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*Using AI Systems in the Promotion of EU Defence Rights: The CrossJustice Project**

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I. INTRODUCTION

ONE OF THE crucial challenges of our times is the ability to understand and exploit to our advantage – as individuals as well as part of a broader community – the economic and social benefits of using artificial intelligence (AI) systems.¹ The European Union (EU), (that is) well aware of this, has embarked on a digital agenda aimed at exploring all possible uses of AI while respecting the rights of citizens, as the recent establishment of the Special Committee on Artificial Intelligence in a Digital Age (AIDA) by the European Parliament confirms.² The ability of AI systems to interact with the

*This contribution discusses with certain adaptations and updates the chapter of a volume published a few months ago: G Lasagni, G Contissa, M Caianiello, G Sartor, *Effective Protection of the Rights of the Accused in the EU Directives. A Computable Approach to Criminal Procedure Law* (Leiden, Brill, 2022). This volume, in turn, contains the results of a research project, the Cross-Justice project (Grant Agreement Number: 847346-JUST-AG-2018/JUST-JACC-AG-2018-JUST/REC MGA) funded by the European Union Justice Programme (2014–2020).

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¹ According to Contissa and Lasagni, an artificial intelligence (AI) system ‘Rather than carrying out evaluations and assessments on the basis of an algorithm containing a set of rules predefined by the programmer, the system builds its own model of the domain, applying a learning algorithm to analysis of the training data. Using this model, the system generates classifications, evaluations, and predictions on new cases submitted to it. Updating and expanding the dataset automatically improves the model and the system’s predictive capabilities’: G Contissa and G Lasagni, ‘When it is (also) Algorithms and AI that Decide on Criminal Matters: In Search of an Effective Remedy’ (2020) *European Journal of Crime, Criminal Law and Criminal Justice* 280–304, 281. As Hildebrandt affirms with regard to machine learning (ML) systems (quoting Mitchell), ‘A computer program is said to learn from experience E with respect to some class of tasks T and performance measure P, if its performance at task T, as measured by P, improves with experience’: M Hildebrandt, *Smart Technologies and the End(s) of Law* (Edward Elgar, 2015) 35; TM Mitchell, *Machine Learning* (Burr Ridge, McGraw Hill, 1997) 2).

² As it is reported on the AIDA webpage, available at https://multimedia.europarl.europa.eu/it/aida-special-committee-on-artificial-intelligence-in-digital-age_16506_pk.

most diverse areas of human life has also had an impact on the thinking of legal experts, making increasing inroads into lawyers' processes of reflection. This cultural attitude towards the potentialities deriving from the interaction between AI and the law also involves criminal justice, where relevant studies have been published.³

The EU and the Council of Europe seem to be aware of the relevant and numerous interactions that may arise from the use of AI systems in the administration of criminal justice. This is confirmed by two well-known documents, the first issued by the European Commission for the Efficiency of Justice (CEPEJ) and the second by the European Parliament. The CEPEJ adopted the first European Ethical Charter on the use of AI in judicial systems in 2018, the ambition being to provide 'a framework of principles that can guide policy makers, legislators and justice professionals when they grapple with the rapid development of AI in national judicial processes'.⁴ The LIBE Committee of the European Parliament commissioned a study, published in July 2020, on the effects on fundamental rights deriving from the use of AI systems in the area of law enforcement.⁵

There are various areas of the administration of justice where the use of AI and machine learning (ML) systems may have some relevance, and possibly a positive impact. One of them concerns the capacity of AI to improve the consistency and predictability of legal issues, and especially of potential litigations, two essential features related to the rule of law. This is specifically important for criminal law and criminal justice, where the principle of legality plays a pivotal role, as both the basis and the primary source of justification for the whole system. AI and ML systems might satisfy, in the end, that quest for certainty and predictability which constitutes the ultimate goal (and the basic philosophical justification) of criminal justice since the post-Enlightenment reforms. The goal of legal certainty could be achieved by substituting human hermeneutic ambiguity – that is, the inability of humans to reach stable interpretations of legal provisions – with computational certainty.

This contribution is dedicated to the description of a recently completed project,⁶ funded by the EU Commission, on the topic of legal certainty and the protection of the rights of suspects and defendants in criminal proceedings. The aim of the research (that has been conducted) is to verify whether and to what

³ See, among the most recent studies on the topic, S Quattrococo, *Artificial Intelligence, Computational Modelling and Criminal Proceedings. A Framework for A European Legal Discussion* (Springer, 2020).

