamber of Commerce and Industry. Specifically, the lawsuit stated that there were two reasons for this situation: firstly, the failure of the competent state service to carry out the enforcement of the award and, secondly, the approval of a new law introducing a moratorium on the compulsory sale of property.

The award in question condemned a state company - Oriana - to pay several million dollars to COM S.R.O. for a breach of contract. After several unsuccessful attempts at enforcement, COM S.R.O. and the claimant - Regent Company - entered into a contract agreeing on the assignment of the claim in favor of the latter. This transaction, after several attempts, was recognized by the Ukrainian courts and, as a result, Regent Company succeeded COM S.R.O. in the enforcement proceedings. Since June 2004, Regent Company made several

unsuccessful attempts to enforce the award. Faced with this situation, aggravated by Oriana's insolvency proceedings, Regent Company, after exhausting all the remedies available under domestic law, finally brought an application before the ECtHR.

The award in ordered a state-owned company -Oriana- to pay several million dollars to COM S.R.O. for a breach of contract. After several unsuccessful attempts at enforcement, COM S.R.O. and the claimant -Regent Company- concluded a contract agreeing on the assignment of the claim in favor of the latter. This transaction, after several attempts, was recognized by the Ukrainian courts and, as a result, Regent Company replaced COM S.R.O. in the enforcement proceedings. Since June 2004, Regent Company made several unsuccessful attempts to enforce the award. Faced with this situation, aggravated by Oriana's insolvency proceedings, Regent Company, after exhausting all the remedies available under domestic law, finally brought an application before the ECtHR.

As can be deduced, the case follows the same scheme as the previous case. It is not surprising, therefore, that the legal grounds are practically identical. Perhaps the main "novelty" is that when assessing the possible violation of art. 6 ECHR and art. 1.1 of Protocol 1 -in this judgment it is done in the same section- it takes into account the debtor's insolvency. To this end, it states that "one of the main reasons why the authorities did not enforce the award was Oriana's insolvency. However, it should be noted that, while allowances for the payment of State debts may cause some delay in the enforcement of judgments, they cannot be considered an excuse for non-compliance with the obligations of Art. 6(1) ECHR"[14].

3.4. Kin Stib c. Majkic v. Serbia (n.º 12312/05)

This judgment stems from an action brought by Kin-Stib -a Congolese capital company- against the State of Serbia and Montenegro, alleging a possible violation of art. 6.1 ECHR and art. 1 of Protocol 1. The claim was brought against Genex, a socially-owned company, for the partial non-enforcement of an arbitration award in which Genex was ordered to pay a certain amount to Kin-Stib and to return possession of an establishment to be operated -a casino integrated into a hotel owned by Genex- due to breaches of a joint venture contract.

At the plaintiff's request, the Commercial Court of Belgrade ordered, in April 1996, the enforcement of the arbitral award in its entirety. After several suspensions and postponements, and with the intervention of the National Bank, the claim was satisfied. However, the restitution of possession of the business premises remained pending. In May 2004, the commercial court ordered the debtor to return possession of the business premises. In the absence of compliance, the court imposed a series of pecuniary fines, up to the legal maximum (approx. $4,770). At that point, it unsuccessfully terminated the enforcement.

14 *Regent Company v. Ucrania* (n.º 773/03), 3 april 2008.

Given these facts, and following the same reasoning as in the previous judgments, the ECtHR declared that Article 1 of Protocol 1 and Article 6(1) of the ECHR had been violated. The court, considering that it has been proven that the Serbian authorities did not take the necessary measures to fully implement the arbitration award in question, and that they have not provided any "convincing reason" to justify this failure[15].

As can be seen, the case follows the same pattern as the two previous cases. Perhaps, its differential element lies in the fact that, in this case, it seems that the defect, rather than in the actions of the authorities in charge of the enforcement, was in the legal regime of this procedure. As can be deduced from the account of the factual background, the commercial court took all the enforcement measures permitted by law. The problem is that the maximum amount of the coercive fines was too low and therefore provided an incentive for non-compliance with the injunction. In any event, as the judgment implies, the state must ensure "that the enforcement of such an award is carried out without undue delay and that the overall system is effective both in law and in practice"[16].

3.5. Singularities of the case BTS Holding, A.S. v. Slovakia (no. 55617/17)

After analyzing the precedents of the BTS Holding, A.S. v. Slovakia, (no. 55617/17 of 30 June 2022), we can confirm that this judgment is not the first to declare a violation of art. 1 of Protocol 1 and Art. 6 ECHR for the non-enforcement of an arbitral award. In all the above-mentioned decisions, the ECtHR equates the arbitral award with the judicial sentence to provide it with the protection of Art. 6 ECHR. Also, as it does with a judgment, it considers that an award can be considered as "property" for Art. 1 of Protocol 1.

Despite all, BTS Holding A.S. v. Slovakia is more than just a case. There are a series of singularities that make it a case of the utmost interest from the point of view of arbitration discipline. Two circumstances deserved to be highlighted:

- The case has its origin in an international arbitration

All the cases reviewed in this section have at least one thing in common: they all have their origin in a domestic arbitration in which the State -or a company dependent on it- is condemned. In the arbitration at the origin of the case BTS Holding A.S. v. Slovakia, the State is also condemned, but the award is not made in the context of a domestic arbitration but in the context of an international arbitration held within the ICC.

In principle, the fact that the non-enforced award was the result of an international arbitration is no more than an accidental matter for the ECtHR, insofar as it does not alter the composition of the rights concerned. But precisely for this reason, the judgment is a novelty in its case law. It confirms that the

15 *Kin Stib v. Majkic c. Serbia* (n.º 12312/05), of 20 april 2010.
16 *Kin Stib v. Majkic c. Serbia* (n.º 12312/05), of 20 april 2010.

foreign award also deserves the protection of art. 6.1 ECHR and Art. 1 of Protocol 1 and, therefore, its non-enforcement is comparable to the non-enforcement of a judicial sentence. This is to be understood as long as the legal system of the state in question recognizes the validity and effectiveness of foreign awards. A nuance which, in reality, has no practical value because all the member states of the Council of Europe[17] have ratified the NYC 1958[18].

- The Court refers to NYC 1958 and how the grounds for opposition are to be interpreted

Holding A.S. v. Slovakia is the first to incorporate the NYC 1958 among the relevant legal rules that the ECtHR always includes before the legal grounds of its judgments. In particular, it reproduces art. V of the NYC 1958 which, as is well known, specifies the five grounds for refusing recognition and enforcement of a foreign award.

But the impact of the NYC 1958 on the award goes further. In paragraphs 51 et seq. The court uses the validity of this convention to justify that the award constitutes a property right for the Convention. As discussed above, the court emphasizes that the procedure for recognition and enforcement of the award is of a "purely enforceable"[19] nature. That is to say, for the court, it is relevant that CNY 1958 does not allow the enforcement judge to review of the merits of the award because this reinforces its status as a "legitimate expectation" of recovery.

Although this is a tangential argument, the ECtHR has for the first time affirmed that the NYC 1958 precludes a review of the merits of the award. It introduces, in our view, a new argument to avoid possible judicial excesses in the recognition and enforcement of awards in States that are members of the Council of Europe. Not only because of the *auctoritas* of this court -and its case law-, but also because of its *potestas*, since it places this court as the ultimate guarantor of the correct application of the procedure of recognition and enforcement of awards provided for in the NYC 1958.

4. BASIS AND SCOPE OF THE RIGHT TO ENFORCE THE AWARD

After what has been explained in the previous sections, we can reach a first provisional conclusion: the ECHR protects the right to recognition and enforcement of an arbitral award. In other words, according to the ECtHR case law there is a right to recognition and enforcement of the final decision adopted by an arbitrator. However, this conclusion should be qualified.

17 https://www.coe.int/es/web/about-us/our-member-states; last consultation: 5/11/2023.

18 https://uncitral.un.org/es/texts/arbitration/conventions/foreign_arbitral_awards/status2; last consultation: 5/11/2023.

19 *BTS Holding, A.S. v. Slovakia,* (n.º 55617/17) of 30 june 2022.

There is no right to arbitration in the framework of this international text. This means that the member states of the Council of Europe, as far as the ECHR is concerned, do not have a duty to ensure the recognition and enforcement of arbitral awards -a duty they do have about judgments-. In other words, at least on a theoretical level, a member state of the Council of Europe could, in the exercise of its sovereignty, not regulate arbitration and therefore not grant awards procedural effectiveness. We understand that in such a hypothetical "anti-arbitral" State, the recognition and enforcement of the award would not enjoy the protection of the ECHR. In this hypothetical scenario, the award could not be equated with a judgment and, therefore, art. 6.1 ECHR would no longer be relevant.

However, this is a very hypothetical case. The reality is that all States regulate arbitration and that, moreover, as we have pointed out, all of them have ratified the NYC 1958. That means that if there is a rule in the State's legal system that recognizes the enforceability of domestic arbitral awards and establishes a procedure for the recognition of foreign arbitral awards -which follows the parameters of the NYC 1958-, the ECtHR equates, to all intents and purposes, the protection of the arbitral award with the judicial sentence. And, therefore, it extends the protection of Art. 6.1 ECHR and Art. 1 of Protocol I to cases of non-enforcement of arbitral awards.

To properly analyze this right, we must start from the premise that this right finds its roots in the right to private property and in the right to a fair trial. In fact, in all the judgments analyzed, the court has considered that the non-enforcement of the award has led to a violation of both rights. This only makes sense if one takes into account the instrumental nature of the right to a fair trial. If the State "fails" to guarantee the right to enforcement -of the judgment or award-, in addition to violating this procedural right, it will also violate the substantive right that was intended to be enforced through this procedure, which, in the case of civil justice -in a broad sense- will normally be the property right.

However, this does not mean that the scope of protection of both rights is identical. In the protection of the right to recognition and enforcement of the award, there is an important "area of intersection" where the right to a fair trial and the right to private property converge. However, beyond this intersection, a violation of one right may not be accompanied by a violation of the other. The best way to make explicit the different scope of protection afforded by these rights is to delimit the scope of each of them about the recognition and enforcement of awards separately.

4.1. Protection under art. 6.1. ECHR

Although Art. Art. 6.1. ECHR does not expressly recognize the right to enforcement of the judgment, the ECtHR has reiterated that the right to a fair trial:

"It would be an illusion if the domestic legal system of a State party were to allow a final and binding judicial decision to be rendered inoperative to the detriment of a party. It would be incomprehensible for Article 6(1) to describe in detail the procedural guarantees - fairness, publicity and speed - afforded to the parties and at the same time not to protect the enforcement of judgments; if that Article were to refer exclusively to access to the judge and the conduct of the proceedings, it would run the risk of creating situations incompatible with the principle of the rule of law which the States Parties undertook to respect when ratifying the Convention. The enforcement of a judgment or judgment, whatever the jurisdiction, must therefore be regarded as an integral part of the "proceedings" within the meaning of Article 6".

To satisfy this right, the ECtHR has been demanding, on the one hand, that the execution be complete, perfect and not partial. And, on the other, that it be carried out within a reasonable period. To this end, it considers that the reasonableness of the time limit must be assessed taking into account, in particular, the complexity of the enforcement procedure, the conduct of the applicant and the competent authorities, as well as the amount and nature of the sum awarded by the judge. Following this idea, States can be condemned for violating this right if the authorities involved in the enforcement process lack the required diligence or even prevent enforcement. In other words, under Art. 6(1) ECHR, States have a positive obligation to establish an effective system, both in law and in practice, to ensure the enforcement of final judgments.

Based on the above, if the domestic legal system of the State in question regulates arbitration and recognizes the procedural effectiveness of awards -as has been the case so far in all Council of Europe States- this right to enforcement "of a decision or judgment" also covers arbitral awards. Therefore, we understand that the level of protection must be the same, irrespective of whether the decision was rendered by a State court or an arbitral tribunal[20].

4.2. Protection under art. 1 of Protocol 1

BTS Holding A.S. v. Slovakia is the best example of how the property right can protect the right to recognition and enforcement of an arbitral award. Therefore, in order not to repeat ourselves, we refer to para. 2.2. where the legal grounds of the judgment are analyzed in detail.

At first glance, it may seem that art. 1 of Protocol 1 and art. 6.1 ECHR provides identical protection. That is to say, the way for the state to guarantee the right to property in this context is by fulfilling its positive obligation to organize an effective system both in law and in practice, which guarantees the enforcement of final judgments. However, the scope of protection under Art. 1 of Protocol 1

20 *Hornsby v. Greece* (n.º 18357/91), of 19 march 1997; *Matheus v. France* (n.º 62740/00), of 31 march 2005; *Immobiliare Saffi v. Italie* (n.º 22774/93), of 28 july 1999; *Fuklev c. Ukraine* (n.º 71186/01), 7 june 2005.

varies depending on who the debtor is. If the debtor is a private individual, the State's responsibility does not extend beyond the performance of that obligation, whereas if the debtor is the State -or a company controlled by it- it has the burden of ensuring effective compliance with the award[21].

From a practical point of view, this means that, if enforcement is directed against a private individual, the State only must ensure that the competent enforcement authorities act diligently. If, even so, enforcement cannot be carried out because, for example, the debtor has no assets, the State would still have fulfilled its duty. Where, on the other hand, the State is the debtor, the case law of the ECtHR requires the State to comply with the court decision in full and in good time. Thus, it has been held that the state cannot plead a lack of funds to comply with the stipulations of the judgment[22].

This idea shows that the content of the right to enforcement of the award is variable. When the debtor is the state, the ECHR reinforces its protection under the umbrella of Article 1 of Protocol 1. Perhaps for this reason, in all the decisions that we have located in which the state was condemned for non-enforcement of the award, it was the state -or a dependent company- that was being enforced.

5. PRACTICAL IMPLICATIONS OF THE ECTHR DOCTRINE

To assess the practical implications of this case law, it is essential to take into account the nature of the ECtHR. The ECtHR is not a court of cassation. As OVEJERO PUENTE has pointed out, its function "is to establish the existence of a violation of conventional [sic] rights, and not the annulment of national acts declared to infringe rights, and therefore, the declaration of the retroaction of the state's legal action to the moment before the violation of the right"[23]. Once the infringement of the right has been declared, it is up to the States to adopt the necessary measures to remedy the injury caused within the scope of their legal systems.

Based on this idea, and in general terms, we believe that the interaction between the ECHR and arbitration improves access to justice. The excessively formalistic approach whereby submission to arbitration was considered to entail the waiver of all the rights and guarantees provided for in Art. 6.1 ECHR seems to have been[24]. Although this question has traditionally been raised about the guarantees that should govern the declaratory phase of arbitration, this case law

21 *Tokel v. Turkey* (n. 23662/08), 9 february 2021.

22 *Burdov c. Russia,* (n.º 59498/00) 7 may 2002.

23 OVEJERO PUENTE, A. M.ª., *El derecho al juicio justo en el Convenio Europeo de Derechos Humanos,* Tirant lo Blanch, Valencia, 2019, p. 78.

24 ELISABERA CRILIG, R., "The interplay between courts and tribunals assures access to justice," *Access to Justice in Arbitration: Concept, Context and Practice* (ed. Leonardo de Oliveira y Sara Hourani), Wolters Kluwer, p. 87.

shows that the protection afforded by the ECHR to parties who decide to resolve their disputes through arbitration goes beyond the arbitral judgment. The arbitral award is equivalent to a judgment for all purposes and, therefore, the winner of an arbitration has the right to be provided by the State with an effective legal and judicial system so that the award can be enforced.

One of the difficulties that have traditionally been identified when assessing the applicability of the ECHR to arbitration has to do with its scope of application[25]. That is to say, the subjective scope of the ECHR includes States, not individuals. From the outset, this means that an arbitral tribunal, not being a state organ, is not bound by the provisions of the ECHR. This approach has been qualified by the doctrine of "positive obligations". According to this doctrine, the fact that the subjective scope of the Convention is limited to signatory states and excludes individuals does not mean that they "are not protected against other individuals by the positive obligations imposed on the public authorities (legislative, executive and judicial) that make up the state"[26]. In other words, if the judges of a State, in the exercise of their functions of support and control of arbitration, allow the guarantees of art. 6.1 ECHR to be violated in an arbitration process, the responsibility could be imputable to the State, insofar as the violation of rights committed in the arbitration process can be considered as a lack of protection to the State. This difficulty, however, disappears in the enforcement phase of arbitration[27]. As is well known, the recognition and enforcement of the award is one of the State's assistance functions about arbitration. Therefore, the recognition and enforcement of the award is carried out directly by the State, normally through its courts.

Following this idea, the ECtHR has jurisdiction to review the process of execution- and/or recognition- carried out before the State authorities, to assess whether it has violated any rights during its processing. However, this does not mean that the ECtHR can review of the regularity of the procedure. As LÓPEZ GUERRA has pointed out, "[i]n terms of the intensity of the Court's control, it should be borne in mind that Article 6 protects the fairness of the proceedings as a whole, and not merely the regularity from a legal point of view of any of its moments or phases. The Court judges whether the proceedings, considered in toto, have complied with the procedural guarantees laid down by the Convention, and does not constitute a fourth instance for reviewing the judgments or procedural errors of the courts of the States"[28].

---

25 JARROSON, C., "L'arbitrage et la Convention européenne des droits de l'Homme", *Revue de l'Arbitrage*, vol. 1989, issue 4, p. 595

26 ARZOZ SANTISTEBAN, X., "La eficacia del CEDH en las relaciones entre particulares", *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, n.º 21, 2017, p. 171.

27 SERAGLINI, C., "Du contrôle de l'impartialité et de l'independence d'un centre d'arbitrage", *Revue Critique de Droit International Privé*, 2002, p. 124.

28 LÓPEZ GUERRA, L., *El Convenio Europeo de Derechos Humanos. Según la jurisprudencia del Tribunal de Estrasburgo*, Tirant lo Blanch, Valencia, 2021, p. 142.

However, it would be a mistake to overestimate the role that the ECtHR can play in the context of arbitration. The fact that the ECtHR has adopted this position on arbitration is highly relevant. This case law sends a message to States: when a citizen seeks recognition and/or enforcement of an award, he is exercising a right protected by the ECHR. This strengthens the position of arbitration in the member states of the Council of Europe, among other things because it allows the parties to have a court outside the structures of the state "supervise" the action carried out by the state -after exhausting domestic remedies-[29]. Nevertheless, we understand that, under the prism of art. 6.1. ECHR, recourse to the ECtHR will only be viable when there is an arbitrary refusal to recognize and/or enforce the award or if the procedure has been ineffective. The ECtHR is not to review "errors of fact or law alleged to have been committed by a domestic court, except in so far as they may have infringed rights and freedoms protected by the Convention"[30].

On this basis, it is foreseeable that the ECtHR -and its case law- will play an important role in investment arbitration, at least about the recognition and enforcement of awards in which a member state of the Council of Europe is condemned. Even more so after the latest decisions adopted within the European Union that put a stop to investment arbitration between its member states[31].

29 KAUFMANN-KOHLER, G., "Commercial Arbitration Before International Courts and Tribunals –Reviewing Abusive Conduct of Domestic Courts," *Arbitration International,* vol. 29, núm. 2, 2013, p. 154.

30 *García Ruiz c. España* (n.º 30544/96), of 21 january 1999.

31 JULIÁ, J. M.ª, "Strasbourg as the guarantor of last resort of due process in voluntary arbitration", *International Bar Association,* 4 march 2022. (https://www.ibanet.org/strasbourg-guarantor-last-resort-due-process#_edn9; última visita: 05/11/2023).

PART IV
CROSS-BORDER LITIGATION: DIGITAL EVIDENCE AND ALTERNATIVE DISPUTE RESOLUTION

Data encryption: the delicate balance of the privacy-security trade-off[1]

María Dolores García Sánchez

PAIDI Predoctoral Contract Lecturer. University of Seville

1. PREVIOUS CONSIDERATIONS: THE PRIVACY AND SECURITY DUALITY

In the current world, encryption technology is increasingly being used in all areas of public and private life. It serves as a means of protecting individuals, civil society, critical infrastructure, media, industry and governments, ensuring privacy, confidentiality, information integrity, and the availability of communications and personal data.

Data encryption involves a process that employs a mathematical algorithm capable of transforming the characters of standard text into an unreadable format (ciphered text). It utilizes encryption keys to scramble the data - a process known as cryptography - so that only authorized users with the key can read it.

Essentially, there are two main types of encryption: symmetric encryption and asymmetric encryption. The difference is that in symmetric encryption, also known as single-key encryption, the same key is used to both encrypt and decrypt the message, which must be known in advance by the sender and the recipient.

On the other hand, asymmetric encryption relies on the use of two keys: a public key, which is available to anyone needing to encrypt information and is not used for the decryption process, and a private key that enables message decryption.[2]

1 This article is carried out with the support of the Pre-doctoral Researcher Training Contract Grant from the Junta de Andalucía and within the framework of the research project "Biomedicine, Artificial Intelligence, Robotics, and Law: Challenges for Legal Professionals in the Digital Era (PID2019-1081555RB-I00).

2 INCIBE (June 24, 2019), *¿Sabías que existen distintos tipos de cifrado para proteger la privacidad de nuestra información en Internet?*. https://www.incibe.es/ciudadania/blog/sabias-que-existen-distintos-tipos-de-cifrado-para-proteger-la-privacidad

Within these asymmetric encryption methods is where end-to-end encryption is integrated. In many online services, data storage is entrusted to external providers. To ensure compliance with data protection requirements, both legal[3] and technical safeguards are established, including data encryption[4]. Due to its greater ability to ensure the privacy of information transmitted between users -compared to symmetric encryption and other types of asymmetric encryption-, end-to-end encryption is predominantly used by instant messaging companies (WhatsApp, Telegram or Skype), protecting communications from one endpoint to another[5].

In fact, in this companies it has been implemented by default to reinforce the protection of privacy and confidentiality of communications, particularly regarding international data transfers.

In the specific case of WhatsApp, the application informs us about the use of this encryption through a default message every time we start a conversation or open the app on a computer: "Messages are end-to-end encrypted. No one outside this chat, not even WhatsApp, can read or listen to them." The application has been using this end-to-end encryption protocol since March 31, 2016.

The natural question that arises is: What does this end-to-end information encryption technology entails?

As indicated in the quoted message, it prevents third parties, including WhatsApp, from having full access to the messages or calls exchanged between two communicating parties. Moreover, if the encryption keys of a user's device are

3 Specifically in Chapter IV of the General Data Protection Regulation (GDPR), which sets out the relationship between the data controller and the data processor.

4 Enabled by the GDPR itself as a guarantee to preserve security in the processing of personal data (arts. 6 and 32).

5 There is a step further in this encryption: homomorphic encryption, which not only protects data transmission but also provides the ability to process data without decrypting it. This means that actions like additions, multiplications, and other operations can be performed on encrypted data, and encrypted results can be obtained, which can later be decrypted to obtain the result of the original operation. In other words, it enables performing computations on encrypted data without revealing its original content and, therefore, without compromising privacy.

Now, if homomorphic encryption is even more powerful from a privacy perspective, why isn't it employed by instant messaging services? The reason lies in the fact that while it is a very powerful cryptographic technique, it is also computationally demanding. This significant amount of processing power and time could negatively impact the user experience in instant messaging applications, where speed and responsiveness are paramount. Additionally, this type of encryption generally increases the size of the encrypted message compared to the original, which can have a negative impact on bandwidth, storage, and data transmission speed.

Furthermore, it requires both the sender and receiver to be compatible with the same homomorphic cryptographic scheme, which can be a challenge in the instant messaging environment, where users may employ a variety of different applications and platforms. Achieving interoperability between heterogeneous systems using homomorphic encryption can be complex and limit its widespread adoption.

However, these limitations are becoming increasingly less significant due to technological advancements and the increase in system power, so it wouldn't be surprising if, in the near future, homomorphic encryption may begin to be incorporated into such applications as it would allow for handling and processing of user data without compromising their privacy.

physically compromised, they cannot be used to retroactively decrypt previously transmitted messages.

The key lies in not using centralized servers controlled by WhatsApp personnel, but rather storing each encrypted code on our own device. In this way, the system generates a code for each new message sent, and it can only be decrypted on the sender's and recipient's devices[6]. In other words, such a message could only be viewed - without the consent of the device owner, of course - by stealing the person's mobile phone and knowing their password[7].

As can be easily appreciated, this type of technology stands out for a crucial aspect: security in terms of the right to privacy and protection of personal data, which is a growing concern in today's society.

However, while designed for legitimate purposes, this encryption technology is also employed by cybercriminals, significantly hindering the investigative work of law enforcement when it comes to accessing electronic evidence on online platforms.

On its part, Facebook announced in early 2019 its intention to implement end-to-end encryption by default in its instant messaging services. In response to this proposal, FBI Director Christopher Wray categorically stated that such a decision would be a dream come true for cybercriminals and consumers of child pornography[8].

Around the same time, the United States, United Kingdom, and Australia requested that the platform avoid implementing full encryption measures in all its communication services unless Facebook granted authorities legal access through an "encryption backdoor".

The concept of an encryption backdoor refers to a deliberate vulnerability or mechanism built into encryption systems that allows authorized parties, such as law enforcement or government agencies, to bypass encryption and gain access to encrypted data. However, implementing encryption backdoors has been a highly controversial topic, as it poses significant risks to privacy and security[9].

---

6 WHATSAPP (January 24, 2023) *WhatsApp Encryption Overview - Technnical white paper.* https://scontent.fsvq2-2.fna.fbcdn.net/v/t39.8562-6/328495424_498532869106467_756303412205949548_n.pdf?_nc_cat=104&ccb=1-7&_nc_sid=ad8a9d&_nc_ohc=X36q5ZDXuTUAX__Fz2P&_nc_ht=scontent.fsvq2-2.fna&oh=00_AfBdLPuMiwN1ToEZ2zSnzA1c8dT5W4RzrnDc8smExxEjew&oe=64BBCE7C 6/328495424_498532869106467_756303412205949548_n.pdf?_nc_cat=104&ccb=1-7&_nc_sid=ad8a9d&_nc_ohc=pH7eQ1ZtR3AAX_xbZNs&_nc_ht=scontent.fsvq2-2.fna&oh=00_AfDWcbFbd4ysnJz5H3gsgrOXf1xjdyRb9kk3HtU419E8mg&oe=64B3E57C

7 Moreover, such data will not be retained even for the investigation of a criminal offence. Specifically, the app's "Terms and Conditions" state that "We do not retain data for criminal investigations unless we receive a valid request before a user has removed content from our service. During the normal provision of our services, WhatsApp does not store messages after delivery or transaction logs of these delivered messages. Undelivered messages are deleted from our servers after 30 days".

8 FORBES (October 4, 2019), *Encriptación de Facebook, "sueño hecho realidad" para la pornografía infantil: FBI.* https://www.forbes.com.mx/encriptacion-de-facebook-sueno-hecho-realidad-para-la-pornografia-infantil-fbi/

9 To delve further into this issue, you can refer to the following source: DE SCHUTTER, P. (January 2, 2023), "Puertas traseras de cifrado: !No funcionan!", *MAILFENCE.* https://blog.mailfence.com/es/puertas-traseras-de-cifrado/

1.1. The data encyption debate

As it appears from above, data encryption has two sides. It is true that it enhances the privacy of our personal data. However, as mentioned *ex ante*, only the sender and recipient of a message can access it, and the knowledge of this fact by cybercriminals can facilitate the commission of illegal activities through these channels. This makes it difficult for law enforcement to gather electronic evidence that could incriminate them. Besides, the self-destructing feature of some of these applications further hampers police investigations on the internet.

Law enforcement agencies increasingly rely on access to electronic evidence to effectively combat terrorism, organized crime, child sexual abuse (particularly its online aspects), as well as various other cybercrime-related offenses facilitated by the cyberspace. Moreover, this access to electronic evidence is essential to protect victims and contribute to ensuring their safety.

Supporters of encryption argue that introducing backdoors undermines the integrity of encryption systems, as any vulnerability that can be exploited by authorized parties can also be exploited by malicious actors. They assert that weakening encryption to provide access to law enforcement would create a vulnerability that could potentially be exploited by cybercriminals, foreign governments, or other unauthorized entities.

On the other hand, the position of law enforcement agencies, such as the FBI, is often focused on the need for lawful access to encrypted communications to ensure public safety and effectively combat various crimes. They believe that striking a balance between privacy and security requires finding mechanisms that enable lawful access to encrypted communications while minimizing the risks associated with backdoors.

This ongoing discussion highlights the inherent tension between privacy and security in the digital age, and finding a balance between these two fundamental aspects remains a significant challenge for policymakers, technology companies and law enforcement agencies.

Besides, it must be acknowledged that the legal framework for addressing this issue is diverse both within the European context and non-EU level (although we will primarily focus on the European spectrum).

Within the European Union, data protection and privacy are key pillars regulated by the *General Data Protection Regulation* (GDPR) and other directives. These regulations emphasize the importance of safeguarding personal data and respecting individuals' privacy rights. Encryption is recognized as a crucial tool for ensuring data security and privacy.

However, when it comes to law enforcement access to encrypted data, the legal landscape varies among EU member states. Different countries have adopted different approaches, reflecting their respective national laws and policies. Some

jurisdictions have advocated for encryption backdoors or lawful access mechanisms to assist in criminal investigations, while others prioritize the protection of encryption and individual privacy.

Outside of the European Union, countries also have their own legal frameworks and approaches to encryption. The stance on encryption backdoors and lawful access varies, and different jurisdictions have differing perspectives on striking the balance between privacy, security and law enforcement needs.

The diverse legal landscape within and outside the European Union underscores the complexity of the debate. Harmonizing approaches to encryption regulation while considering the principles of privacy, data protection and law enforcement requirements remains a challenge that requires international collaboration and dialogue.

2. DATA ENCRYPTION IN THE EXTRACOMMUNITY SCOPE

Australia, Canada, New Zealand, the United Kingdom, and the United States, collectively known as the "Five Eyes" intelligence alliance, issued a joint statement[10] in 2019 expressing their concerns regarding the use of data encryption technology, despite acknowledging its crucial role in protecting personal data, privacy, intellectual property, trade secrets, and cybersecurity. In the statement, they called on technology companies to consider incorporating the possibility for governments to access encrypted information in a readable and usable format, subject to judicial authorization, into the design of their products and services. They also urged the industry to collectively explore legal solutions that align with the principle of proportionality.

However, technology firms warned that the establishment of backdoors in their systems to enable government access could weaken them and make them more vulnerable to cybercriminals or foreign governments.

2.1. Australia

In Australia, the *Assistance and Access Act of 2018*[11] provides agents with the necessary tools to operate effectively in the digital age and maintain public safety. Specifically, this law introduced key reforms to enable agents to access the evidence they require:

10 REUTERS (July 30, 2019), *"Five Eyes" security alliance calls for access to encrypted material.* https://www.reuters.com/article/us-security-fiveeyes-britain/five-eyes-security-alliance-calls-for-access-to-encrypted-material-idUSKCN1UP199

11 AUSTRALIAN GOVERNMENT, Department of Home Affairs, , *Assistance and Access Act 2018.* https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/lawful-access-telecommunications/data-encryption

- Enhancing industry cooperation with law enforcement and security agencies.
- Improving agents' computer access capabilities.

It is important to note that nothing in this legislation compels the industry to break encryption. In fact, according to the Australian Government, *the Assistance and Access Act* includes a clear prohibition on introducing weaknesses or vulnerabilities in software or physical devices that could endanger the security of innocent users. This prohibition is stated in section 317ZG of the Act, which also emphasizes that any form of assistance leading to a decrease in encryption or authentication effectiveness for general users is strictly forbidden. Furthermore, the same section prohibits the development of new decryption capabilities and prohibits any requirements that would prevent a company from addressing existing security flaws in their systems.

Moreover, all proposed mandates for creating new capabilities must be referred to an independent assessment panel consisting of a technical expert and a retired judge. This panel is responsible for evaluating whether the proposed requirements violate the explicit prohibition against including 'backdoors'.

Importantly, the Act lacks the authority to compel a company to build any capability that undermines electronic protection, such as encryption. In other words, if a company does not already possess the ability to decrypt certain data, the Act cannot force them to develop the capability to do so[12].

Notwithstanding the above, the measures undertaken aim to enhance the existing capacity within Australian organizations to undertake specific surveillance activities that are provided and independently monitored.

In this vein, The *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* -the Act- introduced three new powers for the Australian Federal Police (AFP) and the Australian Criminal Intelligence Commission (ACIC) to identify and disrupt serious online criminal activity:

- Data disruption warrants. It enables the disruption of data through modification and deletion of data to frustrate the commission of serious offences, such as the distribution of child abuse material. For example: an agency may remove content from a website hosting child abuse material, or redirect or block activity to the webside to prevent access to, and dissemination of, this harmful material[13].
- Network activity warrants. It allows the collection of intelligence on serious criminal activity carried out by criminal networks operating online. For

12 AUSTRALIAN GOVERNMENT, Department of Home Affairs, (September 16, 2019), *Assistance and Access: Common myths and misconceptions.* https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/lawful-access-telecommunications/myths-assistance-access-act

13 AUSTRALIAN GOVERNMENT, Department of Home Affairs (September 17, 2021), *Data disruption warrants.* https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/lawful-access-telecommunications/surveillance-legislation-amendment-identify-and-disrupt-act-2021/data-disruption-warrants

example a network activity warrant can be utilized to gather intelligence on an online-based transnational serious and organized crime syndicate, which potentially engages in various criminal undertakings such as drug importation and firearms trafficking. This warrant enables an agency to collect intelligence on the syndicate to gain a comprehensive understanding of their identity and operational methodologies. Subsequently, the agency can obtain a focused investigatory warrant, such as a computer access warrant or a search warrant, to procure evidence related to the criminal activities.[14]

- Account takeover warrants. They enable agencies to take control of an online account -as a social media accounts, online banking accounts and accounts associated with online forums- and deprive the account holder of access to that account for the purposes of gathering evidence about criminal activity[15].

It should be noted that the Crimes Act does not explicitly provide any other authority for an officer to assume control of an online account. The power of account takeover solely grants authorization for assuming control of the account itself. If the agency requires using the account for additional activities, such as impersonating the original account holder and communicating with others, they must seek another appropriate authorization or warrant. Account takeover warrants are designed to be used in conjunction with other powers, such as controlled operations, to fulfill their intended purpose.

2.2. United States

The United States, on the other hand, has a pronounced controversy[16] with the project known as the "EARN IT Act[17]". The proposal suggests that digital

14 AUSTRALIAN GOVERNMENT, Department of Home Affairs (September 17, 2021), *Network activity warrants*. https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/lawful-access-telecommunications/surveillance-legislation-amendment-identify-and-disrupt-act-2021/network-activity-warrants

15 AUSTRALIAN GOVERNMENT, Department of Home Affairs (September 17, 2021), *Account takeover warrants*. https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/lawful-access-telecommunications/surveillance-legislation-amendment-identify-and-disrupt-act-2021/account-takeover-warrants

16 The Department of Justice in this country, in a statement regarding the implications of end-to-end encryption (E2E) - *International Statement: End-to-End Encryption and Public Safety* - for public safety and access to electronic evidence in internet applications, mobile devices, and servers, emphasized the vital importance of encryption for privacy protection and cybersecurity. However, it also acknowledged that this should not completely hinder the operations of law enforcement agencies in combating illegal activity on the internet.

Vid., U.S DEPARTMENT OF JUSTICE, Office of Public Affairs (October 11, 2020), *International Statement: End-To-End Encryption and Public Safety*. https://www.justice.gov/opa/pr/international-statement-end-end-encryption-and-public-safety

17 A bill to establish a National Commission on Online Child Sexual Exploitation Prevention, and for other purposes.

messages first pass through government-approved scanning software to monitor malicious criminal activity. It would allow compelling any cloud service provider to grant authorities access to the system to monitor private data and messages sent online.

The primary objective of the proposed legislation is to amend Section 230 of the *Communications Act of 1934*, which grants webside operators the authority to remove user-generated content they consider inappropriate, while also providing them with immunity against civil lawsuits pertaining to such content[18].

In particular, a series of events throughout the 2010s[19] prompted lawmakers[20] to question the legal laxity enjoyed by website operators. As a potential course of action, the

18 Section 230 of the Communications Decency Act (CDA) states:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

No provider or user of an interactive computer service shall be held liable on account of:

(A)any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B)any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph 1.

Vid., U.S CODE. § 230 - *Protection for private blocking and screening of offensive material*. https://web.archive.org/web/20201207144333/https://www.law.cornell.edu/uscode/text/47/230

19 Particularly in the United States, this access to encrypted information by the government has been a controversial issue. One of the most striking examples was the case of Apple and the FBI following the terrorist attack in San Bernardino in 2015. The FBI had asked Apple to program a backdoor into a special sequence within a programming code that would bypass security systems.

Apple, which had been cooperating with the FBI to unlock the iPhone, refused to create this backdoor. Its CEO, Tim Cook, published an open letter to users explaining that Apple would reject the court order, thereby avoiding setting a precedent on the matter: "The US government has asked us for something we do not have and consider very dangerous to create. In the wrong hands, this software, which does not exist yet, would have the potential to unlock any iPhone." He, thus, estimates that such action could lead to potentially disastrous consequences for privacy since it is not possible to create selective technology that is only used by those claiming to have good intentions. Furthermore, he emphasizes that even though the government argues that its use is limited to the specific case, there is no guarantee to that effect.

Vid., APPLE (February 16, 2016), *A Message to Our Customers*. https://www.apple.com/customer-letter/

On the other hand, the 2016 United States presidential election sparked concerns regarding potential Russian interference in the electoral process. Subsequently, the U.S. government, then under Republican leadership, began questioning the roles of major technology companies such as Google, Apple, Microsoft, and Facebook, as well as other social media platforms like Twitter, in their content moderation practices. These companies faced mounting pressure to address issues related to misinformation, hate speech, and violent content present on their platforms. *Vid.*, ZAKRZEWSKI, C, (January 14, 2021). "The Technology 202: It's not just social media: Capitol violence spurs changes at Airbnb, GoFundMe and more", *Washington Post*. https://web.archive.org/web/20210126020125/https://www.washingtonpost.com/politics/2021/01/14/technology-202-it-not-just-social-media-capitol-violence-spurs-changes-airbnb-gofundme-more/; and ZHOU, L., SCOLA, N., GOLD, A., (November 1, 2017), "Senators to Facebook, Google, Twitter: Wake up to Russian threat", *Politico*. https://www.politico.com/story/2017/11/01/google-facebook-twitter-russia-meddling-244412

In response, social media sites took measures to moderate content and, leveraging the protections provided by Section 230, blocked accounts that were found to violate their respective terms of service, many of which were associated with alt-right and far-right groups. This led Republican lawmakers to assert that these platforms were exploiting Section 230 immunity to display bias.

EARN IT Act was put forth to modify the protective measures outlined in Section 230 and impose heightened accountability upon website operators. Despite an initial unsuccessful passage in 2020, the bill was reintroduced in 2022 and subsequently for a third time in 2023.

The EARN IT Act has already been unanimously approved by the Senate Judiciary Committee[21] and is currently being reported to the Senate[22].

This bill revises the federal framework regulating the prevention of online sexual exploitation of minors and it establishes the National Commission for the Prevention of Online Child Sexual Exploitation. The Commission is tasked with developing best practices for interactive computer service providers (such as Facebook and Twitter) in order to prevent, reduce, and respond to the sexual exploitation of children online.

Furthermore, it limits the liability protections of interactive computer service providers in relation to claims alleging violations of child sexual exploitation laws.

Besides, the bill makes changes to reporting requirements for electronic communication service providers and remote computing service providers reporting apparent cases of crimes related to the sexual exploitation of minors to the National Center for Missing and Exploited Children. Among the changes, it requires providers to report sufficient facts and circumstances to identify and locate each minor and individual involved. Additionally, it extends the time during which providers must retain the content of a report[23].

Lastly, it is important to highlight that, in relation to end-to-end encryption, it is stipulated that when a provider offers fully end-to-end encrypted messaging services, device encryption, or other encryption services, the provider neither possesses the required information to decrypt a communication, nor takes

---

Vid., HARMON, E., (April 12, 2018), "No, Section 230 Does Not Require Platforms to Be "Neutral"", *Electronic Frontier Foundation (EFF)*. https://www.eff.org/deeplinks/2018/04/no-section-230-does-not-require-platforms-be-neutral

20 Senator Ted Cruz argued that Section 230 should only be applicable to politically "neutral" service providers, suggesting that a provider should be held legally responsible as a "publisher or speaker" of user-generated content if they selectively determine what content gets published or spoken.

Vid., MASNICH, M., (April 13, 2018), "Ted Cruz Demands A Return Of The Fairness Doctrine, Which He Has Mocked In The Past, Due To Misunderstanding CDA 230", *Techdirt.* https://web.archive.org/web/20201207144701/https://www.techdirt.com/articles/20180412/23230639618/ted-cruz-demands-return-fairness-doctrine-which-he-has-mocked-past-due-to-misunderstanding-cda-230.shtml

Senator Josh Hawley further alleged that Section 230 immunity represented a preferential arrangement between big tech companies and the government, characterizing it as a "sweetheart deal."

Vid., EGGERTON, J., "Sen. Hawley: Big Tech's Sec. 230 Sweetheart Deal Must End", *Multichannel News.* https://web.archive.org/web/20200821184943/https://www.multichannel.com/news/sen-hawley-big-techs-sec-230-sweetheart-deal-must-end

21 LINDSEY GRAHAM (May 4, 2023), *Senate Judiciary Committee Unanimously Approves EARN IT Act.* https://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=5A0FDDE3-8F28-4A41-803A-92F38D2F2BA2

22 US CONGRESS, *S. 1207- 118th Congress (2023-2024).* https://www.congress.gov/bill/118th-congress/senate-bill/1207

23 *Íbidem.*

any action that would undermine their ability to provide complete end-to-end encrypted messaging services, or other encryption services, under no circumstances shall these conditions be considered as standalone grounds for holding a provider of an interactive computer service liable for any claims or charges as described by the bill[24].

2.3. United Kingdom

In the early stages, the GCHQ, a parallel agency to the United States' NSA, put forward a potential solution that would enable surveillance of encrypted conversations[25] as a potential application of the *Investigatory Powers Act 2000*[26]: "The Ghost Protocol"[27].

The Ghost Protocol is a framework of how law enforcement might access to encrypted communications. As we pointed out before, the way most messaging systems work is by using public and private key methods of encryption. Only the person possessing the matching private key to that public key can decrypt and read the encrypted message. And, if multiple individuals are involved in a conversation, the message must be encrypted multiple times using their respective public keys. Bearing this in mind, the Ghost Protocol proposes the inclusion of an additional account owned by law enforcement in those messages. The participants of the conversation would be unaware that copies of their messages are being simultaneously transmitted to GCHQ.

This posed serious threats to digital security and undermined user authentication mechanisms for platform access. In fact, while this measure allowed for the preservation of the encryption mechanism, it eroded users' trust by compromising the confidentiality and privacy of communication.

The situation led to significant criticism from major internet platforms such as Apple, Google, and WhatsApp. Fortunately, the "Ghost Protocol" never saw the light of day.

However, in its up-to-date version, the RIPA specifically contains a legal regulation that compels those in possession of protected information to provide the authorities with access keys, deliver the information in an unencrypted

24 *Íbidem.*

25 This issue has been a longstanding battle for the GCHQ, as they have consistently argued for law enforcement's access to personal conversations in order to conduct investigations. Initially, the GCHQ asserted that encrypted channels were unnecessary for users' communication. However, when this argument proved unsuccessful, they suggested the inclusion of back doors in encryption algorithms, which would likely weaken the overall security and render communication apps vulnerable to hacking.

26 UK GOVERNMENT. *Regulation of Investigatory Powers Act 2000,* also known as RIPA. https://www.legislation.gov.uk/ukpga/2000/23/contents

27 LOMAS, N., (May 30, 2019), "Apple, Google, Microsoft, WhatsApp sign open letter condemming GCHG proposal to listen in on encrypted chats", *TechCrunch+*. https://techcrunch.com/2019/05/30/apple-google-microsoft-whatsapp-sign-open-letter-condemning-gchq-proposal-to-listen-in-on-encrypted-chats/?_guc_consent_skip=1620561688

format, or allow authorities to access such data[28]. Specifically, this requirement for disclosure of protected information is considered in cases where it is deemed necessary for national security interests, to prevent or detect crimes, or in the interest of the economic well-being of the United Kingdom.

Furthermore, following the lead of the United States and using child protection as an argument, the United Kingdom is currently debating a bill called the *Online Safety Bill*[29], in which they propose scanning users' private messages. The regulation, not yet in force, is currently in the report stage before the House of Lords, having obtained the approval of the House of Commons[30]. As it stands, this British law could potentially break end-to-end encryption and pave the way for mass surveillance of personal messages.

In particular, the operators of the most popular messaging applications[31] -such as WhatsApp, Wire, Viber, Signal, Threema, and Element-, in an open letter[32], reject the proposed legislation and argue that weakening encryption is not the way to proceed. They assert that the protection of children in online environments is merely a pretext to achieve large-scale surveillance of online messages without probable cause. Moreover, they consider end-to-end encryption to be one of the strongest defenses against persistent online threats. However, the bill does not provide any explicit protection for encryption and, in its currently worded terms, it could even empower OFCOM—the regulatory body for communication in the United Kingdom—to enforce proactive scanning of private messages in end-to-end encrypted communication services, thereby undermining its purpose and compromising user privacy.

Thus, the text of the proposed bill establishes the obligations that should be imposed on providers of these platforms, including the requirement to share the risk associated with "service functionalities that facilitate the presence or dissemination of illicit content," as well as the possibility of these applications being used to commit crimes[33].