⁴ See CEPEJ, 'CEPEJ European Ethical Charter on the Use of Artificial intelligence (AI) in Judicial Systems and their Environment', available at www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment.

⁵ European Parliament, 'Artificial Intelligence and Law Enforcement – Impact on Fundamental Rights', available at [www.europarl.europa.eu/RegData/etudes/STUD/2020/656295/IPOL_STU\(2020\)656295_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2020/656295/IPOL_STU(2020)656295_EN.pdf).

⁶ CrossJustice project (n *).

extent the use of AI can allow the effective protection of the individual rights of suspects and defendants to be strengthened, in a complex and multilevel system such as the one created today by the legal sources adopted by the EU.

II. THE DEVELOPMENT OF EU CRIMINAL LAW IN THE LAST TWO DECADES

European criminal law, with particular reference to criminal procedure, started to grow just over 20 years ago, following the entry into force of the Treaty of Amsterdam. With the Tampere Council in 1999, the EU laid the foundations for the development of judicial cooperation in criminal matters, while at the same time making it possible to make use of legal instruments, initially Framework Decisions (FD), which until that point had not been possible to implement in criminal matters.⁷

All in all, the path undertaken can be considered as a successful story. Within the framework of EU law, the criminal law area has developed rapidly, with a range of new legal sources regulating many different aspects. This has shed new light on the subject as a whole, contributed to the emergence of new methods of study and led to the establishment of new institutional actors, such as the European Public Prosecutor's Office (EPPO).⁸ The enterprise started in Tampere has also been consolidated and developed in a crucial way after the entry into force of the Lisbon Treaty. Thanks to that Treaty, the Charter of Fundamental Rights of the European Union (CFREU) today enjoys the same value as the Treaties, thus acknowledging that it is an essential mission of the EU to ensure an adequate and effective level of protection of fundamental rights.⁹

An essential area regulated by a network of provisions adopted after Lisbon, concerns the protection of individual rights, in particular those of the victim of crimes and of the accused in criminal proceedings. With regard to the latter, the Union constructed a road map that has led to a certain harmonisation in the discipline, at the supranational level, of the essential aspects of the accused's defence. It would seem correct to say that the six procedural Directives adopted by the European legislator in accordance with the Stockholm Programme have laid down *ad hoc* rules for most of the aspects touched upon, in general terms, by Article 6 of the European Convention on Human Rights (ECHR).¹⁰

⁷ A Klip, *European Criminal Law. An Integrative Approach* (Intersentia, 2021) 59.

⁸ L Bachmaier Winter (ed), *The European Public Prosecution Office. The Challenges Ahead* (Springer, 2018) v–xii.

⁹ V Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust, and the Transformation of Justice in Europe* (Hart Publishing, 2016) 9–11.

¹⁰ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01) [2009] OJ C295, subsequently recognised in the Stockholm Programme – An open and secure Europe serving and protecting citizens (2010/C 115/01) [2010] OJ C 115. See A. Klip, 'Fair Trial Rights in the European

The unconcealed ambition, in this respect, has been to guarantee an EU statute of the rights of the defence, equally valid both from the horizontal perspective, that is in judicial cooperation between the different Member States, and from the vertical one, in the relationship between the EU criminal justice institutions and the national jurisdictions. In this regard, it is important not to forget that, according to Article 41 of the EPPO Regulation,¹¹ the Directives on the rights of the accused are the main reference also for EPPO, when its investigations interfere with defence rights.

A first conclusion we can draw, therefore, is that the Area of Freedom, Security and Justice (AFSJ), 20 years after its initial development, appears to be vital and capable of projecting its effectiveness in the different dimensions in which EU law traditionally operates. At the same time, precisely because of the abundance and diversity of new legal sources, it presents numerous aspects that need to be clarified and standardised in terms of interpretation and application.

III. A COMPLEX LEGAL FRAMEWORK

In spite of the passion in the EU for classical culture and its heritage, it is indeed difficult to adapt the image of the Greek temple, which was used to give the idea of the EU's structure before Lisbon, to describe European criminal law. This is not surprising, of course. Although certainly impetuous in terms of timing and abundant in terms of quantity, the criminal law set of normative provisions within the EU is more than ever the result of compromises and accelerations followed by sudden setbacks.