Additionally, in the section on "investigations and interviews[34]", the bill specifies that OFCOM can demand explanations from providers in the event of an investigation into their services or if it requires information during an audit. It is at this point that the *Online Safety Bill* highlights that companies would be

28 Part III, Section 49 and 50 RIPA.

29 ONLINE SAFETY BILL (as amended in Committee). https://bills.parliament.uk/publications/51870/documents/3679

30 In order to review the proposal development process *vid.*, UK PARLAMENT, Parliamentary Bills. https://bills.parliament.uk/bills/3137/stages

31 Except Telegram.

32 THREEMA (April 18, 2023), *Open Letter to the British Government Regarding the Online Safety Bill.* https://threema.ch/en/blog/posts/online-safety-bill

33 Part 3, Chapter 2 "Providers of user-to user services: duties of care", section 8 "Illegal content risk assessment duties" of the Online Safety Bill.

34 Part 7, "OFCOM's power duties in relation to regulated services, Chapter 4 "Information", Section 95 (1) "Investigations" of the Online Safety Bill.

in violation if they provide encoded information in a way that OFCOM cannot understand[35], revealing a rejection of end-to-end encryption systems.

This represents a fundamental difference from US legislation, where, as we pointed out, the mere fact that a provider uses end-to-end encryption, does not possess the necessary information to decipher communication, or does not take actions to undermine end-to-end encryption, does not, by itself, serve as a basis for attributing liability to the provider.

Given this situation, the bill would pose a threat to the privacy, security and protection of British citizens and those with whom they communicate worldwide. Recently, Apple[36] has joined the collective complaint, emphasizing the importance of end-to-end encryption in privacy protection.

3. EUROPEAN CONTEXT

3.1. The approach to encryption technology in Europe

Issues related to encryption technology have also been addressed by European institutions. In this regard, we must start from the premise that secure processing is an important element of personal data protection and encryption is recognized as one of the security measures in the *General Data Protection Regulation*[37]. Additionally, European institutions encourage companies, public administrations and individuals to use encryption to protect their data and electronic communications.

The *e-Privacy Directive*[38], also promotes the use of encryption technologies to protect users' communications (recital 20). Nonetheless, it is important to

35 Part 7, Chapter 4 "Information", Section 99 (4) "Offences in connection with information notices" of the Online Safety Bill.

36 EUROPA PRESS (June 30, 2023), *Apple considera la regulación de Reino Unido del cifrado E2EE "una grave amenaza" para la protección de los ciudadanos"*. https://elderecho.com/apple-considera-la-regulacion-de-reino-unido-del-cifrado-e2ee-una-grave-amenaza-para-la-proteccion-de-los-ciudadanos

37 EUROPEAN UNION, *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 (General Data Protection Regulation)*. https://eur-lex.europa.eu/eli/reg/2016/679/oj

38 EUROPEAN UNION, *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)*. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0058

When it comes to the privacy of electronic communications, it is worth noting that there is currently a proposal for an ePrivacy Regulation that applies to both individuals and legal entities (in contrast to the General Data Protection Regulation, which solely applies to individuals). In line with the 2002 Directive, the ePrivacy Regulation, as stated in its recital 37, encourages the utilization of encryption techniques by service providers offering electronic communications services. *Vid*, EUROPEAN UNION, *Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of*

keep in mind that criminals also take advantage of the opportunities offered by encryption technology to conceal their data and potential evidence, as well as to protect their communications and obfuscate their financial transactions.

In this regard, the 2016 *Internet Organised Crime Threat Assessment* (iOCTA)[39] by EUROPOL emphasized that strong encryption is crucial for e-commerce and other activities in cyberspace. However, adequate security depends on law enforcement authorities having the ability to successfully investigate criminal activity. Thus, the use of encryption deprives law enforcement agencies of crucial evidential opportunities, especially since encryption is no longer limited to desktop computers but is increasingly present in mobile devices. Many commercially available communication platforms now have default encryption, such as the case of WhatsApp mentioned above.

In December 2016, the Council of Europe addressed the challenges of encryption in the field of criminal investigations[40] during the Summit of Justice and Home Affairs[41]. In June 2017, it adopted initial conclusions that assigned shared responsibility to the industry in the fight against terrorism and cybercrime, calling for solutions in situations where end-to-end encryption prevents authorities from accessing digital evidence[42].

In October 2017, the European Commission proposed measures to support law enforcement and judicial authorities in accessing electronic evidence during cross-border investigations, along with the development of technical capabilities supported by Europol -EC3- to access encrypted information on devices and storage devices, as well as end-to-end encrypted communications.

3.1.1. Note 10730/20 on September 18, 2020

As a result of collaboration between law enforcement and judicial authorities and representatives from the private sector, the Commission services published its conclusions in *Note 10730/20 on September 18, 2020*[43].

---

personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications). https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52017PC0010&from=ES

39 EUROPOL (September 28, 2016), *The Internet Organised Crime Threat Assessment (IOCTA).* https://www.europol.europa.eu/publications-events/main-reports/internet-organised-crime-threat-assessment-iocta-2016

40 COUNCIL OF THE EUROPEAN UNION, (November 23, 2016), NOTE: *Encryption: Challenges for justice in relation to the use of encryption – future steps,* (progress report). https://data.consilium.europa.eu/doc/document/ST-14711-2016-INIT/en/pdf

41 COUNCIL OF THE EUROPEAN UNION (December 8 and 9 2016), *OUTCOME OF THE COUNCIL MEETING (3508th Council Meeting) Justice and Home Affairs.* https://data.consilium.europa.eu/doc/document/ST-15391-2016-INIT/en/pdf

42 EUROPEAN COUNCIL (June 22, 2017), *European Council conclusions on security and defence* (press release). https://www.consilium.europa.eu/en/press/press-releases/2017/06/22/euco-security-defence/

43 COMISSION SERVICES (September 18, 2020), NOTE: *End-to-end encryption in criminal investigations and prosecution.* https://data.consilium.europa.eu/doc/document/ST-10730-2020-INIT/en/pdf

According to these conclusions, technical solutions that weaken or directly or indirectly prohibit the use of encryption would not be valid. Weakening one part of the system could potentially weaken the system as a whole. Access orders to encrypted communications will be directed to an individual or group within the framework of an investigation, excluding mass surveillance. These orders must be proportionate and issued or subject to prior validation by a judicial authority. The transmission of data to authorities will be done with the most advanced security measures in compliance with data protection. Techniques that enable access to encrypted information should only be used if there are no less intrusive alternatives. Given the wide range of encryption solutions that can be deployed simultaneously on devices or systems to provide multiple layers of protection, there should not be a single technical solution aimed at providing access to data (principle of technological neutrality).

3.1.2. Resolution 13084/1/20 of the Council of the European Union on November 24, 2020

Subsequently, *Resolution 13084/1/20 of the Council of the European Union on November 24, 2020*, which calls for new rules to regulate end-to-end encryption in Europe [44], further develops those conclusions.

It fully supports the development, implementation and use of strong encryption as a necessary means for the protection of fundamental rights, digital security of governments, industry, and society. However, at the same time, the Council emphasizes the need for the EU to ensure that authorities in the security and criminal justice domain can exercise their legitimate powers, both online and offline, to protect our societies and citizens by guaranteeing access to data.

The resolution also establishes the principle of "security through encryption and despite encryption" as a starting point, which must be fully respected. This means finding an appropriate balance between ensuring the continued application and use of encryption technology, which is the foundation of trust in digitization and the protection of fundamental rights and should be promoted and developed, and enabling law enforcement and judicial authorities to exercise their powers regarding legitimate access to relevant data for legitimate and clearly defined purposes in the fight against organized crime, serious crime, and terrorism, as well as in defense of the rule of law, under the same conditions as in the offline world, while preserving cybersecurity in the fight against organized crime and terrorism through the application of yet-to-be-defined technical solutions.

It is considered essential to preserve the powers of competent authorities in the security and criminal justice domains with legitimate access to carry out

44 COUNCIL OF THE EUROPEAN UNION (November 24, 2020), NOTE: *Council Resolution on Encryption – Security through encryption and security despite encryption*. https://data.consilium.europa.eu/doc/document/ST-13084-2020-REV-1/en/pdf

their tasks in accordance with the law and authorized measures, regardless of the technological environment of the moment.

Thus, while not directly referring to "backdoors," the text suggests finding a middle ground between secure technology and the power to investigate encrypted content. A middle ground that experts agree does not currently exist[45].

Since there is no single way to achieve these objectives, the Council believes that governments, industry, the research community and the academic sphere should collaborate closely and transparently to strategically propose balanced technical solutions and improve the technical and operational capabilities of law enforcement and judicial authorities. These potential solutions should preserve the benefits of encryption while respecting the principles of legality, transparency, necessity, proportionality, and subsidiarity, as well as common European values and fundamental rights.

3.1.3. CSA proposal

Recently, on May 11, 2022, the European Commission presented a proposal for a regulation that establishes rules for preventing and combating child sexual abuse (CSA proposal[46]). Its objetive is to replace the Interim Regulation[47],

45 In this regard, the Electronic Frontier Foundation (a digital privacy advocacy group) argues that there are no middle grounds when it comes to encryption or secure backdoors. They assert that exceptional access undermines encryption security and that the compromise demanded by authorities ultimately results in weak encryption.

Vid, RUIZ, D. "There is No Middle Ground on Encryption", *Electronic Frontier Foundation*. https://www.eff.org/deeplinks/2018/05/there-no-middle-ground-encryption

In the same vein, Sergio Carrasco Mayans argues that the concept of "security despite encryption" can be confusing and dangerous. In his view, the danger lies in disregarding the importance of encrypted communications for all users in such an insecure environment as the Internet. The reduction of encryption security affects all users without exception. He believes that a backdoor could be exploited by anyone who discovers and knows how to exploit it, not just by authorized authorities. Furthermore, he highlights the danger posed by such a precedent in a global framework where certain countries do not have the same safeguards as the EU.

While these backdoors would supposedly only be available to authorities following a procedure with the necessary guarantees, the reality is that they are deliberate singular points of failure and, as a result, can be exploited by criminals. Similarly, Mayans understands that discussing "security despite encryption" introduces a concept that does not align with the technical reality, as there are no compromises or middle grounds in this matter. It is not possible to simultaneously guarantee the security and integrity of encryption while ensuring constant and secure access to communications In conclusion, it is either encryption and privacy, or the existence of backdoors that can be exploited by malicious actors.

Vid, GONZALO M., (December 16, 2020), "Seguridad a pesar del cifrado: el riesgo de las puertas traseras en la UE", *Newtral*. https://www.newtral.es/seguridad-a-pesar-cifrado-puertas-traseras-ue/20201216/

46 EUROPEAN COMISSION (May 11, 2022), *Proposal for a Regulation of the European Parliament and of the Council laying down reules to prevent and combat child sexual abuse*. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A209%3AFIN

47 The Interim Regulation will remain in effect until 3 August 2024 or until an earlier date if the current proposal for a regulation is adopted by the EU legislator and supersedes this temporary measure.

Vid., EUROPEAN UNION (July 14, 2021), "Regulation (EU) 2021/1232 of the European Parliament and the Council on a temporary derogation from certain provisions of Directive 2002/58/EC as regards

which provides a temporary legal basis for number-independent interpersonal communication services to continue their voluntary practices of detecting, reporting, and removing child sexual abuse material (CSAM) online. Through the CSA proposal, the European Commission aims to establish a long-term legal framework and it sets out a system of targeted detection orders[48].

The proposed legislation incorporates a procedure for issuing detection orders which would require the provider to implement automated content recognition technologies for detecting CSAM or grooming. Besides, it emphasizes the deployment of technologies that are least intrusive on privacy and detection orders must be targeted and limited to what is strictly necessary. It also includes a template for detection orders and specifies that they should encompass measures, indicators, and safeguards.

If necessary, the national Competent Authority (CA) would request a court or administrative authority to issue a removal order. The CA would also be responsible for requesting the competent judicial or independent administrative authority to issue an order compelling relevant information society service providers to block access to specific CSAM items that cannot be reasonably removed at the source.

Considering that the removal or disabling of access may impact the rights of users, providers should inform them about the reasons for the removal, enabling such users to exercise their right of redress[49].

However, it should be stressed that the detection process, particularly when it comes to identifying potential grooming, is generally regarded as the most intrusive for users, compared to the detection of known and new child sexual abuse material. This is because it involves automated scanning of text within interpersonal communications.

To support the proposal, the Commission conducted an impact assessment (IA)[50] that relied on input from a study and various consultations with a wide range of stakeholders from February 11, 2021, to April 15, 2021. Surveyed users, particularly in Germany, expressed concerns about end-to-end encryption[51].

---

the use of technologies by providers of number-independent interpersonal communications services for the processing of personal and other data for the purpose of combating online child sexual abuse", *Official Journal of the European Union*. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1232&qid=1636576483536

48 Again, as in the case of the US and the UK, child protection is used as an opportunity to attack data encryption.

49 Exceptions to this requirement may be made to avoid interference with activities related to the prevention, detection, investigation, and prosecution of child sexual abuse offenses.

50 EUROPEAN COMMISSION (May 11, 2023), *Commission Staff Working Document Impact Assessment Report. Accompanying the document "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down rules to prevent and combat child sexual abuse"*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0209

51 EUROPEAN PARLIAMENT (June 2023), BRIEFING: "Combating child sexual abuse online", *EU Legislation in Progress,* p.4. https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/738224/EPRS_BRI(2022)738224_EN.pdf

On September 22, 2022, the European Economic and Social Committee (EESC) adopted an opinion on the Combating Child Sexual Abuse Online package. The EESC supports the principle of the initiative but highlights privacy risks and expresses skepticism about scanning encrypted communication. It considers the proposed measures to be disproportionate and raises concerns about the potential infringement of the presumption of innocence[52].

For its part, the European Digital Rights Association (EDRi) also reiterates that automated scanning and chat controls could potentially be illegal[53].

The file pertaining to the proposal has been assigned to the Civil Liberties, Justice, and Home Affairs Committee (LIBE) at the Parliament, which draft report[54] was published on April 19, 2023.

It welcomes and expresses support for the main objectives of the proposal but also introduces numerous amendments and includes several new elements. For example, it empowers CA designed by Member States to request the issuance of detection orders "as a measure of last resort". A caution that wasn' considered before. In fact, to emphasize detection orders as a measure of last resort, the rapporteur[55] recommends strengthening prevention as an integral component of the mitigation measures to be implemented by relevant information society communication services[56]. Examples of such measures include incorporating safety and security design principles that prioritize child protection by default, implementing functionalities that enable age verification, and scoring, providing age-appropriate parental control tools, facilitating flagging and/or notification mechanisms, offering self-reporting functionalities, and actively engaging in codes of conduct focused on protecting children[57].

Furthermore, the draft report concluded[58] that each platform has the freedom to choose the technologies they should use to effectively comply with detention orders and adopt all available safeguard measures to ensure that the technologies employed preserve the security and confidentiality of users' communications.

That being said, initially, the text proposed by the Commission included a reference to the use of end-to-end encryption technology, recognizing its significance as a crucial tool in ensuring the security and confidentiality of user

52 *Íbidem*, p.7.

53 *Íbidem*, p. 10.

54 EUROPEAN PARLIAMENT (April 19, 2023), *Draft Report on the proposal for a regulation of the European Parliament and of the Council Laying down rules to prevent and combat child sexual abuse.* https://www.europarl.europa.eu/doceo/document/LIBE-PR-746811_EN.pdf

55 Javier Zarzalejos.

56 These mitigation measures should encompass specific actions aimed at safeguarding the rights of children.

57 *Vid.,* EUROPEAN PARLIAMENT (April 19, 2023), *Draft Report on the proposal for a regulation (…), op., cit.,* p. 139.

58 Amendment 16, Proposal for a regulation, Recital 26 of the Draft Report.

communications. However, the amendment made by the European Parliament removed this reference, suggesting a revision of the original stance on the matter.

Another important amendment is the implementation of voluntary detection orders[59]. This additional mechanism would serve two purposes: firstly, to ensure that mandatory detection orders are only utilized as a last resort measure; and secondly, to address any potential gap that may arise between the enactment of the new Regulation and its effective application.

Besides, in order to achieve proper alignment with the principle of proportionality, it is expressly stipulated that "The reasons for issuing the detection order shall outweigh negative consequences for the rights and legitimate interests of all parties affected, with particular regard to the need to ensure a fair balance between the fundamental rights of those parties"[60].

Finally, it brings search engines and other artificial intelligence systems within the scope of the proposal and limits CSA scanning in end-to-end encryption (conducted to detect suspicious patterns of behavior without accessing the content of encrypted communication) to metadata analysis[61].

Notwithstanding the foregoing, the detection orders required to identify the types of CSAM envisaged in the proposal, would necessitate a general data retention obligation for service providers, which is prohibited by EU law and the case law of the Court of Justice of the European Union (CJEU). General monitoring obligations are also forbidden. However, in order to combat CSAM and protect children's rights, the Commission proposes granting competent judicial or independent administrative authorities the power to issue orders to certain providers for communication scanning or website blocking[62].

Particularly, the concerns raised in relation to the detection of known CSAM also apply to the detection of new material and grooming in E2EE communications.

---

59 Amendment 99, Proposal for a regulation, Article 5 a (new) of the Draft Report.

60 Amendment 11, Proposal for a regulation Article 7 - paragraph 2 - subparagraph 1 a (new).

61 In this manner, the rapporteur asserts that end-to-end encryption plays a vital role in safeguarding the security and confidentiality of user communications, including those involving children. In order to address this concern, the regulation explicitly clarifies throughout the document that nothing in the proposal should be interpreted as prohibiting or weakening end-to-end encryption. This clarification is included to ensure that the proposed measures do not undermine the use or effectiveness of end-to-end encryption in any way.

To effectively address the potential misuse of services for online child sexual abuse, providers may be authorized by a competent judicial or independent administrative authority. This authorization would enable them to process metadata capable of identifying suspicious behavioral patterns, without gaining access to the actual content of encrypted communications. It is important to stress that such measures should strictly adhere to the principles of necessity and proportionality. *Vid.,* EUROPEAN PARLIAMENT (April 19, 2023), *Draft Report on the proposal for a regulation (…), op., cit.,* p. 138.

Amendment 4, recital 5 of the Draft Report.

62 *Vid.,* EUROPEAN PARLIAMENT (June 2023), BRIEFING: "Combating child sexual abuse (…)", *op., cit.*, p. 6.

That's because the imposition of new binding obligations resulting from detection orders on relevant service providers to identify, report, and remove new material and grooming from their services would likely fail the proportionality test. Furthermore, in terms of the technology employed for the detection of CSAM in E2EE communications, scanning communications on the device side is disproportionate to the intended objective and very intrusive for users.

As a result, the CSA proposal is expected to negatively influence the fundamental rights of service users, including children.

This impact on fundamental rights (mainly articles 7, 8 and 11 of the *Charter of Fundamental Rights* -CFR-), as identified in the Complementary Impact Assessment of the European Parliament[63], aligns with relevant case law from the CJEU, such as La Quadrature du Net[64] or Digital Rights Ireland[65].

Thus, article 7 of the CFR guarantees the right to a private life, which includes the right to private communications, and state authorities are generally prohibited from interfering with personal communications. However, in order to detect CSAM according to the measures outlined in the CSA proposal, users' communications need to be monitored for specific content outlined in it.

Therefore, the proposed detection orders significantly impact the confidentiality of communications and can reveal a substantial amount of personal information about individuals (their personal relationships, family associations, friendships, and professional connections). The impact extends to all aspects of their lives and is not limited to a particular domain. These measures also interfere with the rights of a large group of users who are not involved in using or distributing online CSAM. Depending on the types of information society services involved, detection orders may monitor traffic and location data, as well as the content of interpersonal communications.

In this regard, the CJEU has previously ruled that the retention and analysis of both traffic and location data (metadata) by state authorities fall under the scope of Article 7 of the CFR. Hence, collecting metadata constitutes a significant interference with Article 7 of the CFR.

---

63 EUROPEAN PARLIAMENT (April 2023), *Proposal for a regulation laying down the rules to prevent and combat child sexual abuse (Complementary impact assessment),* p. 37 et seq.

https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740248/EPRS_STU(2023)740248_EN.pdf

64 COURT OF JUSTICE OF THE EUROPEAN UNION (October 6, 2020), *La Quadrature du Net and Others* (C-520/18, ECLI:EU:C:2020:791). https://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrec=pt&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-511%252F18&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=16743290

65 COURT OF JUSTICE OF THE EUROPEAN UNION (April 8, 2014), *Digital Rights Ireland Ltd v. Ireland* (C-293/12 and C-594-12, ECLI:EU:C:2014:238). https://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=150642&occ=first&dir=&cid=99319%20(judgment,%20advisory%20opinions,%20resolutions,%20dissenting%20opinions)

Furthermore, the purpose of personal data protection (Article 8 of the CFR) is to provide individuals with protection regarding the processing of their personal data. In this light, the activities required by information society service providers under the CSA proposal, such as retaining, analyzing, and forwarding communication data to public authorities in the case of a positive detection, qualify as the processing of personal data and fall within the scope of Article 8 of the CFR.

On the other hand, the fundamental right to freedom of expression and information includes a prohibition on public authorities restricting individuals' ability to both send and receive information and ideas. As stated in La Quadrature du Net case, the mere fact that information society service providers retain traffic and location data for policing purposes already infringes on Article 11 of the CFR, as it may potentially discourage people from openly expressing their views and freely receiving information.

Continuing the line of reasoning from the CJEU, if the retention of traffic and location data is deemed to infringe Article 11 of the CFR, it can be inferred that the monitoring and retention of the content of interpersonal communications would likely have an even more significant impact on Article 11 of the CFR.

In summary, both the monitoring and retention of interpersonal communications content and the screening of all accessed content via internet services can be seen as intrusions that infringe upon the rights protected by Article 11 of the CFR, including the prerogative to receive information freely. These interferences affect a broad range of users who may be covered by a detection order.

In response to this regulation, hundreds of scientists and researchers from different countries have signed an open letter[66] addressed to Members of the European Parliament and members of the European Council, expressing their concerns about the potential dangers posed by this new law in the fight against child sexual abuse. According to the signatories, the proposed monitoring system represents an unprecedented violation of citizens' privacy.

Namely, the letter points out the fact that, to address the challenge of maintaining end-to-end encryption while enabling the search for known or new content and the detection of grooming within service providers, a techinique called Client-Side Scanning (CSS) has been suggested. These tools would function by scanning content on the user's device before it is encrypted or after it is decrypted, and would then report whenever illicit material is detected.

With that in mind, the experts argue that while end-to-end encryption itself may remain intact, the proposed alternative of scanning messages before they are sent is equally detrimental, and inevitably leads to a weakening of end-to-end

66 CSA ACADEMIA OPEN LETTER (July 17, 2023). https://docs.google.com/document/u/0/d/13Aeex72MtFBjKhExRTooVMWN9TC-pbH-5LEaAbMF91Y/mobilebasic?pli=1

encryption, making communications less secure. That would be akin to reading a letter before placing it in an envelope and sending it via postal service[67].

Besides, they emphasize that the effectiveness of the law relies on the availability of successful scanning technology. Unfortunately, existing and near-future technologies have significant flaws, resulting in numerous false positives[68]. Specifically, these shortcomings indicate that scanning is bound to be inefficient.

In addition, integrating widespread scanning into user device applications would have the unintended consequence of making the online environment and digital society less secure for everyone.

Finally, it is also highlighted that the proposed regulation sets a dangerous precedent for internet filtering, controlling access and infringing upon the right to privacy in the digital realm. Therefore, the open letter urges policymakers to reconsider the potential negative implications of the proposed legislation and to explore alternative approaches that can effectively combat child sexual abuse while upholding the principles of privacy and strong encryption.

3.2. The approach to encryption technology in the State Members

Although the preceding statement encompasses the stance adopted by European institutions, it is imperative to briefly allude to the domestic developments within the context of the Union.

This specific matter is comprehensively addressed in the June 2021 publication of the joint report by EUROPOL and EUROJUST, titled "Third observatory report on encryption"[69].

As the report shows, only Denmark, France, Germany, Poland, Sweden, Switzerland and The Netherlands have provisions that specifically address the use by law enforcement authorities of technical tools to attack encryption. Other countries apply general legal provisions -as it's the case in Spain[70]-. Besides, a distinction can be made between provisions permitting attacking directly encrypted content and those providing for the use of tools to gain access to content before it is encrypted or after it is decrypted[71].

---

67 MÉNDEZ, M.A (July 4, 2023), "Expertos avisan del peligro de la nueva ley europea: "Es poner una cámara en tu casa"", *El Confidelncial*. https://www.elconfidencial.com/tecnologia/2023-07-04/cifrado-reglamento-europeo-abuso-menores-whatsapp-mensajeria_3684963/

68 Content incorrectly flagged as illegal material.

69 EUROPOL AND EUROJUST (June 2021), *Third Report of the observatory function on encryption*. https://www.europol.europa.eu/cms/sites/default/files/documents/3rd_report_of_the_observatory_function_on_encryption-web.pdf

70 In the case of Spain, in accordance with the various technological investigation measures regulated in the Spanish Criminal Procedure Law (LECr), it is possible to employ any technique that enables the decryption of information, as long as it satisfies the legal requirements and is accompanied by a judicial resolution authorizing the search (Article 588 septies, pertaining to Remote Registers on computer equipment).

71 *Vid.*, EUROPOL AND EUROJUST (June 2021), *Third Report of* (…) *op., cit.*, p. 11 et seq.

In Denmark, section 791 b of the *Administration of Justice Act* permits the replication of non-public data from an information system or device through the covert installation of software. This allows law enforcement to obtain a copy of all user entries or commands made on the information system or device. By utilizing such software, it is possible to breach encryption and acquire the password to encrypted data without the suspect's awareness. The evidence collected in accordance with this provision is admissible in its entirety, provided it meets the relevant legal criteria.

France has a comprehensive and intricate legislation regarding encryption, encompassing aspects related to bypassing and attacking encryption. It can be asserted that the efforts of French authorities were fortified by a strong legal framework concerning encryption, which fosters legal certainty and facilitates the admissibility of evidence in court proceedings.

From a procedural standpoint, provisions such as articles 230-2 and 706-102-1 of the *Code of Criminal Procedure* authorize competent authorities to install technical tools for capturing encrypted data and the utilization of decryption tools by authorized entities to access the content of seized devices.

In Germany, there are no legal restrictions on the utilization of tools or techniques to decrypt encrypted data. According to Section 100a, paragraph 1 of the *Code of Criminal Procedure*, technical methods can be employed to intercept and record telecommunications in an unencrypted format.

In Poland, the setting is identical, due to the specific provision that permits the utilization of technical tools for lawful data access.

In the case of Sweden, as of April 1, 2020, a new law on secret data reading has entered into force. Under Swedish jurisdiction, a court can authorize the covert reading or recording of data intended for automated processing in a readable information system using the necessary technical tools. According to this legislation, in investigations related to serious crimes and subject to specific safeguards outlined in the law, law enforcement authorities can install software or devices required to access encrypted digital evidence without the knowledge of the suspect. The new law has a validity period of five years and will be subject to review thereafter.

In Switzerland, although general provisions on search and seizure allow authorities to break encryption, there is a specific provision regarding the use of government software. This provision permits the installation of software on a device to access encrypted communication either before it is encrypted or after it is decrypted by the receiving device.

The Netherlands has established specific provisions concerning access to encrypted data and the utilization of technical tools for gathering encrypted digital evidence. These provisions were introduced with the implementation of the *Computer Crime Act III* on March 1, 2019, aimed at enhancing investigative powers and the prosecution of cybercrime.

Besides, in the *Dutch Code of Criminal Procedure*, a new investigative method was added (section 126nba, DCCP), which allows for the use of technical tools to access digital evidence without the knowledge of the suspect. Additionally, law enforcement authorities are permitted to employ commercial technical tools, with only those used for investigative activities being subject to inspection.

In summary, while only a few countries have explicit provisions regarding encryption or the use of tools to attack it, the interception of encrypted data or the decryption of seized data is typically permitted under general provisions. However, the lack of specific provisions on the use of software or devices to attack encryption, although covered in theory under general provisions, can pose several challenges to the admissibility of the electronic evidence gathered by these methods.

4. CONCLUSION

The realm of "digital life" and cyberspace offers not only significant opportunities but also presents considerable challenges. The digitization of modern societies brings forth inherent vulnerabilities that can be exploited for criminal purposes.

While the ongoing debate revolves around addressing the challenges associated with encryption, technological advancements continue to unfold. This progress underscores the broader predicament of conducting criminal investigations in contemporary society, where conventional data sources traditionally employed for evidence collection are becoming increasingly biased. Meanwhile, the question of how to approach and respond to these challenges while acknowledging and respecting the various interests at stake remains unresolved. Adding to the complexity is the disparate national regulatory landscape concerning access to encrypted data among different countries within the Union, potentially jeopardizing the cross-border recognition of electronically gathered evidence obtained through encryption attacks.

As of today, the establishment of legally enforceable backdoors by authorities or the scanning of encrypted interpersonal communications, even while preserving end-to-end encryption, unavoidably entails weakening and eroding this technology, thus compromising the security of communications and user privacy.

In our view, the solution lies not in centering the debate on introducing a potential new avenue for attacks but rather in developing and promoting measures aimed at enhancing cybersecurity and fostering cyber resilience in the network, actively involving the general population in understanding its significance.

Security, freedom and criminal procedure: data retention, european jurisprudence and the new italian regulation

Alessandro Malacarne

PhD student in Criminal Procedure, Department of Law, University of Genoa (Italy)

1. INTRODUCTION

The adoption of Directive 2002/58/EC[1] was an important step to ensure rights and freedoms of persons with regard to the processing of personal data and, especially, their right to privacy and to respect for private and family life, as protected by articles 7 and 8 of the Charter of Fundamental Rights of the European Union and art. 8 of the European Convention on Human Rights (ECHR). The aim of the European legislator, in brief, was to harmonise the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms with respect to the processing of personal data in the electronic communication sector. Indeed, the European Parliament observed that Internet is overturning traditional market structures by providing a common, global infrastructure for the delivery of a wide range of electronic communications services. However, at the same time, publicly available electronic communications services over the web open new possibilities for users, but also new risks for their personal data and privacy.

Nevertheless, twenty years on, the *modus comunicandi* has profoundly changed.

The increasing use of high-tech tools in everyday life (such as smartphones and tablets) has resulted in a new way of communicating. The development of the Internet of Things[2] and the advent of social network has led not only

1 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

2 With this expression, used for the first time in 1999 by Kevin Ashton, we intended to describe the socio-technological phenomenon in which everyday objects (such as smartphones, cars, televisions, household appliances, etc.) are connected to the Internet via sensors that enable continuous use (and control) of these devices. On the topic, see, *amplius*, L. DENARDIS, *Internet in ogni cosa. Libertà, sicurezza e privacy nell'era degli oggetti iperconnessi*, Luiss University Press, Rome, 2022.

to a radical change in social relationship, but also to the creation of a digital archive that is «larger than the human mind that, to some extent, "remembers" everything»[3]. In this regard, the new way to communicate, create and maintain interpersonal relationships in the "online space" produced an important consequence from the procedural point of view: we refer, more specifically, to the mass-production of a large numerous typologies of metadata. In the web-era, in fact, every human action and activity realized in the cyberspace leaves a series of "digital traces" that can prove extremely useful for the investigation of crimes.

2. VALUES AND THE EUROPEAN LAW

The Directive 2002/58/EC establishes that Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services. Specifically, art. 5 introduces the principle of confidentiality, which establishes the general prohibition of listening, tapping, storage of communications and the related traffic data by persons other than users, without the consent of the users concerned.

Nevertheless, the value of privacy, like any right in a pluralist and democracy Nation, is not absolute and – as said the Italian Constitutional Court in a well-know judgment – «tyrant»[4], but, on the contrary, it must be balanced with other and competing principles. For this reason, the European legislator has provided that Member States can adopt legislative measures to restrict the rights of privacy, even if only when such «restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security, defence, public security, and the prevention, investigation, detection and prosecution of criminal offences»[5].

The provision *de quo* is built as a "rule-exception model": the privacy of communication can be limited only for a specific reason indicated by the Law.

On one hand, privacy is ever more important in the "digital society". With the awareness of the «constant relationship between changes in technologies [...] and changes in the concept of [privacy]»[6], this right has become a matter of relevant public interest for contemporary societies. Nowadays, privacy is

3 G. ZICCARDI, Internet, *controllo e libertà. Trasparenza, sorveglianza e segreto nell'era tecnologica*, Cortina Editore, Milan, 2015, p. 149. All translations from Italian language in the following pages are by the Author.

4 Italian Constitutional Court, 9 May 2013, n. 85.

5 Art. 15 of Directive 2002/58/EC.

6 S. RODOTÀ, *La privacy tra individuo e collettività*, in *Pol. dir.*, 1974, p. 551.

not merely the «right to be alone»[7], but a complex form of *habeas data*[8]: an expression that refers to the general right to monitor and control one's personal information.

On the other hand, the "risk society"[9] made it necessary to introduce new instruments for the protection of security. Especially following the crisis of the welfare State – which was unable to guarantee the rights and freedoms of citizens – security has acquired a primary position in the society[10]. Security is indeed a super-primary value[11], a necessary precondition for the enjoyment of any other right and, therefore, intended to impact the essential needs of individuals[12]. Regarding the criminal procedure system, the security is embodied by the principle of prevention and prosecution of crimes[13].

These general considerations concerning the relationship between security and rights in the "digital era" are crucial for examining the issue addressed in this work: data retention for the purposes of prevention and repression of criminal activities.

With this expression (*rectius*, data retention), we refer to the tool that, in a criminal proceeding, allows the storage and acquisition of the so-called telephone and telematic traffic metadata. This is information which, although not explicitly indicating the content of a conversation, makes it possible to know who the users contacted, the frequency of the calls, the time, duration, and place where the calls took place, as well as access to the web pages visited by the user[14].

Traditionally, telephone records have been regarded as a less invasive means of searching for evidence than wiretapping. In the technological era, however, this tool has assumed an increasingly significant role in the fight against all

7 S.D. WARREN – L.D. BRANDEIS, *The Right to Privacy*, in *Harward Law Review*, 1890, 4, p. 193.

8 On the topic, see C.E. PÉREZ-LUÑO ROBLEDO, *El procedimiento de Habeas Data. El derecho procesal ante las nuevas tecnologías*, Dykinson, Madrid, 2017.

9 See U. BECK, *Risk Society. Towards a New Modernity*, Sage, London, 1992.

10 Cfr. T. PITCH, *La società della prevenzione*, Carocci, Rome, 2006.

11 G. CERRINA FERONI – G. MORBIDELLI, *La sicurezza: un valore superprimario*, in *Percorsi Costituzionali*, 2008, 1, p. 31.

12 Security «is when the citizen can carry out his lawful activity without being threatened by offences to his physical and moral personality» (Italian Constitutional Court, 23 June 1956, n. 2). In the same sense, see also French Constitutional Court, 18 January 1995, n. 94-352.

13 For more details, see C. CONTI, *Sicurezza e riservatezza*, in *Dir. pen. proc.*, 2019, p. 1572.

14 For an exhaustive definition, cfr. Directive 2002/58/EC, par. 14: «Location data may refer to the latitude, longitude and altitude of the user's terminal equipment, to the direction of travel, to the level of accuracy of the location information, to the identification of the network cell in which the terminal equipment is located at a certain point in time and to the time the location information was recorded"; n. 15: "naming, numbering or addressing information provided by the sender of a communication or the user of a connection to carry out the communication. Traffic data may include any translation of this information by the network over which the communication is transmitted for the purpose of carrying out the transmission. Traffic data may, inter alia, consist of data referring to the routing, duration, time, or volume of a communication, to the protocol used, to the location of the terminal equipment of the sender or recipient, to the network on which the communication originates or terminates, to the beginning, end or duration of a connection. They may also consist of the format in which the communication is conveyed by the network».

forms of crime, both cyber and traditional. In fact, knowledge of external communication data can reveal the life habits of a subject: frequented places, personal relationships, social status, religious beliefs, etc.

That information is essential - and sometimes indispensable - for the law enforcement activities and to counter the criminal phenomenon. At the same time, however, the indiscriminate collection of such data conflicts with privacy[15]. In fact, the debate - both at European and national level - that has arisen on the subject *de quo agitur* is often portrayed as «a clash between those who seek to defend liberty and those who seek more security» [16].

In this perspective, we think that the limit of this instrument of investigation is the protection of the democratic nature of the State. As has been observed, art. 15 of the Directive 2002/58/EC recalls the criterion of necessity and, at the same time, the need to guarantee, in any case, the democratic nature of society. Consequently, the use of telephone records for purposes of detection of offences cannot turn into a remedy worse than the evil, undermining or even destroying the democracy they purport to defend[17].

3. THE PRINCIPLES OF EUROPEAN JURISPRUDENCE

The jurisprudence of the European Court has contributed significantly to the creation of a sort of "statute of criminal data retention". The judgments of the Court, in fact, have not only offered a simple interpretation of the provisions of the directive, but also a comprehensive (though not exhaustive) regulation of the matter.

Two reasons why the European Court has intervened so incisively in this area can be identified.

Firstly, the Member States have adopted national regulations that are inadequate with respect to the principles laid down in Directive 2002/58/EC, not considering the reflections of the technological innovation that has affected the communications sector. Secondly, national States are very reluctant to give the European Parliament the power to regulate the issue of data retention for the purposes of crime prevention and repression. This is, indeed, a strategic area for the defence of primary and essential interests of states.

15 See, in a more general way, S. PEREIRA PUIGVERT, *Las medidas de investigación tecnológicas y su injerencia en la privacidad de las personas y la protección de datos personales*, in I. Villar Fuentes (edt), *Investigación y prueba en los procesos penales de España e Italia*, Thompson Reuter, Cizur Menor, 2019, p. 293 ss.

16 A. JUSZCZAK – E. SASON, *Recalibrating Data Retention in the EU. The Jurisprudence of the CJEU – Is this the End or the Beginning?*, in *Eucrim*, 2021, 4, p. 259.

17 F. CAPRIOLI, *Sicurezza dei cittadini e processo penale*, in M. Donini-M. Pavarini (a cura di), *Sicurezza e diritto penale*, Bononia University Press, Bologna, 2011, p. 143.

For those reasons, the Court of Justice has ruled on several occasions to strike a balance between the need to ensure an effective search and investigation of crimes and the protection of the right to privacy.

The landmark case, as it is well known, is the *Digital Rights Ireland*[18], in which the Luxembourg judges declared the invalidity of Directive 2006/24/EC regarding the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. Specifically, articles 3 and 6 of Directive provided a generalised retention obligation of traffic data for a certain period[19].

The *modus argomentandi* of this judgment can be summarized as follows. The judges, first, recognise the existence of a general interest of every Member State in the repression of serious crime. Then, they emphasise how the provision in the directive of an obligation for Internet service provider (ISP) to retain traffic data constitutes an interference with the rights guaranteed by art. 7 of the Charter. This interference is justified - by the art. 52(1) of the Nice Charter - only within the limits of what it is strictly necessary and in accordance with the principle of proportionality. The directive, however, did not identify these limits in detail, instead, it permitted the indiscriminate collection, processing, and use of traffic data. For those reasons, the Court declared the European directive invalid.

From that moment, the Court has ruled numerous judgments censuring the regulations of the Member States that were deemed incompatible with the principles set out in the Directive 2002/24/EC. Among the most significant, we can mention *Tele 2 e Watson*[20], *Ministero Fiscal*[21], *La Quadrature du Net*[22], *H.K. c. Prokuratuur*[23], *G.D.*[24] e *V.D.*[25].

In brief, the jurisprudence of the Court analyses two different, however related, issues: *A*) the legality of laws obliging ISP to retain telephone traffic data; *B*) the acquisition of traffic data for purposes of prevention and repression of crimes.

---

18 CJEU, 8 April 2014, *Digital Rights Ireland*, C-293/12 and C-594/12C.

19 Not less than six months and not more than two years from the date of the communication.

20 CJEU, 21 December 2016, *Tele 2 and Watson*, C-203/15 e C-698/15.

21 CJEU, 2 April 2018, *Ministero Fiscal*, C-207/16. On the topic, see J.C. ORTIZ PRADILLO, *Europa: Auge y caìda de las investigaciones penale basadas en la conservaciòn de datos de comunicaciones electronicas*, in *Revista General de Derecho Procesal*, 2020, 52, p. 1 ss.; I. COLOMER HERNÀNDEZ, *La cesión de datos de las comunicaciones electrónicas para su uso en investigaciones criminales: una problemática en ciernes*, in F. Jiménez Conde (etd), *Adaptación del derecho procesal español a la normativa europea y a su interpretación por los tribunales*, Tirant lo Blanch, Valencia, 2018, p. 77 ss. For a general overview, see also T. ARMENTA DEU, *Derivas de la justicia. Tutela de los derechos y solución de controversias en tiempos de cambio*, Marcial Pons, Madrid, p. 280 ss.; and, with specific focus on Spain regulation after the judgment, P. MARTÍN RÍOS, *Digital forensics and criminal process in Spain: evidence gathering in a changing context*, Thompson Reuters, Cizur Menor, 2022, p. 123 ss.

22 CJEU, 6 October 2020, *La Quadrature du Net*, C-511/18, C-512/18 and C-520/18.

23 CJEU, 2 March 2021, *H.K.*, C-746/18.

24 CJEU, 5 April 2022, *G.D.*, C-140/20.

25 CJEU, 20 September 2022, *VD* (C-339/20) and *SR* (C-397/20).

With reference to the so-called static phase (*A*), judges set out the following principles: 1) prohibition of general and indiscriminate retention of all traffic and location data of all subscribers and registered users with respect to all means of electronic communications for the purpose of preventing and fighting serious crime (bulk data retention); 2) legitimacy of general and indiscriminate retention of all traffic and location data limited to *i*) those relating to the civil identity and IP addresses attributed to the source of a connection, *ii*) the need to safeguard national security in the face of a concrete and current danger; 3) legitimacy of targeted and rapid retention of traffic and location data for the purpose of preventing and suppressing serious crime.

With reference to the third point, the so-called targeted retention is the form of retention of traffic data that is limited, on the basis of objective and non-discriminatory factors, according to the categories of persons concerned or using a geographical criterion, for a period that is limited in time to what is strictly necessary, but which may be extended. Instead, the quick freeze (or expedited retention) is a particular type of retention consisting of an order given to ISP, in relation to a specific fact and to specific persons, to hand over traffic data in their possession.

With regard to the issue (*B*) of data acquisition (so-called dynamic phase), the Court ruled that access to traffic data is only permitted for the prevention and suppression of serious crime and must be subject to control by a «court or independent administrative body».

The interpretation offered by the judge, with specific reference to the first point (*A*), is based on the distinction between "serious crimes" and "ordinary crimes". The *modus argomentandi* can be schematised as follows. Interference by the national authorities with an individual's private life can be defined as "serious" only if the information collected is capable of revealing precise indications of the private life of the person; in such circumstances, the access to the data by authorities is a seriously infringing fundamental rights and, therefore, may be ordered only for the prosecution of serious forms of crime or for the purpose of preventing serious threats to public security; the obtaining of communications data entails a serious interference with the fundamental rights enshrined in articles 7, 8 of the Nice Charter, in that it is potentially capable of revealing information of a strictly personal nature; in these few lines, the acquisition of telephone records may only take place for the prevention and detection of "serious" forms of crime.

Even if we can share the logical-argumentative interpretation adopted by the Court, the judges' exegesis does not resolve an important issue. The core of the problem, in fact, concerns the identification of those incriminating offences that can be abstractly qualified in terms of seriousness. In the absence of guidance from the Court of Justice, Member States have adopted very different approaches[26],

26 Cfr. G. VACIAGO, *La disciplina normativa sulla* data retention *e il ruolo degli* internet service provider, in L. Luparia (etd), Internet provider *e giustizia penale. Modelli di responsabilità e forme di collaborazione*

producing a disharmonious regulation between the various Countries of the European Union.

4. THE ITALIAN REGULATION

Before the come into force, in 2003, of the Privacy Code[27], the Italian procedural system did not provide for regulation of data retention for the purposes of criminal prevention and repression[28]. In fact, the matter was entirely regulated by the jurisprudence[29].

From a constitutional point of view, it may be convenient to start the analysis from the art. 15 of Constitution, which protects the secrecy of «all forms of communication». This is an inviolable right of every person that can be restricted only in cases that are provided by law and by a reasoned measure of the judicial authority.

In the landmark judgment of Italian Constitutional Court in 1993, judges extended the protection provided by the art. 15 to the information contained in telephone records. According to the ruling, in brief, the freedom and secrecy of communications, which are related to the essential core of human personality values (art. 2 of the Constitution), must be subject to an extensive interpretation, such as to preclude third parties from knowing not only the content of telephone conversations, but also all those external information that can be indirectly obtained from them[30].

Even though external communications data were brought under the regulation of art. 15 and, therefore, under the Procedural Code provision concerning wiretapping, the Constitutional Court denied that the two instruments were equivalent. The judges, in fact, expressly formulated an invitation to the legislator to organically regulate the acquisition of metadata considering the differences with respect to wiretapping[31].

---

processuale, Giuffrè, Milan, 2012, p. 155.

27 Legislative Decree, 30 June 2003, n. 196.

28 For a general overview of the Italian discipline, cfr. E. ANDOLINA, *L'acquisizione nel processo penale dei dati "esteriori" delle comunicazioni telefoniche e telematiche*, Cedam, Padova, 2018; R. FLOR – S. MARCOLINI, *Dalla* data retention *alle indagini ad alto contenuto tecnologico. La tutela dei diritti fondamentali quale limite al potere coercitivo dello Stato. Aspetti di diritto penale processuale e sostanziale*, Giappichelli, Turin, 2022; G. FORMICI, *La disciplina della* data retention *tra esigenze securitarie e tutela dei diritti fondamentali. Un'analisi comparata*, Giappichelli, Turin, 2021.