One good example concerns the issuing of a harmonised legal system in the law of evidence, and the decision to approve, at last, the European Investigation Order Directive.¹² While the original plan was to draft a directive with the ambition to establish a single regime for the mutual admission of evidence, the final legal product ended up being just an instrument to execute orders to conduct investigations more quickly. Yet, with a deeper analysis, you may discover that, among the EIO provisions, there may be hidden passages which allow, with a little hermeneutical sagacity, a fairly complete European regime of the admission of evidence to be constructed through case law.¹³

Union: Reconciling Accused and Victims' Rights' in T Rafaraci and R Belfiore (eds), *EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer, 2019) 29.

¹¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L283/1.

¹² Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1.

¹³ See on that point A Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order' (2014) 10 *Utrecht Law Review* 113.

Similar considerations apply to the rights of the accused in criminal proceedings as they have developed within the Union, which are an area of specific interest in the research at hand. Conceived as part of a unitary and coherent body of law, the 2003 Green Paper, the set of components of defence rights were segmented and approved separately following the entry into force of the Lisbon Treaty, thanks to the political solution promoted through the Stockholm Programme, in order to overcome Member States' political resistance.

Breaking down the original framework into separate sets of regulations, the EU has succeeded, in the space of about seven years, in realising its original plan by adopting legal instruments (a set of six Directives¹⁴) capable of providing an answer to the main problems that the defence may encounter in criminal proceedings (especially if they are transnational in nature, as those where EU law typically comes into play).

However, although the Directives certainly raise the level of protection of the right of defence within the EU AFSJ, they present quite a few problematic aspects. In some cases, they contain provisions that are not clear enough, while in others, these are not sufficiently effective: It seems undeniable, it is worth observing incidentally, that the legislator has almost always been careful to use language that would allow, with an adequate hermeneutic will, to adopt even the best possible standard of protection. Moreover, rights sometimes overlap, as in the case of the information to be given to the defendant. Finally, the use of the directives as legal sources, a condition imposed by Article 82 Treaty on the Functioning of the European Union (TFEU), always places the interpreter in front of at least two legal texts: the supranational one, and the national implementing one, which may be partially different from the former, by exploiting the margins of discretion made available by the Directive.¹⁵ Naturally, the complexity may be far greater when the procedure is transnational and involves several legal systems. In such a case, faced with the European legal source, the interpreter may be forced to consider (and apply) as many national transposition sources as the Member States' jurisdictions involved.

¹⁴See the following directives: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2012] OJ L280/1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1.

¹⁵See A Klip, 'The Substantive Criminal Law Jurisdiction of the European Public Prosecutor's Office' (2012) 20 *European Journal of Crime, Criminal Law and Criminal Justice* 367.

The same phenomenon is bound to occur in the system set up with the EPPO, which will structurally have to deal with cases with a transnational dimension. Although the legislator could choose to unify the legal discipline of rights of the accused, since Article 86 TFEU allows the adoption of a regulation in this field, it preferred referring to the directives already launched by the Stockholm Programme.¹⁶ In this way, practitioners will necessarily have to apply, most times they come across a legal issue, two EU legal texts (the EPPO Regulation, and the Directive specifically concerned), in addition to the national legal provisions transposing the European sources.

As always, at the peak of the system is the EU Charter of Fundamental Rights, which, as if the level of complexity were not already high enough, by means of a game of cross-references carried out through Articles 52 and 53, transposes the legal precipitate of the ECHR and the common constitutional traditions as elaborated by the jurisdictions of the Member States.

IV. THE DIFFICULT APPLICATION OF THE ESTABLISHED REGULATORY SYSTEM IN PRACTICE WITH A SPECIFIC FOCUS ON THE DEFENDANT'S FAIR TRIAL RIGHTS

The observations made so far suggest that dealing with European criminal law, and in particular with the rights of defence within the framework of the EU legal system, is quite difficult. First, as we have seen, the network of rules is extremely varied. This increases combinatorial possibilities for the interpreter. The difference in legal sources also allows interpreters to make use of various interpretative methods. This aggravates the overall difficulty of making the system predictable *ex ante*. Such difficulties arise only when applying the general principles to cases, due to the complex interconnection between the two charters of rights (ECHR and CFREU).