29 For more details, see F.R. DINACCI, *L'acquisizione dei tabulati telefonici tra anamnesi, diagnosi e terapia: luci europee e ombre legislative*, in *Proc. pen. giust.*, 2022, 2, p. 301 ss.

30 Italian Constitutional Court, 11 March 1993, n. 81. In the same sense, Italian Constitutional Court, 17 July 1998, n. 281. Accordingly with this interpretation, *ex plurimis*, A. CAMON, *Le intercettazioni nel processo penale*, Giuffrè, Milan, 1996, p. 28 ss.; L. FILIPPI, *L'intercettazione di comunicazioni*, Giuffrè, Milan, 1997, p. 25 ss. *Contra*, CAPRIOLI, *Colloqui riservati e prova penale*, Giappichelli, Torino, 2000, p. 165 ss.

31 Italian Constitutional Court, 17 July 1998, n. 281, cit.

The Italian Government, however, did not immediately transpose these indications. It was only after the approval of Directive 2002/58/EC that Parliament intervened to transpose the directive by introducing *ad hoc* legislation: Law 196/2003 (Privacy Code). Art. 132 is the provision that regulated (and still regulates) the issue of data retention for the purpose of crime prevention and repression. The importance of the subject and the difficulty of balancing the different interests (effectiveness of criminal prosecution and privacy) is represented by the fact that the article has been amended so many times over the years that it is very difficult to reconstruct the various amendments in detail[32]. However, one of the most important changes is the recent Legislative Decree 132/2021, which we will examine in the following paragraphs.

5. THE NEW ITALIAN LEGISLATION IN 2021

As we have mentioned above, with the *H.K.* judgment, the Court of Justice intervened regarding various issues directly related to both the traffic data storage and acquisition phases.

With the ruling, the Court of Luxembourg provided, for the first time, an authentic interpretation of the expression «court or independent administrative body». This qualification assumes that the body or the court «must be able to strike a fair balance between, on the one hand, the interests relating to the needs of the investigation in the context of combating crime and, on the other, the fundamental rights to privacy and protection of personal data of the persons whose data are concerned by the access».

The European judges "squared the circle" regarding the term "independent", which, from the first's pronouncements on the issue, was excessively generic.

In primis, the Courts emphasised that this expression must be interpreted in the sense that the authority holding the authorisation power «must have a status enabling it to act objectively and impartially when carrying out its duties and must, for that purpose, be free from any external influence»[33]. *In secundis* - and this is the fundamental point - the Court firstly stated that the authority entrusted with the preventive control «must not be involved in the conduct of the criminal investigation in question» and, secondly, has a «neutral stance *vis-à-vis* the parties to the criminal proceedings»[34].

Even if these considerations refer to a Member State (Estonia) where the prosecutor is subject to the jurisdiction of the Ministry of Justice, the disruptive statements contained in the *H.K.* judgment had consequences also in Italy (a

32 See F.R. DINACCI, *La localizzazione mediante celle telefoniche tra limiti costituzionali e comunitari*, in A. Scalfati (eds), *Le indagini atipiche*, Giappichelli, Turin, 2019, p. 473, nt. 30.

33 CJEU, 2 March 2021, *H.K.*, cit., par. 52.

34 CJEU, 2 March 2021, *H.K.*, cit., par. 54.

system in which the public prosecutor is independent from the politic power). In our system, indeed, art. 132(3) of the Privacy Code attributed the acquisitive power to the public prosecutor, who is the *dominus* of the pre-trial phase and part in the trial hearing.

Following the *H.K.* judgment, therefore, the legislator radically changed the rules contained in Legislative Decree No. 196/2003. With Law Decree No. 132 of 30 September 2021[35], the Government intervened with the aim of guaranteeing both the possibility of acquiring external data of communications and compliance with the principles enshrined in the ruling of 2 March 2021. More specifically: on the one hand, Parliament wanted to limit the use of telephone records only in cases of repression of "serious crime", as repeatedly emphasised in European rulings. On the other hand, the legislature wanted to set up a control system based on the necessary authorisation from the jurisdictional authority.

5.1. The necessary authorisation of the Court

With reference to the authority that can authorise the acquisition of metadata, the new art. 132(3) states that information are acquired with prior authorisation issued by the judge in a reasoned decree. That attribution has generated a fervent debate among Italian scholars. The question concerns the possibility to qualify the Italian public prosecutor (*pubblico ministero*) as an "impartial party" and as a "third and neutral party".

The answer, in our opinion, is negative, because the concept of impartiality refers exclusively to the judge and not, instead, to the public prosecutor[36].

Effectively, the justification - still in use today - already adduced by the Italian Minister of Justice during the discussion for the approval of the preliminary draft of the Code of Procedure of 1930 does not appear convincing. There, the Minister had argued that the public prosecutor, although «party of the criminal process», is nevertheless «an organ of the State and therefore always subject to the principles of legality and impartiality»[37]. This interpretative mistake stems from a misinterpretation of the concept of impartiality. According to FOSCHINI, indeed, two distinct meanings could be attributed to the term *de quo*: a) «one relating to rectitude and to a balanced exercise of the function»; b) the other one, «relating to a transcendence with respect to the opposing interests, inherent

35 Converted by the Law 3 December 2021, n. 205.

36 Impartiality, in fact, is an exclusive feature «of judges in the performance of their decision-making function» (A. GIARDA, *Imparzialità del giudice e difficoltà operative derivanti dall'incompatibilità*, in AA.VV., *Il giusto processo*, Giuffrè, Milan, 1998, p. 35). In the same perspective, see P. FERRUA, *Studi sul processo penale. Declino del contraddittorio e garantismo reattivo*, Giappichelli, Turin, 1997, p. 43.

37 RELAZIONE DEL GUARDASIGILLI AL PROGETTO PRELIMINARE DI UN NUOVO CODICE DI PROCEDURA PENALE, in *Lavori preparatori del codice penale e del codice di procedura penale*, VIII, Rome, 1929, p. 21. The thesis, as we known, was supported by V. MANZINI, *Trattato di diritto processuale penale italiano*, vol. I, Fratelli Bicocca, Turin, 1925, p. 142: «the function of the public prosecutor» is «in itself personally disinterested and impartial».

in the *regiudicanda*»[38]. Only the first one is suitable for defining the concept of impartiality as contained in art. 111(2) of the Italian Constitution, where the *conditores* established that all court trials are conducted with adversary proceedings and the parties are entitled to equal conditions «before an impartial judge in third party position». It is precisely for this reason that also SABATINI describes the impartiality of the public prosecutor in terms of mere «one-sided objectivity»[39]. However, even if we consider the public prosecutor as an "impartial party", he cannot be defined as a "third party": the prosecutor is not third and neutral with respect to the other parties to the proceedings[40].

In any case, the legal attribution to the judge of the power to obtain telephone records leads us to make two considerations.

Firstly, the need for preventive judicial scrutiny and the adoption of a reasoned order entails a prejudice to the principle of procedural efficiency[41] and reasonable duration of proceedings. However, in our view, this is justified by the need to effectively guarantee the rights of the suspect and to transpose European *dicta*.

Secondly, it is important to underline that the Italian legislator introduced by the reform of 1988 a new authority with the functions of guarantee in the preliminary phase (*indagini preliminari*)[42]. This new type of judge is called "Preliminary investigation judge" (*giudice per le indagini preliminari* - GIP) who exercises a so-called *ad acta* jurisdiction: in a nutshell, he has to intervene, as a guarantee for the individual persons involved in the pre-trial phase, only and exclusively in the cases exhaustively provided for by law[43].

The role of this judge, however, is perhaps destined to change.

---

38 G. FOSCHINI, *Il pubblico ministero in un processo penale a struttura giurisdizionale*, in *Justitia*, 1966, p. 40.

39 G. SABATINI, *Vecchio e nuovo nella teoria dell'azione penale*, in *Arch. pen.*, 1962, p. 157. See also O. DOMINIONI, *Le parti nel processo penale. Profili sistematici e problemi*, Giuffrè, Milan, 1985, p. 92, who traces the conception of impartiality referred to the public prosecutor to an «objectivity» in the exercise of his function.

40 In this sense, see also G. LEO, *Le indagini sulle comunicazioni e sugli spostamenti delle persone*, in *www.sistemapenale.it*, 31 May 2021, p. 18. More in general, argues that the Italian public prosecutor is not a third party, C. SANTORIELLO, *Il pubblico ministero nel "sistema"*, in *www.archiviopenale.it*, 29 April 2021, p. 1 ss.

41 The principle of procedural efficiency, according to the most accredited doctrine, refers to a sort of "quality efficiency", i.e., the ability of a procedural system to pursue the objective of efficiency respecting the guarantees of the accused (see, for an extensive analysis, M. GIALUZ – J. DELLA TORRE, *Giustizia per nessuno. L'inefficienza del sistema penale italiano tra crisi cronica e riforma Cartabia*, Giappichelli, Turin, p. 1-17.

42 For more details about the Italian system, see L. LUPARIA – M. GIALUZ, *Italian criminal procedure: thirty years after the great reform*, in *Roma Tre Law Review*, 2019, p. 26 ss., and, with specific reference to the new role of GIP, p. 42 ss. See also M. GIALUZ, *The Italian Code of Criminal Procedure: A Reading Guide*, in M. Gialuz – L. Luparia – F. Scarpa (edt.) *The Italian Code of Criminal Procedure. Critical Essay and English Translation*, Cedam, Padova, 2017, p. 17 ss.

43 Art. 328, Code of Criminal Procedure: «In the cases provided for by law, decisions on the requests of the public prosecutor, the private parties and the victim shall be taken by the Preliminary Investigation Judge» (English translation by M. GIALUZ – L. LUPARIA – F. SCARPA (edt.) *The Italian Code of Criminal Procedure*, cit., p. 312).

The increasingly significant presence of technological tools during the preliminary investigation phase has led the legislator to strengthen the role of the GIP during this phase. The Italian legislator is giving more and more powers to the GIP during preliminary investigations for two reasons.

On the one hand, digital investigative tools are able to limit the fundamental rights of the suspect more significantly than traditional means of evidence gathering. On the other hand, digital evidence tools allow for an earlier formation of evidence at the pre-trial phase. Evidence is thus no longer formed in the adversarial process between the parties in the trial hearing. On the contrary, it is formed during the preliminary investigation, a phase that, as we all know, tends to be secret and in which the powers of defence are very limited.

For those reasons, the legislator gives more powers to the GIP. All of this, however, contributes to debasing the role and function played by the "principle of separation of phases" (according to which evidence gathered in the preliminary investigations phase cannot be used for decision in the process) and legitimises even more the importance given to the evidence collected in the preliminary phase.

5.2. The acquisition request

Regarding the identification of the persons entitled to request the acquisition of telephone records to the GIP, the new third paragraph of art. 132 attributes this power to the public prosecutor, the suspect, the accused, the lawyer, and the other private parties.

It is evident that nowadays the lawyer cannot request the metadata directly from the ISP. The legislator has implicitly excluded the possibility previously expressly granted to the lawyer to request to the provider the metadata relating to his client[44].

This choice is in line with a certain doctrinal trend according to which the attribution to the suspect's lawyer of the power to directly access telephone records is contrary to the principle of equality of arms[45]: it seems unreasonable - according to this perspective – to allow the lawyer to carry out an investigative activity which, conversely, is expressly precluded to the public prosecutor, who is the holder of the punishment power (*azione penale*).

This interpretation, however, does not appear reasonable. A distinction, in our opinion, must be made between the case where access to the metadata concerns a third party or the lawyer's client.

---

44 Art. 132(3), Privacy Code, abrogated version: «The counsel of the defendant or of the person under investigation may request, directly from the ISP, the data relating to the utilities in the name of his client in the manner indicated in Article 391-*quater* of the Code of Criminal Procedure».

45 For this opinion, see R. CANTONE, *Le modifiche processuali introdotte con il«decreto antiterrorismo» (d.l. n. 144/05 conv. in l. n. 155/05)*, in *Cass. pen.*, 2005, p. 2512; Gius. AMATO, *Dati conservabili solo per due anni*, in *Guida dir.*, 2004, 10, p. 55 ss.

In the first case, the rejection of access is justified because the privacy of a third party is at stake. In this case, only a court can legitimise interference in the private life of a person who is not involved in a criminal proceeding. In the second case, instead, the right of direct access to the metadata exercised by the lawyer would be nothing more than the (delegated) exercise of the legitimate right of each user to know the external data of his communications. As has been observed by CAMON, in fact, in such circumstances «the subscriber - and, by extension, his lawyer - [could] not violate the secrecy of the communications to which he [was] a party» [46].

In these few lines, in the event, the principle of equality of arms seems to be violated in relation to the new hypothesis of the "emergency acquisition procedure" provided for by art. 132(3-*bis*) of the Code of Privacy. When reasons of urgency exist and there is well-founded reason to believe that the delay could result in serious prejudice to the investigation, the public prosecutor can order the acquisition of the data by reasoned decree, subject to subsequent validation by the GIP. In this respect, it is not clear why the legislator has not provided for an identical power for the defence counsel. It may well be the case that, in practice, the latter also needs to acquire the data urgently because, for example, the maximum retention periods are about to expire. The legislature, in our opinion, should have provided for an urgent acquisition procedure also for the lawyer.

5.3. Offences for which telephone records can be obtained

As we have mentioned, one of the most controversial issues about data retention regulation – not only in the Italian system – concerns the identification of the threshold of seriousness of offences for which to allow the acquisition of metadata. In other words, what do we refer to when we talk about "serious crime"?

European jurisprudence never explicitly answered this question. In its judgments, the Court only said that Member States must provide «any objective criterion by which to determine the limits of the access of the competent national authorities» [47]. On the contrary, in the *Ministero Fiscal*, for instance, judges did not deal with the first preliminary question explicitly raised by the *Audiencia Provincial de Terragona* concerning the need for the threshold of seriousness of offences to be identified by having as a reference parameter the "penalty imposed" in abstract terms or the conduct concretely engaged in by accused [48].

For these reasons, we can identify, in the Italian debate, two different hermeneutic approaches.

46 A. CAMON, *L'acquisizione dei dati di traffico delle comunicazioni*, in *Riv. it. dir. proc. pen.*, 2005, p. 609.

47 CJEU, 8 April 2014, *Digital Rights Ireland*, cit., par. 60; CJEU, 21 December 2016, *Tele 2 e Watson*, cit., par. 119.

48 S. OROMÍ VALL-LLOVERA, *Acceso a datos personales conservados por proveedores de servicios de comunicaciones electrónicas en investigaciones penales según el Tribunal de Justicia de la UE*, in *Revista d'Internet, Dret i Política*, 2020, p. 6.

According to the Italian Supreme Court, the assessment of proportionality and necessity must be made in concrete by the judicial authority, since such principle «lends itself poorly to a preventive, rigid codification»[49]. Judges state that the *Digital Rights* ruling does not impose any obligation on the Member State to list, in an exhaustive manner, offences that can legitimate the access. In this sense, the assessment could easily be conducted by having as a reference the parameters indicated in the art. 266 of the Code of Criminal Procedure, which identifies the criminal offences for which it is permissible to order wiretapping.

The Italian doctrine, on the contrary, have stressed the need to predetermine on an abstract level the types of offences legitimising access because, otherwise, there is a risk of discrimination between citizens resulting from an unequal application of procedural law depending on the discretion of each authority[50].

The Italian legislator, with the recent reform, has confirmed to the second approach.

In implementing the *riserva di legge* as laid down in art. 15 of the Constitution[51], the legislator have expressly established that metadata can be acquired only in the event of proceedings for offences for which the law provides the penalty of life imprisonment or imprisonment for a maximum of no less than three years, and for other offences indicated by the art. 132[52].

The legislator, in this way, distinguished offences for which wiretapping can be ordered from those for which telephone records can be acquired[53]. Pursuant to art. 266 of the Code of Criminal Procedure, in fact, the judge may only authorise wiretapping if the offence for which proceedings are being conducted

---

49 Italian Court of Cassation, 25 September 2019, n. 48737, par. 3.6. In the same sense, Italian Court of Cassation, 2 September 2021, n. 33116.

50 In this sense, see, *ex plurimis*, S. MARCOLINI, *Le indagini atipiche a contenuto tecnologico nel processo penale: una proposta*, in *Cass. pen.*, 2015, p. 778; M. ARANCI, *L'acquisizione dei dati esteriori delle comunicazioni nel processo penale italiano dopo la sentenza H.K.: alcuni spunti di riflessione sulle prime applicazioni giurisprudenziali*, in *www.lalegislazionepenale.eu*, 2021, p. 19, nt. 56; F. RUGGIERI, Data retention *e giudice di merito penale. Una discutibile pronuncia*, in *Cass. pen.*, 2017, p. 2483.

51 The expression refers to the necessity, provide to in art. 15 Const., that the limitations of the freedom and confidentiality of correspondence and of every other form of communication may only be imposed «in accordance with the guarantees provided by the law».

52 Some Authors, however, emphasised that the list of offences and the penalty limit identified by the legislator do not fall within the notion of "serious crime" as defined by European jurisprudence (see F.R. DINACCI, *L'acquisizione dei tabulati telefonici tra anamnesi, diagnosi e terapia*, cit., p. 315. *Contra* G. PESTELLI, *D.L. 132/2021: un discutibile e inutile aggravio di procedura per tabulati telefonici e telematici*, in *www.quotidianogiuridico.it*, 4 October 2021).

53 In the judgment *Big Brother watch vs Regno Unito* (ECHR, 25 May 2021), the Court observed that nowadays the volume of external data of communications can reveal more information about the private life of the interviewees than can occur by simply listening to an intercepted dialogue. Precisely based on this assumption, some commentators had argued that the regulation of the data retention should be amended on account of the «substantial homogeneity of the level of interference in fundamental rights between what happens in the case of the interception of the contents of communications and the collection of external data» (M. ARANCI, *L'acquisizione dei dati esteriori delle comunicazioni nel processo penale*, cit., p. 25. Cfr. also I. NERONI REZENDE, *Dati esterni alle comunicazioni e processo penale: questioni ancora aperte in tema di data retention*, in *www.sistemapenale.it*, 2020, 5, p. 195.).

is punishable by life imprisonment or by a term of imprisonment of more than five years. The different discipline is justified, in the view of the *conditores*, by the different degree of interference caused by the acquisition of metadata compared to the apprehension of the content of a conversation[54].

The choice appears pesuasive.

In judgments No. 81 of 1993 and No. 218 of 1998, the Italian Constitutional Court said that there are two structural differences between wiretapping and telephone records: a) the investigative needs underlying the two tools and b) the elements of knowledge for the acquisition of which they are respectively aimed. The Constitutional Court, therefore, decided not to extend the rules on wiretapping to telephone records.

Even though such rulings date back to a period of history that cannot be compared with the "hyper-connected world" in which we live today, it seems overly simplistic to assert that the difference between the two tools should be resized in the light of the quantity of the data collected (*rectius*, the fact that telephone contains a significant mass of metadata). In other words, we do not doubt the need to extend the guarantees of art. 15 of the Constitution to telephone records as well. Conversely, we consider questionable the reasonableness (*ex* art. 3 Const.) of a legislative choice that wants to operate the balancing between secrecy and repression of crimes in equal measure between telephone records and wiretapping because both tools of searching would have the same procedural incidence[55].

5.4. Authorisation requirements

According to art. 132(3), the judge authorises the acquisition of telephone records only if there are «sufficient evidence of a criminal offence» and whether the acquisition is «necessary to the establishment of facts».

Regarding the first criterion, it seems to be interpreted as the nexus between the user monitored and the crime qualifiable in terms of mere «probability of offence»[56], without the need for a prior subjective identification of the perpetrator. Moreover, it is interesting to observe that this criterion is different from that provided for wiretapping. Art. 267 of the Code of Criminal Procedure,

54 See also A. PASTA, *Luci e ombre nella disciplina dei tabulati nel processo penale*, in *Cass. pen.*, 2022, p. 4460, nt. 12, who states that wiretapping is more intrusive than the mere acquisition of telephone traffic data.

55 See F. CAPRIOLI, *Colloqui riservati*, cit., p. 166, who agrees with the statements of the Constitutional Court in Judgment No. 81 of 1993: «it is not desirable, for the future [...], for the legislator to make a novel intervention aimed at purely and simply equating the two investigative activities». In the same sense, Italian Court of Cassation, 19 April 2019, n. 36380, par. 3.7, in which it is stated that «the acquisition of the data generates a decidedly lesser impairment than that relating to the tapping of conversations». We must also consider that other jurisdictions have adopted different disciplines for telephone records and wiretapping. See, in relation to the German legal system, §100 and §100g StPO. (cfr. R. ORLANDI, *Tabulati telefonici e immunità parlamentare*, in *Giur. cost.*, 2019, p. 680, note 8).

56 E. ANDOLINA, *L'acquisizione nel processo penale dei dati "esteriori" delle comunicazioni*, cit., p. 103.

in fact, provides for «serious suspicion that an offence has been committed»[57] as a requirement. This is another element that leads to believe that the legislator wanted to differentiate the regulation of wiretapping from that of telephone records.

With regard to the second criterion, it is important to underline that the legislator had initially provided, in the Legislative Decree, for a different parameter: the necessity «for the purpose of the continuation of investigations». The use of this standard was criticised by some authors for being too general[58]. More specifically, it seemed that would make it possible to to acquire traffic metadata only in the preliminary investigation phase and only for the purpose of obtaining information aimed at supporting the accusatory hypothesis and not, conversely, the innocence of the suspect[59]. For those reasons, the choice of the legislator to change the parameter during the phase of converted in Law the Decree appears reasonable[60].

5.5. The passive subjective of the acquisition procedure

A brief mention should also be made of the issue of identifying the persons against whom telephone traffic data may be accessed.

In this regard, the European jurisprudence[61] specified that the possibility of access to this information should be restricted exclusively to those «individuals suspected of planning, committing or having committed a serious crime or of being implicated in one way or another in such a crime»[62].

In these few lines, some Authors argues that it is necessary for Italian law to specify in detail the category of persons whose data may be acquired[63]. This interpretation, however, was rejected by the Italian legislature in 2021.

We agree with the choice.

First of all, the European jurisprudence addresses the expression *de qua agitur* exclusively to offences characterised by a certain seriousness[64]. Consequently, we can think that in those cases in which the interference is not such as to affect the

57 English translation by M. GIALUZ – L. LUPARIA – F. SCARPA (edt.) *The Italian Code of Criminal Procedure*, cit., p. 259.

58 See, for example, C. PARODI, *Sottratto al P.M. il potere di richiedere autonomamente i tabulati*, in *www.ilpenalista.it*, 1 October 2021; G. PESTELLI, *D.L. 132/2021: un discutibile e inutile aggravio di procedura*, cit.

59 *Contra* F.R. DINACCI, *L'acquisizione dei tabulati telefonici tra anamnesi, diagnosi e terapia*, cit., p. 317. See also A. PASTA, *Luci e ombre nella disciplina dei tabulati nel processo penale*, cit., p. 4464.

60 *Contra* F.R. DINACCI, *L'acquisizione dei tabulati telefonici tra anamnesi, diagnosi e terapia*, cit., p. 317; A. PASTA, *Luci e ombre nella disciplina dei tabulati nel processo penale*, cit., p. 4464.

61 CJEU, 21 December 2016, *Tele2 e Watson*, par. 119.

62 Cfr. CJUE, 2 March 2021, *H.K.*, cit., par. 50. Actually, the Court allows an exception in «special situations», such as those where «vital national security, defence or public safety interests are threatened by terrorist activities».

63 L. FILIPPI, *La nuova disciplina dei tabulati: il commento "a caldo" del Prof. Filippi*, in *www.penaledp.it*, 1 October 2021.

64 CJEU, 2 March 2021, *H.K.*, cit., par. 50.

rights of the individual citizen (such as in the case of *Ministero Fiscal*), the access may be allowed with reference to anyone.

Moreover, it is very complex to make a detailed listing of subjects[65]. Effectively, the need not to limit the collection of external data exclusively to those who are suspects or defendants is justified by the necessity to ensure their acquisition also in proceedings against unknown persons. Furthermore - and this is the central point - it is justified by the need to ensure that the public prosecutor has access to the information of all those persons who, even if indirectly, have facilitated the *iter criminis* (for example, by unknowingly lending their smartphones to the suspect[66]) or are involved in the investigation.

6. UNRESOLVED ISSUES

Even if the recent Italian reform has regulated some important legal issues about data retention, it is still inadequate compared to European standards. In the following paragraphs, we will examine two issues that the Italian legislator have to consider complying with European standards.

6.1. The "timeline" of conservation of metadata

The Italian law of telephone record (*rectius*, art. 132 of Privacy Code) provides a "*doppio binario*" regime regarding the retention phase. With this expression, the Italian literature usually refers to the tendency of our legislator, in many areas of the criminal process, to adapt and modulate the procedural rules according to the different type of crime. According to this view, in brief, the lawmaker could differentiate the legal regime of some institute based on the different nature of the offences.

Even if this choice is criticised by some Authors[67], the topic of data retention issue is an example of these *modus procedendi.*

More specifically, for "common offences", art. 132(1) provides that the ISP must retain data relating to telephone traffic for twenty-four months from the date of communication, and data relating to telematic traffic for twelve months from the date of communication. In this regard, it must be emphasised that this distinction appears unreasonable. In the digital age, communications mostly

65 In the same sense, see G. LASAGNI, *Dalla riforma dei tabulati a nuovi modelli di integrazione fra diritti di difesa e tutela della* privacy, in *www.lalegislazionepenale.eu*, 27 July 2022, p. 9-10; G. DI STEFANO, *La Corte di giustizia interviene sull'accesso ai dati di traffico telefonico e telematico e ai dati di ubicazione a fini di prova nel processo penale: solo un obbligo per il legislatore o una nuova regola processuale?*, in *Cass. pen.*, 2021, p. 2574.

66 E. ANDOLINA, *L'acquisizione nel processo penale dei dati "esteriori" delle comunicazioni*, cit., p. 104 s.

67 See O. MAZZA, *Tradimenti di un codice. La procedura penale a trent'anni dalla grande riforma*, Torino, 2020, p. 41 s. But, in a different perspective, see F. VIGANÒ, *Terrorismo, guerra e sistema penale*, in *Riv. it. dir. proc. pen.*, 2006, p. 687-695.

exploit the Internet and the many tools it provides[68]. It is incomprehensible, therefore, why the legislature persists in maintaining an outdated distinction.

On the contrary, for terrorist and mafia offences and, more generally, for all the offences provided for in articles 51(3-*quater*) and 407 (2, lett. a) of the Code of Criminal Procedure, the law establishes that the term of retention of telephone and telematic traffic data, as well as data relating to unanswered calls, is set at seventy-two months from the date of communication[69].

The provision of a longer retention period, in the latter case, is justified – in the legislator's view – by the specific nature of the criminal phenomenon and the seriousness of the offences concerned, for which more effective investigative tools must be provided. In other words, when it comes to prosecuting particularly serious crimes, such as those linked to the mafia or terrorism[70], the balance between privacy and security plays in favour of the latter; thus, ISP are forced to retain data for a longer period.

To be honest, the system just described is not constructed as a real "*doppio binario*". When the ISP is called upon to store the data, it is not known to them either whether those data will sooner or later be requested from them by a judicial authority (and, therefore, whether or not they relate to an offence), or for what type of offence they may possibly be requested. Consequently, in practice, providers will retain all traffic data, in any case, for seventy-two months to fulfil its obligations.

Does this retention period appear justified and reasonable?

On the one hand, the provision of such a long retention period, as we have observed, is necessary to effectively fight the most dangerous criminal phenomena. On the other hand, the risk associated with such an extended period is that of the creation of mass archives collecting sensitive information on the community. The risk, in other words, is a mass profiling of the population.

In this direction, both the Italian Data Protection Authority[71] and numerous commentators[72] have censured the disproportionality of the retention period (72 months) in relation to the objectives pursued by the law (prevention and repression of criminal activity). In support of this thesis, we can observe that the

68 Such as the Applications of Instant Messaging like WhatsApp, Facebook Messanger and Telegram.

69 Art. 132 (5-*bis*).

70 Actually, the offences for which retention is determined in seventy-two months are not necessarily characterised by a uniform level of seriousness.

71 ITALIAN DATA PROTECTION AUTHORITY, *Parere sullo schema di decreto-legge per la riforma della disciplina dell'acquisizione dei dati relativi al traffico telefonico e telematico a fini di indagine penale*, 10 September 2021, at *https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9704851*.

72 Cfr., *ex multis*, E. ANDOLINA, *La raccolta dei dati relativi alla localizzazione del cellulare ed al traffico telefonico tra inerzia legislativa e supplenza giurisprudenziale*, in *www.archiviopenale.it*, 17 December 2020, p. 14-16; G. LASAGNI, *Dalla riforma dei tabulati a nuovi modelli di integrazione fra diritti di difesa e tutela della* privacy, cit., p. 9; R. FLOR – S MARCOLINI, *Dalla* data retention *alle indagini ad alto contenuto tecnologico*, cit., p. 89-91.

Court of Justice has censured Directive 2006/24/EC precisely in the part in which (art. 6) it obliged ISP to indiscriminately store traffic data for periods of not less than six months and not more than two years from the date of communication.

Nevertheless, the Court of Cassation considers the Italian regulation to be compliant with EU law because it expressly provides for a «temporal delimitation of the storage activity»[73] for a «limited period of 24 months»[74] (in the "ordinary cases"). This interpretation, however, seems to contrast with the *Digital Right* decision, in which European judges have clarified that the mere provision of a maximum retention period is not sufficient to make the national legislation comply with the principle of proportionality.

In our opinion, even if the retention period laid down by law can be considered particularly long, it is no easy to identify an ideal time frame in practice. An excessively long period might be contrary to the protection of the privacy of millions of European citizens. However, at the same time, an excessively short time limit could be detrimental to the right of defence, because, as observed some Author, the «telephone records and data such as IP addresses can sometimes serve as evidence of the groundlessness of the charges»[75].

6.2. The geographic criterion

The Court of Justice stated that targeted and rapid conservation measures must be based on objective standard which makes it possible to identify a public whose data is likely to reveal a link, at least an indirect one, with serious criminal offences. These data must contribute to fight serious crime or prevent a serious risk to public security. In this respect, judges emphasised that such limits may be set by using a "geographical criterion": national authorities can consider, based on objective evidence, that exists, in one or more geographical areas of the Country, a high risk of preparation for or commission of such offences.

The issue of the "geographical retention criterion" was first analysed in the *Tele 2* judgment[76], but recently it returned to the centre of doctrinal debate following the *La Quadrature du Net* and *G.D.*

In exemplifying this criterion, the European judges, in the first judgment, expressly referred to places characterised by a high number of acts of crime or areas exposed to the commission of serious crimes, such as «places or infrastructure which regularly receive a very high volume of visitors, or strategic locations, such as airports, stations or tollbooth areas»[77] (so-called *hotspot*).

73 Italian Court of Cassation, 10 December 2019, n. 5741.

74 Italian Court of Cassation, 24 April 2018, n. 33851.

75 SIGNORATO, *Note in tema di* data retention. *La riformulazione dell'art. 132 Codice* privacy *da parte del d. lgs. 10 agosto 2018*, in *Dir. pen. cont. - Riv. Trim.*, 2018, 11, p. 153 ss., and, especially, p. 160: «any possible reform should at least ensure a period of thirty-six months, but not exceeding seventy-two».

76 CJEU, 21 December 2016, *Tele2 e Watson*, cit., par. 111.

77 CJEU, 6 October 2020, *La Quadrature du Net*, cit., par. 150.

After this ruling, the European Commission prepared a working paper, a sort of guidelines, to stimulate the adoption of *ad hoc* regulations by the Member States. As far as the geographical criterion is concerned, the European Government attempted to specify this parameter by making reference to certain «sensitive areas» such as those that are located «in a certain radius around sensitive critical infrastructure sites» or «areas with above average crime rates» or, again, to places that can be the target of serious crimes (for example, «wealthy neighbourhoods, places of worship, schools, cultural and sporting venues, places of political meetings and international summits, parliaments, courts, shopping centres»[78]).

This proposal, however, has been censured by many commentators.

First of all, the reference to the expression «a certain radius» to indicate the breadth of the geographical area contrasts with the *dicta* of the European Court, which, in this regard, has legitimised measures of this kind with reference only to «sensitive areas». Judges, on the contrary, did not admit the extension of control also in the proximity of such places[79]. Moreover, this measure seems to be not proportionate: the apprehension of metadata in places of worship, for instance, might be able to reveal particularly sensitive data, such as religion or political orientation.

This said, the territorial criterion, as mentioned, was again examined by the Court of Justice in its ruling of 5 April 2022. There, the European judges made explicit, for the first time, the guiding parameter to which Member States may refer to legitimise geographically targeted retention. The reference is to the «average crime rate» of a given area, regardless of the existence of concrete indications concerning the preparation or commission of illegal activities. This would be - in the Court's view - a non-discriminatory criterion, since it could potentially affect both places characterised by a high number of acts of serious crime and areas particularly exposed to the commission of such acts[80].

The interpretation adopted by the judges, however, is not very persuading.

The justification offered, in fact, seems to disregard the concrete consequences of the geographical criterion, which could appear not only discriminatory, but also disproportionate. It is reasonable to hypothesise, for instance, that control systems based on territorial delimitation may lead to forms of profiling of certain sensitive areas, such as the suburbs of cities. Some commentators, in this sense, have observed how the Court of Justice, even though it has banned «indiscriminate data retention», has ended up making «discriminate retention» legitimate[81].

78 EUROPEAN COMMISSION, *Working paper*, p. 6, at *https://www.patrick-breyer.de/en/comeback-of-data-retention-former-eu-judge-dismisses-commissions-plans/*.

79 For this criticism, see the considerations of the European emeritus judge, Prof. Vadapalas: V. VADAPALAS, *Legal opinion*, 24 February 2022, p. 31, at *https://www.patrick-breyer.de/wpcontent/uploads/2022/04/20220407_Legal_Opinion_Data_Retention_Vadapalas_updated-SimeonTC-VV-REV.pdf*.

80 CJEU, 5 April 2022, *G.D.*, cit., par. 80.

81 See A.K. WOODS, *Implications of the EU's Data Retention Ruling. Lawfareblog*, 22 December 2016, at *https://www.lawfaremedia.org/article/implications-eus-data-retention-ruling*. Stresses the risk of discrimination

Moreover, it is the European Court that expressly recognises how such a criterion could lead to the mass acquisition of traffic data of persons living in or frequently passing through certain city areas, without there being any connection with the crime prevention objective[82]. Furthermore, the parameter of the «average crime rate» contrasts with the *dicta* expressed by the judges of Luxembourg who, in previous rulings, had emphasised - for the purpose of the operation of targeted conservation - the need to ascertain a «high» (and, therefore, above-average) incidence of serious crimes in a geographical area[83].

6.2.1. The praxis: Belgian and Danish "new" legislation

The Italian regulation on telephone records, although recently amended, is still affected by shortcomings, especially as regards the prior identification of criteria to limit the indiscriminate and undifferentiated storage of metadata. In this sense, we can examine if and how the other European States have transposed the indications of the Court of Justice with specifically regard to the use of a "geographic criterion".

In this perspective, it is interesting to analyse the recent reforms in the Belgian and Danish procedural system.

Following the judgement of the constitutional illegitimacy of the regulations on telephone records[84], the Brussels Parliament reformed the regulations on the subject, identifying the geographical criterion as the parameter for applying the *targeted retention*. On 17 March 2022 it was filed in the *Commission de l'Économie, de la Protection des consommateurs et de l'Agenda numérique* the draft law (No. 2575/1) concerning «*collecte et à la conservation des données d'identification et des métadonnées dans le secteur des communications électroniques et à la fourniture de ces données aux autorités*», the aim of which was to adapt the domestic regulations to the criteria indicated by supranational case-law.

In a nutshell, the legislation approved on 7 July 2022 identifies two areas which are subjected to control measures: a) the *arrondissements judiciaires* in which at least three offences referred to in art. 90-*ter* (2-4) of Code of Criminal Procedure per 1000 inhabitants per year have been recorded on an average of the previous three calendar years; b) the *zones de police* in which at least three offences referred to in art. 90-*ter* (2-4) of Code of Criminal Procedure per 1000 inhabitants per year, have been recorded over an average of the three calendar years preceding

based on geography also G. LASAGNI, *Dalla riforma dei tabulati a nuovi modelli di integrazione fra diritti di difesa e tutela della* privacy, cit., p. 10 and O. DI STEFANO, *La Corte di Giiustizia conferma la regola del divieto, con eccezioni, di conservazione dei dati di traffico telefonico e telematico ai fini di lotta alla criminalità grave: la fine della prova a mezzo di tabulati?*, in *Cass. pen.*, 2023, p. 364.

82 CJUE, 5 April 2022, *G.D.*, cit., par. 81.

83 CJEU, 6 October 2020, *La Quadrature du Net*, cit., par. 150.

84 Belgian Constitutional Court, 22 April 2021, n. 57. For more information about Belgian legislation, cfr. C. VAN DE HEYNING, *Data Retention in Belgium*, in M. Zubik-J. Podkowik-R. Rybski (etd), *European Constitutional Courts towards Data Retention Laws*, Springer, Cham, 2021, p. 53 ss.

the current one and which are located in judicial districts in which, during the previous calendar year, fewer than three offences referred to in art. 90-*ter* (2-4) of the Code of Criminal Procedure per 1000 inhabitants, have been recorded over an average of the three preceding years[85].

A very similar regulation was recently approved in Denmark.

In November 2021, the Government presented a draft law on data retention that was finally approved in March of the last year[86]. Section no. 786(c) of law no. 291/2022 provides that the national police may order ISP to carry out targeted recording and storage of metadata to cover geographical areas of 3 km by 3 km, if, without any individual or subjective assessment, one of the following criteria is met: a) the number of reports for offences - identified *ex lege* on the basis of a quantitative and qualitative criterion[87] - committed in the reference area amount to at least 1.5 times the national average calculated over the previous three years; b) the number of residents, in the reference area, convicted of certain offences[88] amount to at least 1.5 times the national average over the previous three years. In addition, regardless of these parameters, targeted preservation may also concern certain areas defined as «critical» for national security (for example, Parliament, the Prime Minister's residence, embassies, railway stations, ports and border crossings[89]).

Both the Belgian and Danish rules are positive because attempt to fulfil the EU *dictum*. Nevertheless, both regulations are characterised by critical aspects.

On the first front, the threshold limit identified by the Belgian legislator appears, according to recent statistical studies[90], to be so low as to cover the entire Brussels region and, probably, most of the country, circumventing, *de facto*, the indications coming from the Court of Justice. Similarly, the Danish national police estimated, in a recent report, that 11% of Denmark's geographical area and 67% of its population will be subject to targeted conservation[91].

Another factor to be taken into consideration concerns the type of data used to support the operation, in practice, of the geographical criterion. It is evident, in fact, that the choice of the parameter to be input is reflected in the identification of the area subject to control.

The Belgian system, in this sense, only values the number of offences detected («*constatées*») over a certain period. More complex, instead, is the

85 The content of the Law can be found at *https://www.dekamer.be/kvvcr/showpage.cfm?section=flwb&language=fr&cfm=flwbn.cfm?lang=N&dossierID=2572&legislat=55*.

86 Law 8 March 2022, n. 291, at *https://www.retsinformation.dk/eli/lta/2022/291*.

87 Section n. 786 c), par. 1, lett. a).

88 Section n. 786 c), par. 1, lett. a).

89 Section. n. 786 c), par. 2.

90 In this sense, see the online map at *https://www.patrick-breyer.de/en/targeted-data-retention-online-map-shows-what-the-belgian-government-wants-to-hide/*.

91 J. LUND, *The new Danish data retention law: attempts to make it legal failed after just six days*, 15 June 2022, at *https://itpol.dk/articles/new-Danish-data-retention-law-2022*.

system adopted in Denmark. Both the number of reports of criminal activity in a specific territory («*antallet af anmeldelser af lovovertrædelser begået i området*») and the number of residents convicted of a certain type of crime in a specific geographical area («*antallet af beboere dømt for lovovertrædelser*») are considered. Even with the differences just highlighted, we can observe that the metric used in both models is that of the mere algebraic sum of the number of reported or ascertained offences, without considering, for example, population density. Indeed, these metrics are based on the actual number of crimes or the number of reported offences, regardless of the size of the local population.

In brief, it is possible to note the difficulties of national legal systems in crystallising, in *ad hoc* data retention regulation, the numerous principles enunciated at European level. As we have seen, in fact, the recourse to a system of geographical surveillance - which, at first sight, might appear to be a balanced compromise between security and the protection of privacy - shows, when it is applied, unquestionable critical profiles, especially regarding the choice of the parameter that should underlie the recourse to such a criterion.

7. FINAL REMARKS

The Belgian and Danish regulations just examined represent a new generation of Law about data retention that try to implement *dicta* of Europea Court judgments: we must say that this attempt is commendable and should be followed by other European States. Nevertheless, as observed, both legislations have a large noumerous of critic profiles, especially with regard to the geographical criterion. So that, in practise, there is a inadequate level of protection of fundamental right of privacy: these new laws, in our opinion, risk to be worse than the evils they want to treat, "opening the doors" to mass control over the entire European community.

In this direction, therefore, it is still necessary to continue reflecting on and questioning what might be the best tools and rules to find a balance between legitimate demands for the prevention and repression of crime and the protection of the right to privacy. It is important to underline that the legislation – european and national – has to recognize the central role attributed today to the privacy of citizens. The principle of crime persecution – that, as we observed, has an important function in the our Consistutional system – can legitimate the collection of metadata (*rectius*, an interference with private life), but only in accordance with the principles laid down by the European Court. The reference is, especially, to the proportionality of the misure: as it is weel knos, that is a cornerstone of European law and jurisprudence and play a fundamental role also in the data retention regulation. Art. 8 of European Convention, especially, estableshes that, according to this principle, the collection and storage of telephone reconding

should be possible only if there is a proportion between the sacrifice imposed on confidentiality of communications and privacy of peolpe and the requirement of persecution and of crimes.

Production and preservation of electronic evidence within the European Union

Dra. Elisabet Cueto Santa Eugenia

Profesora ayudante doctora en la Universidad Pontificia Comillas (Facultad de Derecho ICADE)

1. E-EVIDENCE IN THE DIGITALIZATION CONTEXT

The current world is undeniably constantly evolving, and the new technologies are having a more protagonic role in everyday life. In many aspects such as work, education, entertainment, communication and social interaction its use is simply generalized. We could claim that the digitalization is transforming the way in which people relate to each other and to the world that surrounds them and, without doubt, that includes the way in which the justice operates —both at a national and international levels—[1].

In the legal field, digitalization has had an impact both on the way in which proceedings can be held —a clear example of this is the oral hearings held during the pandemic[2]— and on the expediting of certain procedures, making it possible to reduce the time and paperwork. On the other hand, for some time now, the possibility of presenting electronic evidence in proceedings has arisen. There is, however, no unanimity among the doctrine when it comes to defining the exact meaning electonic evidence[3].

1 With regard to the shift produced by technology and the way it affects justice within the EU, *vid.* NEWLOVE-ERIKSSON, L. M., ERIKSSON, J., "Technological megashift and the EU: Threats, vulnerabilities and fragmented responsibilities", in *The European Union and the technology shift*, Palgrave Mcmillan, Switzerland, 2021, p. 29 and ss.

2 About this, *vid.* MARTÍN OSTOS, J., "Justicia y pandemia en España (2020)", *Revista de Estudios Jurídicos y Criminológicos*, 2, 2020, p. 84.

3 This is a problem explained by: *vid.* BUENO DE MATA, F., *Prueba electrónica y proceso*, Tirant lo Blanch, Valencia, 2014, pp. 95 y ss., DEPAUW, S.,"Electronic Evidence in Criminal Matters: How about e-Evidence Instruments 2.0?", *Freedom Under Pressure, International Conference, Abstracts*, 2017, p. 66 and SANJURJO RÍOS, L., "Hacia una nueva realidad en las relaciones jurídicas entre particulares: nuevas tecnologías, prueba electrónica y su repercusión en el derecho procesal civil español", en *Economía, empresa y justicia. Nuevos retos para el futuro,* Ed. Dykinson, 2021, p. 324.

In the following section we will review the different meanings of "electronic evidence", in order to then proceed to analyze the procedural cooperation tools existing within the European Union to preserve and deliver electronic evidence between member countries.

1.1. Definition of e-evidence

It is important to start recalling the classic distinction between source and means of evidence —the source being used to designate an extra-legal reality that is independent of the process and the means of evidence being, on the other hand, the activity that has to be carried out to introduce said extra-legal reality into the process[4]—.

It is undeniable that technological or digital sources exist everywhere. The difficult part of using them is to successfully bring them into the process, converting them in means of evidence, as we will see later on.

In general, we understand that electronic evidence —or e-evidence, in its shorter version or abbreviation, which is commonly used— is all the information collected in digital support that can provide evidence with probative value during a judicial process[5]. Such electronic information or collections of data must be suitable to be submitted to the judgment of computer experts to determine their authenticity and to be introduced in a trial in a way that their content is relevant to the case[6].

At this point, analyzing the components of e-evidence is crucial. In general, it is presented as a combination of two elements: a technical or hardware element and a logical or software element[7]. Thus, we could say that on the one hand there is the physical support of the evidence —which is the container— and on the other the information stored on it —which is the content—. In this sense, it should be clarified that sometimes the hardware may constitute a source of evidence in itself, because what is of interest to the case can be something physical, such as the phone, the computer or the pendrive itself, due to specific issues related to the case. However, in this work, we will analyze the electronic evidence thinking about the software or digital information, since it is the one that can be scattered or stored in some server outside the jurisdiction of the court that needs it. Electronic evidence, understood as data or software, includes various entities such as e-mails, text messages, call logs, audio files, electronic documents, photographs, video recordings and other types of digital information.