This statement appears to be confirmed by an analysis, even if not in-depth, of the recent jurisprudence of the European Courts, including both the European Court of Human Rights (ECtHR) and the European Court of Justice (CJEU). Both courts, when confronted in recent years with a case involving both ECHR and EU law, have tried to combine the two levels, justifying the solution adopted in light of supranational law other than the one on which they formally have jurisdiction over. Thus, for example, in *Ibrahim*,¹⁷ and in *Knox*,¹⁸ the ECtHR arrived at its final decision after considering the relevant EU sources – the Charter and the directives specifically concerned – on the right to a lawyer and

¹⁶ See D Brodowski, 'Article 41' in HH Herrfeld, D Brodowski and C Burchard, *European Public Prosecutor's Office* (Hart Publishing, 2021) 383–84.

¹⁷ *Ibrahim and others v UK* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECHR, 13 September 2016) §§ 203 ff.

¹⁸ *Knox v Italy* App no 76577/13 (ECHR, 24 January 2019) §§ 106 ff.

on the right to an interpreter and the translation of documents respectively (as well as after trying to understand how these sources interact with the national rules of the State involved in the case).

The difficulty of following each step of the reasoning in the above-mentioned decisions makes it clear that the elaboration of legal solutions in the area of European criminal justice, in particular with regard to the rights of defence and to a fair trial, appears to be highly complex. This realistically implies that, very often, one and the same lawyer does not have all the necessary skills to offer an effective defence.

In order to achieve effective solutions, it is necessary to have a good knowledge of the EU legal level, and, at the same time, have a thorough knowledge of the ECtHR jurisprudence developed in this field in the second half of the last century. In addition, it is necessary to have an adequate command of the national system in which the sources are to be applied: if more than one jurisdiction is involved, as is likely when the case has a European dimension, it is also useful to have some familiarity with national systems other than one's own.

This is an unusual intellectual challenge for modern criminal jurists. It is difficult, for the reasons indicated, to find precedents to refer to, or practices to adapt to the area examined here. This is also due to the fact that, unlike other legal fields, criminal law is characterised by a claim to specificity and strictness, of clear *ex ante* predictability, which does not operate with comparable significance in areas other than that of criminal law.

V. THE USE OF AI SYSTEMS TO ADVANCE KNOWLEDGE AND IMPROVE THE EFFECTIVE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AREA OF FREEDOM, SECURITY AND JUSTICE

To put it simply, the system is extremely complex. It requires multifarious competences, which are not easy to integrate. At the same time, it must guarantee, as an essential reason for legitimacy, high levels of a priori predictability for the citizen, in the name of the principle of legality. This is a task that is very difficult for an individual to accomplish under his/her own steam / on his/her own.

Of course, you may object that these kinds of cases will usually be handled by a group of jurists, whose background is as varied as the legal sources they have to apply. Thus, there will be justices (and defenders) capable of composing the framework of the European sources, and of the jurisprudences of the relevant supranational Courts, while there will also be other jurists who are trained specifically for the purpose of operating at the national level, in which they are experts. In other words, the solution of a European criminal case with a supra- (and trans-) national dimension will in practice always be the result of a team effort, and not of an isolated jurist.

This objection is certainly well-founded, but it does not solve all the problems. On the one hand, although you can certainly speak of teamwork, the

solution to a case must ultimately be unitary (and requires an ability to develop an overall view of the legal problems involved at different levels). On the other, the very need to work in teams may produce inequalities. In particular, it may amplify the delta separating the position of the prosecution, which will hopefully be equipped with the necessary personnel resources to face the challenge posed by multilevel criminal justice, from the defence, which will rarely benefit from a comparable set of tools:¹⁹ such as a pool of defenders able to move in a coordinated way to challenge a case built by the EPPO, across the multiple levels, national and supranational, in which it is organised.

Of course, inequalities may occur also among defendants, and between defendants and victims, depending on how many resources they can deploy to build a team of lawyers capable of dealing with a case of transnational dimensions. Such a gap between private citizens and supranational prosecution agencies, such as the EPPO, is realistically destined to never, or almost never, be closed. But this is the point: Can it be considerably reduced? From this perspective, is it possible to use technology and computational reasoning to make it easier for citizens (and at an even earlier stage for legal professionals) to become acquainted and familiar with this new area of law?