4 Definition given by MONTERO AROCA, J., *La prueba en el proceso civil*, Civitas, Madrid, 2007, p. 150.

5 *Vid.* ORTUÑO NAVALÓN, M. C., *La prueba electrónica ante los tribunales*, Tirant lo Blanch, Valencia, 2014, p. 34 and SANCHIS CRESPO, C., "La prueba en soporte electrónico", en *Las tecnologías de la información y la comunicación en la administración de justicia*, Aranzadi, 2012, pp. 713.

6 *Vid.* BUENO DE MATA, F., *op. cit.*, p. 99.

7 *Vid.* BUENO DE MATA, F., *op. cit.*, p. 104.

E-evidence, understood in the way that interests the present work, can be divided fundamentally into two groups: on the one hand, there are those computer data that are stored in computer systems or devices and on the other those that are sent using electronic means of communication, such as email or other instant messaging applications. This distinction is important for the purposes of the matter at hand, since when the computer systems and servers in which the evidence is stored are located outside the jurisdiction of the court that requires it, international judicial cooperation is crucial[8].

1.2. Chain of custody of electronic evidence

When providing evidence in a trial, it is important to adopt a series of precautions to ensure that the sources arrive at the trial as they were provided for their incorporation into the process, i.e., without having undergone any modification or manipulation[9]. This, which in physical evidence basically consists of diligently preserving the evidence in some place until the hearing in which it is to be presented, is much more complex in the case of electronic evidence. In this sense, it should be noted that digital evidence, since it is not presented in a material form —since its electronic nature implies that its support is not necessarily physical—, is more difficult to preserve[10].

Therefore, in order to preserve an electronic document, it is necessary to take into account not only the hardware but also —and especially— the software, which allows its correct reproduction. Because the key to preserving a flash drive or a CD lies not in the object itself, but in the digital files it contains. This issue becomes relevant in relation to matters such as format obsolescence, an aspect that happens very often because digital programs and languages are constantly and rapidly changing[11].

In addition to potential obsolescence, the ease with which computer data can be altered or disappear from a particular server must be addressed, and it is a fundamental issue when considering e-evidence preservation[12]. In this sense, the priority is to find a way to adopt the necessary measures so that the evidential sources —especially those that are available on a website and are not stored on a server accessible to those who need to provide it to the case— are not eliminated or modified. This type of measures often entails procedural preconstitution —

8 *Vid.* FONTESTAD PORTALES, L., "La cooperación judicial internacional en red", en *El uso de las TICs en la cooperación jurídica penal internacional: construyendo la sociedad digital del futuro*, Colex, 2022, pp. 79 y ss.

9 *Vid.* ORTUÑO NAVALÓN, M. C., *op. cit.,* p. 102.

10 *Vid.* SANJURJO RÍOS, L., *op. cit.,* p. 327.

11 *Vid.* ARBÓS Y LLOBET, R., "Conservación del documento electrónico", en La prueba electrónica, Bosch, 2011, pp. 348 y ss.

12 About the problems of access to e-evidence and the possibility of the dissapearence of the evidence, *vid.* ROJSZCZAK, M., "E-evidence Cooperation in Criminal Matters from an EU Perspective", *The Modern Law Review,* Vol. 85, No. 4, 2022 p. 1001.

which involves identifying and collecting the evidence relevant to the process and having it appraised before the corresponding procedural phase, often in order to prevent the evidence from disappearing or not being usable at a later stage—[13].

Pre-constitution is key to avoid a series of specific difficulties: a clear example of this are the cases in which the party interested in providing the evidence or the authority in charge of the investigation decides to take screenshots or printouts of an specific text so that certain information does not disappear from a web page, or a series of messages are not deleted. Nevertheless, this type of evidence which was originally electronic and later became physical and considered documentary evidence, presents the problem of being challenged because it is impossible to submit it to an expert computer examination to prove that these messages were indeed sent in the way they were printed and later deleted by the sender[14].

In addition to the constant changes in technology and the possibility of data being manipulated, preserving e-evidence is also difficult due to possible security breaches in the computer systems or servers that store the information[15]. Hacking or cyber-attacks can compromise the integrity of stored information and this type of situation can have a direct impact on the loss of crucial sources of evidence.

In summary, it can be said that, due to all the reasons recently exposed, the creation of a clear and standardized protocol for the preservation and delivery of electronic evidence is urgently needed.

2. CROSS-BORDER ACCESS TO ELECTRONIC EVIDENCE

Given the fact that we are in an interconnected world and new technologies and means of communication do not understand borders, the issues related to electronic evidence and its potential problems have been of concern to the European Union for years. Thus, in 2018 the European Parliament and the Council drafted and published a proposal for a regulation[16] to include electronic

13 On the importance of preconstitution of electronic evidence for its preservation, *vid.* SANJURJO RÍOS, E. I., "Proceso penal y volatilidad/mutabilidad de las fuentes de pruebas electrónicas: sobre la conveniencia y el modo de asegurarlas eficazmente", en *Exclusiones probatorias en el entorno de la investigación y prueba electrónica*, Ed. Reus, 2020, p. 204.

14 About the possible alteration of evidence of this kind, *vid.*, FUENTES SORIANO, O., "Comunicaciones telemáticas: práctica y valoración de la prueba" en *El proceso penal. Cuestiones Fundamentales*, Tirant lo Blanch, 2017, p. 289 y BORGES BLAZQUEZ, R., "La prueba electrónica en el proceso penal y el valor probatorio de conversaciones mantenidas utilizando programas de mensajería instantánea", *Revista Boliviana de Derecho*, 25, 2018, pp. 536-549.

15 About this, *vid.* SÁNCHEZ DOMINGO, M. B., "Instrumentos de carácter material en materia penal: la lucha contra la delincuencia informática" en *Nuevas aportaciones al espacio de libertad, seguridad y justicia. Hacia un derecho procesal europeo de naturaleza civil y penal*, Ed. Comares, Granada, 2014, pp. 235 y ss.

16 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on European Production and Preservation Orders for electronic evidence in criminal matters, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A225%3AFIN , last visited on the 2nd of August of 2023.

evidence among the European Union's orders for delivery and preservation of evidence , and these are the procedural tools that will be addressed in this section.

As a precursor to this, it should be noted that the EU had already taken steps in the area of international criminal cooperation by enacting a Directive on investigation orders[17], creating the European Investigation Orders, which are judicial decisions issued or validated by a judicial authority of an EU Member State to carry out one or more investigative measures in another Member State, in order to gather evidence for criminal proceedings or to obtain said evidence when it is already in the possession of the competent authorities[18]. The Directive on such orders establishes a series of standards that lay the foundations for international judicial cooperation in criminal matters within the European Union —for example, that the order must be issued by an authority of the Member State, that a series of requirements of necessity, proportionality and the existence of a similar national case must be met[19]—. The Directive also provides some homogenization of the way in which proceedings shall be carried, since the European Investigation Order is issued by means of a standardized form and translated into the official language of the executing EU Member State or any other language indicated by that Member State.

The promulgation of the European Investigation Order Directive thus proved to be undeniably useful, simplifying and speeding up the process of investigation and prosecution, as well as allowing courts access to evidence beyond the scope of their national jurisdiction. This tool has served as a breeding ground for equal procedural rights to be respected throughout the EU and lays the foundation for cooperation between Member States in the fight against cross-border crime.

However, this legislation only dealt with general cooperation issues and not specifically with e-evidence. In the current context, in which e-evidence is becoming increasingly relevant[20] —to the point of being, in many criminal cases, the fundamental prosecution evidence—, the EU has considered that the fact of not having a regulation dealing specifically with this type of evidence was a setback and something to be solved. In order to improve criminal justice in the cyberspace,

17 See: Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0041 , last visited on the 2nd of August of 2023.

18 About said orders, JIMENO BULNES, M. "Orden europea de investigación en materia penal", en *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, Bosch, 2016, pp. 151 and ss. and GUERRERO PALOMARES, S., "La «cooperación» penal internacional entre fiscales europeos delegados en el ámbito de la prueba transfronteriza y el uso de las nuevas tecnologías", en *El uso de las TICs en la cooperación jurídica penal internacional: construyendo la sociedad digital del futuro*, Colex, 2022, p. 108

19 This is explained in depth by PÉREZ ROMERO, J. M., *La prueba transfronteriza y su eficacia procesal en la Unión Europea*, Dykinson, 2021, p. 121.

20 During the last years, the amount of cross-border electronic evidence used in criminal investigations has grown exponentially, according to QUICK, D., CHOO, K. K. R, "Impacts of increasing volume of digital forensic data: A survey and future research challenges", Digital Investigation, Vol.11, No. 4, 2014, pp.273 and ss.

the EU needs to develope tools to increase cooperation with international service providers, make mutual legal assistance more efficient and propose solutions to the problems of determining and enforcing jurisdiction in cyberspace[21]. This is made through the proposal for international criminal cooperation in the field of e-evidence, which presents the tools that will be discussed below: production and preservation orders for electronic evidence.

2.1. Production order

The proposal for a regulation addresses the specific problem arising from the volatile nature of electronic evidence and its international dimension[22]. In order to do so, first of all it proposes the creation of orders for the delivery of technological information sources, which helps to promote international judicial cooperation between member states of the European Union.

The production orders are legal instruments that allow member countries of the European Union to request and obtain electronic evidence relevant to the investigation and prosecution of criminal offenses[23]. This type of instrument is used to request the delivery of data stored by a payment service provider located in another jurisdiction and needed as evidence in criminal investigations or prosecutions.

It requires the intervention of a judicial authority that issues or validates the order. This authority may be a judge, court, investigating judge or prosecutor competent in the particular case, or it may be any other authority considered and defined as such by the State issuing the order[24]. The presence of this authority shall serve to duly study the proportionality and necessity of the order in each specific case. This is useful to control the legality and relevance of the measures, as well as to avoid possible violations of fundamental rights that the measures may entail. Legality is key within the criminal process and implies that actions respond to legal certainty, which in the subject of this work specifically means the requirement for a clear and consistent application of legal rules and standards regarding the admission and evaluation of evidence in criminal proceedings[25].

---

21 *Vid.* BUONO, L., "The genesis of the European Union's new proposed legal instrument(s) on e-evidence. Towards the EU Production and Preservation Orders", *ERA Forum, Academy of European Law,* Vol. 19, 2019, p. 309.

22 SANJURJO RÍOS, E. I., *op. cit.*, pp. 219 and ss.

23 *Vid.* FUENTES SORIANO, O., "Europa ante el reto de la prueba digital. El establecimiento de instrumentos probatorios comunes: las órdenes europeas de entrega y conservación de pruebas electrónicas", en *Era digital, sociedad y derecho*, Tirant lo Blanch, Valencia, 2020, pp. 281 y ss.

24 *Vid.* PÉREZ TORTOSA, F., "La propuesta de implantación de las órdenes europeas de entrega y conservación de pruebas electrónicas como instrumentos complementarios a la orden europea de investigación", en *A vueltas con la transformación digital de la cooperación jurídico penal internacional*, Aranzadi, Cizur Menor, 2022, p. 240.

25 Legal certainty within the criminal process around Europe is specifically tackled by PERISTERIDOU, C., *The principle of legality in European criminal law*, Ed. Intersentia Ltd, Cambridge, 2015, pp. 58 and ss.

Thus, it should be recalled that the production order may only be issued when it meets certain conditions in relation to its relevance, necessity and proportionality. In this regard, it should be noted that the electronic evidence requested to be handed over must be relevant and useful for the resolution of the case and must not be excessive or disproportionate in relation to the intended purpose. In addition to this, it is important that the obtaining of such data is carried out in a lawful manner and with respect for fundamental rights, in order to ensure that legal certainty is respected —in the sense that the actions of the authorities are in accordance with the law—.

With specific regard to the principle of proportionality, the production order limits requests to data stored on servers (thus removing the possibility of delivering technological data from intercepting telecommunications networks in real time) and to orders issued in criminal proceedings in relation to a specific offense under investigation. In other words, the possibility that the order may be intended for the prevention of crime or other types of prosecutions or offenses (such as administrative proceedings for violation of legal regulations) is categorically excluded.

Another requirement to be met by the production order, apart from the intervention of a judicial authority and proportionality, is in relation to the subject matter of the order. Thus, it should be noted that such orders may only be issued if a similar measure exists for the same offense in a comparable situation at the national level in the issuing State. Apart from this, there is another limit in relation to the threshold of applicability of the tool: orders to surrender transaction data or content data may only be issued for criminal offenses punishable in the issuing state with a maximum custodial sentence of at least three years, or for specific offenses referred to in the proposal and where there is a specific link to electronic tools and offenses covered by the Terrorism Directive. These limits are set so that judicial cooperation between Member States of the Union can be carried out in a way that respects national jurisdictions and their respective criminal definitions.

A further requirement that must be met is respecting the European Regulation on data protection, specifically referring to the General Data Protection Regulation (GDPR)[26] . This is crucial when gathering cross-border evidence within the European Union (EU) or when dealing with data subjects who are EU residents[27]. Even though respecting this regulation is not something

26 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 (General Data Protection Regulation). This requirement is further analyzed in ROJSZCZAK, M., *op. cit.*, p. 1018.

27 About the material scope of the GDPR and its importance, *vid.* DUMORTIER, J., GRYFFROY, P., ROEX, R., SHIN VAN DER SYPE, Y., *European privacy and data protection law,* Wolters Kluwer, The Netherlands, 2022, p. 116 and ss. And about its historical background, *vid.* DOWD, R., *The birth of digital Human Rights*, Palgrave Mcmillan, Switzerland, 2022, pp. 195 and ss. and GONZÁLEZ FUSTER, G., *The emergence of personal data protection as a fundamental right of the EU*, Springer, London, 2014, pp. 253 and ss.

exclusively related to e-evidence, it is extremely important when dealing with sensitive data. The fact that there is a comprehensive framework that governs the processing of personal data among EU Members is key, not only within the European Union, but also with third parties[28].

Finally, in order to be able to be effectively submitted, an analysis will be made in relation to the usefulness, relevance and legality of the source of evidence whose delivery is being requested, so that the order is used in an appropriate manner and does not contravene fundamental rights. In this regard, it should be recalled that the relevance and usefulness of the evidence are understood by examining whether the requested piece of evidence is related to the subject matter of the proceeding and considering whether, through the use of reasonable criteria, it is possible to categorically rule out that the source may serve to clarify the facts in dispute[29].

2.2. Preservation order

On the other hand, the preservation order can be understood as an accessory order to the previous one. Its purpose is, after all, to prevent the removal, deletion or alteration of relevant data in all situations in which the provision of such data may take time[30]. That is to say, this type of order is promoted so that the evidence source do not become unavailable or altered before they can be delivered. In short, the preservation order only aims to secure the data, without actually transferring them to the authorities of the requesting state[31]. After that, a production order may be issued, but it is important to mention that other possibilities —such as a European Investigation Order or a mechanism resulting from mutual legal assistance agreements— can be used after the preservation order.

It is important to mention that the preservation order will also have to be issued by an authority —understanding such authority in the same terms in which it was understood in the previous section regarding the production order—. That authority shall have the power to secure the electronic data in accordance with applicable national law.

Thus, the preservation order is a binding decision adopted by an issuing authority of a Member State requiring a supplier offering services within the Union and established or represented in the territory of another Member State to preserve electronic evidence for the purpose of a subsequent delivery request.

---

28 The GDPR is used as framework when asking for production or preservation of e-evidence with states that are not in the EU, such is the case with the UK for example. *Vid.* DAVIES, G., "Police Access to electronic evidence stored overseas: cooperation between the EU and the UK post- Brexit", in *Criminal Law and Justice in the European Union*, Clarus Press, Dublin, 2022, p. 148 and FENNELLY, D., "Data protection in the field of criminal justice", in *Criminal Law and Justice in the European Union*, Clarus Press, Dublin, 2022, pp. 121 and ss.

29 *Vid.* BUENO DE MATA, F., *op. cit.*, pp. 228 and 229.

30 SANJURJO RÍOS, E. I., *op. cit.*, pp. 219 and ss.

31 *Vid.* ROJSZCZAK, M., *op. cit.*, p. 1005.

The fundamental difference between the requirements of these orders and the previous ones is that for preservation orders there is no threshold of possible conduct committed: any information or computer data that is requested may be subject to a preservation order —i.e., although the necessary analysis will be carried out later in order to verify whether the punishable conduct has a simile in the domestic law of the Member State that will provide the source of evidence, for the initial moment of preservation it is not necessary to carry out such analysis—. In other words, the preservation order has an instrumental function in order to avoid the risk of disappearance or alteration of data in the sources, which is a real risk given the agility with which offenders act; but it is conditional to subsequent cooperation[32].

In short, the preservation order can be given with regard to any electronic evidence, independently of the conduct to to which it is related —a matter that is analyzed afterwards during the process—. Thus, it basically serves to prevent the removal of a specific piece of evidence from a server or digital system, while the production order, which usually takes longer due to its characteristics, is being processed.

3. CURRENT STATE OF THE EUROPEAN REGULATION

The tools described and analyzed in the previous section are part of the 2018 Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters. However, such regulation remains a proposal and is not yet in force.

The Member States of the European Union have not dismissed its usefulness or its application —in fact, they all agree on the importance and urgency of establishing concrete parameters on how to handle and deliver electronic evidence within the Union— but the truth is that the approval of the regulation is taking time.

In this regard, it should be noted that on the 20th of November of 2022, a meeting of the Commission was held in order to discuss the matter in detail. There, a political agreement[33] was signed regarding the proposal for the creation of the preservation and production orders. This agreement, however, given its political nature, requires formal ratification by the Parliament and the Council —it is, in other words, a mere declaration of intentions—.

32 *Vid.* LARO GONZÁLEZ, E., "Prueba penal transfronteriza: de la orden europea de investigación a las órdenes europeas de entrega y conservación de pruebas electrónicas", *Revista de Estudios Europeos*, 79, 2022, p. 295.

33 Piece of news seen in https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7246 , last visited on the 8th of August 2023.

During the meeting, the European Commissioner for Home Affairs proclaimed that new rules on electronic evidence are urgently needed to enable our judicial and law enforcement authorities to act effectively in the fight against terrorism, cybercrime and other serious forms of crime. This served to highlight the importance of the agreement in order to fight anonymous criminals on a borderless internet, who usually end up being impune.

Subsequently, on the 20th of December of 2022, the Permanent Representatives Committee (Coreper) carried out an analysis of the proposed text, introducing a series of suggestions for its improvement, which culminated in a text dated January 20th, 2023, that includes all the proposed amendments to the regulations with a prospect of its future approval[34]. The aim of the latter document is to enact a Directive on the preservation and delivery of electronic evidence —which can remind us of the Directive on the European Investigation Order, which proved to be so useful at the time and constitutes an essential instrument of cooperation within the framework of the European Union—. In this regard, it should be mentioned that, although the directive has not yet been enacted, it is expected to be enacted eventually.

4. FINAL CONCLUSSIONS

Considering that we are in an era in which technology is a fundamental part of our lives and society is in a permanent state of interconnection, it is evident that electronic evidence is absolutely necessary. This type of evidence, being data stored in systems or servers, is often easy to hide, modify or destroy. It is also common, given the nature of this type of information, that the specific servers on which the evidence needed for a process, are located beyond the national jurisdiction that requires them.

This means that, in order to obtain the necessary evidence for a trial — especially in the case of criminal proceedings, where the evidence may be essential to prove the guilt of the suspect or the events that took place— it is important to establish international judicial cooperation tools. Within the European Union, the concern to establish the basis for cooperation in the field of e-evidence has led to the specific proposal of two procedural tools: preservation and production orders.

These tools are designed in such a way that they complement each other — specifically, the preservation order is accessory to the production order, serving to safeguard specific computer data, protecting them from possible alterations and

34 Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings, en https://data.consilium.europa.eu/doc/document/ST-5449-2023-INIT/en/pdf , last visited on the 8th of August 2023.

preventing their elimination while the production order is being processed—. The production order, on the other hand, serves to ensure that the data that constitute the electronic evidence are provided by the Member State in whose jurisdiction the servers are located to the Member State that needs them. To this end, a series of requirements and guarantees must be met: that a judicial authority is involved, that the proceedings are subject to criteria of necessity and proportionality, and that the behavior being prosecuted falls within certain substantive parameters.

The revised tools, if enacted, would be undeniably useful in the European Union's common fight against crime —and especially against cybercrime, given its nature—, and the common opinion of most states is that the regulation is desirable and needs to be enacted. However, the truth is that given the slowness with which the project is being treated, which is still in the process of being passed, it is undeniable that there is still a long way to go.

5. BIBLIOGRAPHY

ARBÓS Y LLOBET, R., "Conservación del documento electrónico", en *La prueba electrónica,* Bosch, 2011, pp. 348-370.

BORGES BLAZQUEZ, R., "La prueba electrónica en el proceso penal y el valor probatorio de conversaciones mantenidas utilizando programas de mensajería instantánea", *Revista Boliviana de Derecho*, 25, 2018, pp. 536-549.

BUENO DE MATA, F., *Prueba electrónica y proceso*, Tirant lo Blanch, Valencia, 2014.

BUONO, L., "The genesis of the European Union's new proposed legal instrument(s) on e-evidence. Towards the EU Production and Preservation Orders", *ERA Forum, Academy of European Law,* Vol. 19, 2019, pp. 307–312.

DAVIES, G., "Police Access to electronic evidence stored overseas: cooperation between the EU and the UK post- Brexit", in *Criminal Law and Justice in the European Union*, Clarus Press, Dublin, 2022, pp.137-149.

DOWD, R., *The birth of digital Human Rights*, Palgrave Mcmillan, Switzerland, 2022.

DUMORTIER, J., GRYFFROY, P., ROEX, R., SHIN VAN DER SYPE, Y., *European privacy and data protection law,* Wolters Kluwer, The Netherlands, 2022.

FENNELLY, D., "Data protection in the field of criminal justice", in *Criminal Law and Justice in the European Union*, Clarus Press, Dublin, 2022, pp. 121-135.

DEPAUW, S., "Electronic Evidence in Criminal Matters: How about e-Evidence Instruments 2.0?", *Freedom Under Pressure, International Conference, Abstracts,* 2017, pp. 62-82.

FONTESTAD PORTALES, L., "La cooperación judicial internacional en red", *en El uso de las TICs en la cooperación jurídica penal internacional: construyendo la sociedad digital del futuro*, Colex, 2022, pp. 73-96.

FUENTES SORIANO, O., "Comunicaciones telemáticas: práctica y valoración de la prueba" en *El proceso penal. Cuestiones Fundamentales*, Tirant lo Blanch, 2017, pp. 277-297.

FUENTES SORIANO, O., "Europa ante el reto de la prueba digital. El establecimiento de instrumentos probatorios comunes: las órdenes europeas de entrega y conservación de pruebas electrónicas", en *Era digital, sociedad y derecho*, Tirant lo Blanch, Valencia, 2020, pp. 281-319.

GONZÁLEZ FUSTER, G., *The emergence of personal data protection as a fundamental right of the EU*, Springer, London, 2014.

GUERRERO PALOMARES, S., "La «cooperación» penal internacional entre fiscales europeos delegados en el ámbito de la prueba transfronteriza y el uso de las nuevas tecnologías", en *El uso de las TICs en la cooperación jurídica penal internacional: construyendo la sociedad digital del futuro*, Colex, 2022, pp. 97-118.

JIMENO BULNES, M. "Orden europea de investigación en materia penal", en *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, Bosch, 2016, pp. 151-208.

LARO GONZÁLEZ, E., "Prueba penal transfronteriza: de la orden europea de investigación a las órdenes europeas de entrega y conservación de pruebas electrónicas*", Revista de Estudios Europeos,* 79, 2022, pp. 285-303.

MARTÍN OSTOS, J., "Justicia y pandemia en España (2020)", *Revista de Estudios Jurídicos y Criminológicos,* 2, 2020, 75-98.

MONTERO AROCA, J., *La prueba en el proceso civil*, Civitas, Madrid, 2007.

NEWLOVE-ERIKSSON, L. M., ERIKSSON, J., "Technological megashift and the EU: Threats, vulnerabilities and fragmented responsibilities", in *The European Union and the technology shift*, Palgrave Mcmillan, Switzerland, 2021, pp. 27-55.

ORTUÑO NAVALÓN, M. C., *La prueba electrónica ante los tribunales*, Tirant lo Blanch, Valencia, 2014.

PÉREZ ROMERO, J. M., *La prueba transfronteriza y su eficacia procesal en la Unión Europea,* Dykinson, Madrid, 2021

PÉREZ TORTOSA, F., "La propuesta de implantación de las órdenes europeas de entrega y conservación de pruebas electrónicas como instrumentos complementarios a la orden europea de investigación", en A vueltas con la transformación digital de la cooperación jurídico penal internacional, Aranzadi, Cizur Menor, 2022, pp. 231-250.

PERISTERIDOU, C., *The principle of legality in European criminal law*, Ed. Intersentia Ltd, Cambridge, 2015.

QUICK, D., CHOO, K. K. R, "Impacts of increasing volume of digital forensic data: A survey and future research challenges", *Digital Investigation,* Vol.11, No. 4, 2014, pp.273-294.

ROJSZCZAK, M., "E-evidence Cooperation in Criminal Matters from an EU Perspective", *The Modern Law Review*, Vol. 85, No. 4, 2022 pp. 997–1028.

SANCHIS CRESPO, C., "La prueba en soporte electrónico", en *Las tecnologías de la información y la comunicación en la administración de justicia*, Aranzadi, 2012, pp. 707-734.

SÁNCHEZ DOMINGO, M. B., "Instrumentos de carácter material en materia penal: la lucha contra la delincuencia informática" en *Nuevas aportaciones al espacio de libertad, seguridad y justicia. Hacia un derecho procesal europeo de naturaleza civil y penal.*, Ed. Comares, Granada, 2014, pp. 223-249.

SANJURJO RÍOS, E. I., "Proceso penal y volatilidad/mutabilidad de las fuentes de pruebas electrónicas: sobre la conveniencia y el modo de asegurarlas eficazmente", *en Exclusiones probatorias en el entorno de la investigación y prueba electrónica*, Ed. Reus, 2020, pp. 195-240.

SANJURJO RÍOS, L., "Hacia una nueva realidad en las relaciones jurídicas entre particulares: nuevas tecnologías, prueba electrónica y su repercusión en el derecho procesal civil español", en *Economía, empresa y justicia. Nuevos retos para el futuro*, Ed. Dykinson, Madrid, 2021, pp. 322-344.

The influence of european jurisprudence in the admission of evidence obtained by the employer to control the worker

Dra. Paloma Arrabal Platero

Profesora Contratada Doctora interina. Universidad Miguel Hernández

1. INTRODUCTION

The legality of evidence obtained by the employer in his control function has been the subject of various resolutions in the European jurisprudence. This work analyzes and examines last of sentences, handed down by the Grand Chamber of the European Court of Human Rights, which reviews the sentence handed down by the Third Chamber in the case "López Ribalda and others against Spain" on the violation of the Articles 6 and 8 of the European Convention on Human Rights (relating to the Right to a fair trial and the Right to privacy, respectively). The ruling of the seventeen Judges - although three cast a dissenting vote - concludes that there is no violation of either of the two guarantees, confirming the ruling of the Third Chamber regarding article 6 of the ECHR, but revoke it with respect to what was held in reference to the 8 of the Convention. The legal discussion focuses on the legality as evidence in judicial processes for dismissal of images obtained by hidden video surveillance cameras installed by the employer without the knowledge of the workers. In the particular matter, it is especially relevant that the employer had prior suspicions of such actions by the employees due to irregularities between the inventory and the daily sales data that represented losses of more than 80,000 euros. Also the recording was made in a space public for a short time of ten days. The Strasbourg Court maintains that there is no violation of the right to a fair trial since the plaintiffs had the opportunity to challenge the nullity of the evidence in the process and that there are no reasons to suspect that the agreement reached by some workers with the employer to avoid the labor procedure in exchange for not initiating criminal actions, it was signed under duress. Furthermore, on this second occasion the ECHR points out that there is no violation of the Right to Privacy either, since the interference in

it is minimal and falls within the control capacity that the employer can exercise in the workplace. To reach this last conclusion, the Grand Chamber justifies its decision because images obtained were only used to prove the dismissal, they were not particularly intrusive, the number of people who saw them was small and there were "reasonably founded suspicions" of unfair behavior. from the workers.

It's special interest the dissenting vote issued by three judges in the majority ruling, which points out the difficulty of resting the proportionality judgment on this new indeterminate legal concept of "reasonably founded suspicions". It also proposes that it be a third party unrelated to the relationship labor that assesses the entity of these prior doubts that allow the adoption of a business control measure limiting the fundamental rights of citizens with full guarantees.

2. STARTING POINT: THE CONFLICT BETWEEN BUSINESS CONTROL AND THE LICITUDE OF THE EVIDENCE OBTAINED

At the workplace, coexist two conflicting interests in balance. On the one hand, the power of management of the employer that includes the Faculty of control to the workers and, on the other, the fundamental rights of employees which don't disappear in the workplace[1].

However, the irruption of technology has altered labor relations, making control more intrusive and upsetting the balance relationship. As an example, video surveillance, tan as opposed to a security guard (or guards, because we need more tan one on a day) allows greater control, more logging capacity (hard drive resgistrer stores more information than a security professional can memorize) and it is cheaper[2].

1 Regarding the technological control of the entrepreneur, you can consult, among others, SAN MARTÍN MAZZUCCONI, C., SEMPERE NAVARRO, A. V., "Sobre el control empresarial de los ordenadores", Revista Doctrinal Aranzadi Social, nº3, parte Tribuna, 2012; SAN MARTÍN MAZZUCCONI, C., SEMPERE NAVARRO, A. V., "¿Puede la empresa controlar el ordenador usado por su trabajador?", Repertorio de Jurisprudencia, nº21, parte Comentario, Aranzadi, 2007; GARCÍA COCA, O., "Algunas cuestiones sobre las posibilidades y limitaciones de supervisión del ordenador del trabajador por parte del empresario", Revista Aranzadi de Derecho y Nuevas Tecnologías, nº 34, parte Estudios jurídicos, 2014; GIL PLANA, J., "Control empresarial del uso personal por el trabajador de los medios tecnológicos de trabajo", Revista Española de Derecho del Trabajo, nº164/2014, parte Comentario de Jurisprudencia, Aranzadi, 2014; TOSCANI GIMÉNEZ, D., CALVO MORALES, D., "El uso de internet y el correo electrónico en la empresa: límites y garantías", Revista Española de Derecho del Trabajo, nº 165, parte Estudio, Aranzadi 2014; GRAU PINEDA, C., "La transgresion de la buena fe contractual en el uso personal del ordenador de la empresa: la legitimidad del control empresarial", Revista Doctrinal Aranzadi Social, nº 11, parte Estudio, 2018.

2 Among other papers, you can consult on the subject GOÑI SEIN, J. L., La videovigilancia empresarial y la protección de datos personales, Thomson Civitas, 2007; ARRABAL PLATERO, P., "La videovigilancia como prueba en el proceso", Revista General de Derecho procesal, nº 37, 2015; ALTÉS TÁRREGA, J. A., "La videovigilancia encubierta en la nueva regulación sobre derechos digitales laborales y la incidencia de la STEDH López Ribalda II", Revista General de Derecho del Trabajo y de la Seguridad Social, nº 55, 2020; ARIAS DOMÍNGUEZ, A., "Crónica de jurisprudencial laboral internacional, enero

This qualitative and quantitative difference has modified the balance of forces between the privacy of employees and the employer's ability to control them.

3. JURISPRUDENTIAL DEVELOPMENT OF THE RELATIONSHIP BETWEEN THE POWER OF EMPLOYERSAND THE RIGHTS OF WORKERS

At Spain, from the analysis of various resolutions related to the relationship between the power of control of employers and the rights of workers, it's possible to notice a first period in which the affectation to the privacy of workers was

/ junio 2018", Cuadernos de derecho transnacional, Vol. 11, Nº. 1, 2019, pp. 639-662; CHACARTEGUI JÁVEGA, C., "Videovigilancia en el lugar de trabajo y "expectativa razonable de privacidad" según el Tribunal Europeo de Derechos Humanos. Comentario a la sentencia de 9 de enero de 2018 (caso López Ribalda contra España)", Revista de derecho social, nº83, 2018, pp. 119-132; CLIMENT GALLART, J. A., "La videovigilancia encubierta en los puestos de trabajo, a la vista de la STEDH en el caso López Ribalda y otros contra España", Revista Aranzadi de derecho y nuevas tecnologías, nº 52, 2020; HENRIQUEZ TILLERÍA, S., "Protección de datos, videovigilancia laboral y doctrina de la sentencia López Ribalda II", Iuslabor, nº 3, 2019; MOLINA NAVARRETE, C., "De "Barbulescu II" a "López Ribalda": ¿qué hay de nuevo en la protección de datos de los trabajadores?"; Revista derecho del trabajo, nº 9, 2018, pp. 121-130; MOLINA NAVARRETE, C., "De "Barbulescu II" a "López Ribalda": ¿qué hay de nuevo en la protección de datos de los trabajadores? Comentario a la Sentencia del Tribunal Europeo de Derechos Humanos de 9 de enero de 2018, caso López Ribalda "et alii" vs. España (Demandas acumuladas 1874/13 y 8567/13)", Estudios financieros. Revista de trabajo y seguridad social: Comentarios, casos prácticos : recursos humanos, nº 419, 2018, pp. 125-135; GOÑI SEIN, J. L., "Video vigilancia empresarial mediante cámaras ocultas: su excepcional validez como control defensivo «ex post»", Trabajo y derecho: nueva revista de actualidad y relaciones laborales, nº 47, 2018, pp. 74-81; GOÑI SEIN, J. L., "Sentencia del Tribunal Constitucional 39/2016, de 3 de marzo. Instalación de cámaras de videovigilancia para la obtención de pruebas y deber de información previa", Ars Iuris Salmanticensis: AIS : revista europea e iberoamericana de pensamiento y análisis de derecho, ciencia política y criminología, Vol. 4, Nº. 2, 2016, pp. 288-29; MONEREO PÉREZ, J. L., ORTEGA LOZANO, P.G., "La grabación o videovigilancia de la empresa", La Ley Unión Europea, nº 76, 2019; MONEREO PÉREZ, J. L., ORTEGA LOZANO, P.G., "Se justifica la grabación con cámaras ocultas en el centro de trabajo por la existencia debidamente acreditada de sospechas razonables de irregularidades graves.: STEDH (Gran Sala) de 17 de octubre de 2019 (números 1874/13 y 8567/13) (asunto López Ribalda II)", Revista de Jurisprudencia Laboral, nº 8, 2019; OCHOA RUIZ, N., Tribunal Europeo de Derechos Humanos. Asunto López Ribalda y otros c. España [GC_], nos 1874/13 y 8567/13, de 17 de octubre de 2019, Revista Aranzadi Doctrinal, nº 1, 2020; PASCUAL, J., ""López Ribalda II": cámaras ocultas, ¿es posible su utilización?", Actualidad jurídica Aranzadi, nº 957, 2019; PASCUAL, J., "López Ribalda II, la utilización de cámaras de video-vigilancia en las relaciones laborales: ¿se puede prescindir del deber de información?", Diario La Ley, nº 9555, 2020; PÉREZ CANET, A., "De nuevo, sobre la videovigilancia como medida de control de la actividad laboral", Revista de información laboral, nº 1, 2018, pp. 55-63; ROJO TORRECILLA, E., "Derecho del trabajador a la privacidad en la empresa y límites a su control por cámaras de vigilancia. Estudio del caso López Ribalda y otras contra España (a propósito de la sentencia del Tribunal Europeo de Derechos Humanos de 9 de enero de 2018)", Derecho de las relaciones laborales, nº 2, 2018, pp. 135-152; RUIZ GONZÁLEZ, C. M., "Las nuevas propuestas interpretativas del Tribunal Europeo de Derechos Humanos sobre el control del uso laboral de la tecnología de la empresa: Barbulecu y López Ribalda", Cuadernos de derecho transnacional, Vol. 10, nº 2, 2018, pp. 915-930; SOTOMAYOR MEDINA, I., "Las dimensiones de la indemnización por daños y perjuicios en el asunto López Ribalda y otros vs. España: demandas nº 1874/2013 y 8567/2013", Trabajo y derecho: nueva revista de actualidad y relaciones laborales, nº 53, 2019, pp. 111-114; ZARAGOZA TEJADA, J. I., "La prueba obtenida por videocámaras de seguridad tras la STEDH del 17 de octubre del 2019. Caso López Ribalda vs España", Revista Aranzadi Doctrinal, nº 2, 2020.

prosecuted (STC 186/2000, of July 10) and a later one in which the courts began to know of the nullity of the images due to violation of data protection Right.

In that second group we can classify, in first place, one from the Spanish Constitucional Court (STC 29/2013, of February 11, U. Seville), that annuls sanctions that the Public University of Seville had imposed because the worker doesn't have been informed of the cameras. In second place, another relevant sentence, the constitutional interpreter (STC 39/2016, of March 3, Bershka), changes his criteria and justifies the company decision because there was a poster informing about the video surveillance.

4. LATEST RESOLUTIONS AS REQUIREMENTS FOR JUDICIAL ASSESSMENT

The current jurisprudential criteria comes from the resolution given by the European courts, especially defined by the following two resolutions.

4.1. ECHR sentence Barbulescu vs Romania, January 12, 2016

The case was based on the fact that the company fired the worker because he sent private messages to his girlfriend form the company media (using the e-mail and the access to Internet). For this case, the European Court of Human Rights stablish the "Barbulescu test" to judge the validity of the employer's technological control measures. There are the next sixt rules for assesing proporcionality:

> "(i) Whether the employee has been notified of the possibility of videosurveillance measures being adopted by the employer and of the implementation of such measures. While in practice employees may be notified in various ways, depending on the particular factual circumstances of each case, the notification should normally be clear about the nature of the monitoring and be given prior to implementation.
>
> (ii) The extent of the monitoring by the employer and the degree of intrusion into the employee's privacy. In this connection, the level of privacy in the area being monitored should be taken into account, together with any limitations in time and space and the number of people who have access to the results.
>
> (iii) Whether the employer has provided legitimate reasons to justify monitoring and the extent thereof. The more intrusive the monitoring, the weightier the justification that will be required.
>
> (iv) Whether it would have been possible to set up a monitoring system based on less intrusive methods and measures. In this connection, there should be an assessment in the light of the particular circumstances of each case as to whether

the aim pursued by the employer could have been achieved through a lesser degree of interference with the employee's privacy.

(v) The consequences of the monitoring for the employee subjected to it. Account should be taken, in particular, of the use made by the employer of the results of the monitoring and whether such results have been used to achieve the stated aim of the measure.

(vi) Whether the employee has been provided with appropriate safeguards, especially where the employer's monitoring operations are of an intrusive nature. Such safeguards may take the form, among others, of the provision of information to the employees concerned or the staff representatives as to the installation and extent of the monitoring, a declaration of such a measure to an independent body or the possibility of making a complaint".

4.2. ECHR sentence, Grand Chamber, of October 17, 2019, in the case of López Ribalda and others against Spain

The other important resolution is López Ribalda case. The origin of the case comes form Spanish Court. The facts are the following one:

I. The manager of a supermarket near Barcelona discovers an accounting mismatch between the stock of products and the volume of sales for a value of more than 80,000 euro[3]

II. He installed two types of cameras to investigate, some visible and other ones whose existence didn't know the employeers

III. The cameras allowed the manager know that clients and workers took products from the establishment without paying any amount for them[4]

IV. The company showed the images to the fourteen affected employees in individual meetings with the presence of the union representative and opted for the disciplinary dismissal

V. Several workers appeal at the Social Court of Granollers, based on the illegality of evidence of the video[5]

VI. On January 20TH, 2010, the Social Court declared the dismissals was appropriate

3 Specifically, the difference between stocks and sales data during 2009 was 7,780 euros in February, 17,971 euros in March, 13,936 euros in April, 18,009 euros in May and 24,614 in June.

4 According to the recordings, the cashiers scanned products from the shopping baskets of customers and colleagues and then canceled the purchase receipts.

5 As the judgment points out in paragraph 40, after the plaintiffs and other dismissed workers challenged their dismissal before the Labor Court, the employer filed a complaint against fourteen employees, including the five plaintiffs. On July 15, 2011, considering that the investigation had failed to establish an agreement between the accused to commit crimes and that the value of the property stolen by each accused did not exceed 400 euros, the investigating judge decided to reclassify the charges in simple lack. By a decision of September 27, 2011, it confirmed the prescription of the procedures because the statute of limitations for this type of crimes had already elapsed.

VII. They appealed to the High Court of Justice of Catalonia (TSJ), which on confirmed the *a quo* decision[6]

VIII. After that, five workers filed an appear at the European Court on Human Rights

At first moment, the Third Chamber concluded that the company did not infringe the fair judicial process right, but said that Spanish court did violated the right to privacy[7].

Once this ruling was handed down, the Spanish State, in accordance with Article 43 of the ECHR, requested the referral of the case to the Grand Chamber of the Court, for review so that it could establish the main lines of its jurisprudence as it is a relatively new issue to the interpretation or application of the Convention. Once the referral to the Grand Chamber was admitted, the Court of seventeen judges was formed and a public hearing was held in which the representatives of the parties orally presented their allegations[8]. After, the Grand Chamber reviewed and modified the first, applying Barbulescu test, concluding the company didn't affevted a trials right, neither the privacy right.

In the Court's opinion, this balance is broken in favor of the company for several reasons that justify its actions. The first of them – and, perhaps, most important – is the employer's prior suspicion of serious employee behavior derived from a mismatch between stocks and sales that caused economic losses of up to 80,000 euros. The Court emphasizes that the employer's well-founded indications of the commission of serious irregularities by the workers justify the measure. Therefore, there is no "slight suspicion" to justify the lack of prior notification in the installation of these video surveillance cameras.

Another element that helps the Court to adopt its decision is related to the low seriousness of the interference, given that some cameras were located in a visible place and others - the hidden ones - had a limited orientation to the payment area. Thus, the Grand Chamber distinguishes several levels of privacy depending on the space in question: from places such as bathrooms or cloakrooms (where, as the ruling says, it is necessary to increase protection or even prohibit video surveillance); to closed work spaces, such as offices, in which there is also a significant intrusion into the protected right; or those, such as the one in the case, visible or accessible to the general public, in which the impact on privacy is less.

Furthermore, the ruling emphasizes that the images were only obtained for ten days, were seen by a limited number of people (specifically three, including the workers' representative) and were not used for any purpose other than the identification of the employees involved in the thefts that produced the economic losses that gave rise to the suspicions. The resolution also indicates

6 Vid. STSJ de Cataluña 1481/2011, de 24 de febrero.

7 You can read this resolution through the link http://hudoc.echr.coe.int/fre?i=001-179881

8 The public hearing held on 28 November 2018 can be viewed at https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=187413_28112018&language=lang&c=&py=2018.

that the plaintiffs had the opportunity to report the company to the Spanish Data Protection Agency and to start civil proceedings to protect their right to privacy.

Along with this, the Grand Chamber highlighted the necessary secrecy of the measure, because prior communication to any affected person would have jeopardized its purpose, which was none other than to verify who had stolen the products, given the reasonable suspicion of serious non-compliance by part of the workers. For all these reasons, the López Ribalda II ruling determines that the Spanish courts made a correct weighing judgment between the employer's right to the protection of his company and the employee's right to privacy, since there was no other less limiting measure that could fulfill the legitimate objective pursued; and, consequently, that the Spanish authorities did not violate Article 8 ECHR.

However, the decision had a particular vote against three dissenting magistrates who advocate the thesis of the Third Section and propose that it be an impartial third party will assess the seriousness of the non-compliance and, if applicable, authorize the appropriate measures to avoid leaving arbitrary investigations in the hands of the employer that may violate the fundamental rights of workers.

5. CONCLUSIONS

In light of the latest resolutions we can conclude the following:

1. Not all cases are "Barbulescu". López Ribalda II refers to the Barbulescu ruling, which is no less true than the facts in both cases, although both deal with business control through technological means, they are diametrically diverse. Thus, in the second of them, the surveillance of the Romanian employee represented a significant interference in his privacy, since the businessman was able to read his intimate conversations and, therefore, the intensity of the impact was much greater than in the cases of the Spanish supermarket. Furthermore, in that case, the conduct that the worker was accused of was using company media (mail and Internet access) for personal communications, an activity that was not permitted by the internal regulations, but which is far from constitute a criminal offense. The right balance between privacy and business control requires careful examination of concrete facts.
2. The most importan corunstance of the Grand Chamber's ruling on the "López Ribalda and others" case is the consideration of the supermarket manager's suspicions of product theft by workers as the essential element to legitimize the use of the images captured by hidden video surveillance cameras whose installation was not mentioned to the

workers. However, the ECtHR requires that this doubt of the employer be "reasonably founded", which is, once again, an indeterminate legal concept that is difficult to objectify to the specific case. Perhaps, for this reason, the possibility raised by the dissenting vote of the sentence that it is an outside entity - judicial, administrative, police - that assesses the seriousness and solvency of the suspicion to admit the control measure is of interest. A judicial examination prior to the installation of video surveillance cameras of the seriousness of the events that justifies their hidden installation is presented as a more guaranteeing requirement for the worker -who has an examination of the proportionality between the rights at stake carried out by a judicial- and provides greater legal security to the businessman -who can operate with solid support for the legitimacy of his measure-.

The present publication can be defined in three words: relevant, original and novel. It is a work divided into four parts, which is immersed in the study of procedural and procedural law for the cross-border litigation in civil and criminal disputes, from a very interesting perspective, mainly for two reasons: originality and critical-constructive character. The book begins with a work on teaching innovation in procedural law in today's globalised, multicultural and interconnected society. The other three parts of the book deal with very new topics in the resolution of cross-border disputes, from the protection of the rights of vulnerable groups, procedural issues such as digital evidence, data encryption, class actions, alternative dispute resolution methods, among many other subjects that shape the resolution of disputes today.