The underlying idea of the research conducted was specifically to verify if and how AI systems may improve the protection of defendants' fundamental rights, where faced with transnational criminal proceedings in the EU AFSJ area. Theoretically, it is possible to choose two different ways to test this research question. The first is to try to build AI systems in order to develop ready-made hermeneutic solutions. In this sense, the operator who has to deal with a transnational EU dimension case has only to enter the relevant data, and try to uncritically follow the solution offered by the algorithm applied by the self-learning machine. This path has recently been theorised in several studies, and is being tested in some areas (usually not including criminal law).²⁰ For various reasons, however, this did not seem to us to be the most appropriate direction to take.

Firstly, especially in relation to CJEU case law, there is a lack of adequate judicial decisions. In almost all the areas concerned with a defendant's rights – with the possible exception of *ne bis in idem* – interpretative guidelines seem to have been established by the CJEU jurisprudence only on a limited number of issues (incidentally, not always prominent).²¹ In such a context, the possibility

¹⁹ See in this regard the observations expressed some years ago in M Thunberg Schunke, 'Whose Responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU' (Intersentia, 2013), especially at 69 ff.

²⁰ See A Garapon and J Lassègue, *Justice Digitale* (PUF, 2018).

²¹ It could be argued that ECtHR jurisprudence on the rights of the accused is sufficient to train a ML system with an adequate amount of data for the purpose. This consideration is partially correct. It is in fact undeniable that the decisions taken in the field considered by the ECtHR are many, and cover different areas of defence rights. However, the lack of developed ECJ jurisprudence seems decisive. Only the EU system has provisions that are directly applicable within the national systems

for an AI system to come up with solutions within a reasonable timeframe that are actually helpful – ready to use, so to speak – seems somewhat illusory. In addition, the intention of the research was to improve the knowledge and familiarity of criminal law practitioners, lawyers, magistrates and scholars with this area of law, without necessarily having to provide ready-made practical solutions.

Indeed, the efficiency of the functioning of the judicial system at the EU level must be achieved through an improved knowledge of this area of law on the part of practitioners, not only by constructing algorithmic calculations that allow the latter to disregard the former. The idea is ultimately to set up a calculation platform that improves knowledge as an instrumental element for a more conscious (and more uniform) application of the law in the field of individual rights safeguards. By means of more widespread shared knowledge among the various stakeholders of criminal justice, it is possible to achieve a better uniformity and predictability of the system, as well as a more effective protection of the fundamental rights of the accused, even assuming that the written law remains with the flaws that have characterised it so far.

Beyond this, it was also felt that even if an AI system could be devised to provide a ready-made answer, it would hardly be accepted with confidence by the practitioners, since research in this area is still not sufficiently developed and known to legal practitioners. A different path has therefore been chosen, with the aim of creating a platform that would allow integrated knowledge of the different regulatory levels, meaning supranational and national ones together. For both, we tried to transpose and translate into computer language the contents of the statutory provisions and those that can be extrapolated from judicial decisions. Finally, due consideration has also been given to the hermeneutical proposals developed by scholars, which are of significant importance in the field of European criminal justice.

These results can be appreciated using the CrossJustice project's knowledge platform (the Legal Database Module and Advisory Module).²² This database allows for an integrated set of results. Firstly, it allows the verification of the necessary information regarding the rights of the defence of each of the 11 Member States covered by the project. In particular, users of this platform can verify the level of fundamental rights through a specific functionality of the database ('transposition cross-reference' functionality). Secondly, through a different functionality of the platform (the Advisory Module²³), it is possible for a legal professional to identify and apply relevant rules of EU and national

of the Member States (if necessary, by disapplying conflicting national legislation). This power of vertical penetration of EU sources gives ECJ case law a potentially very different role from that of the ECtHR. Training an AI system to come up with immediately applicable solutions when it still lacks a numerically significant body of ECJ judgments appeared to be an error of approach.

²² See <https://site.unibo.it/cross-justice/en/project-results/tools>.

²³ See www.crossjustice.eu/en/index.html#crossjustice-platform.

legislation concerning procedural rights of persons suspected or accused of crimes, both at the domestic and the cross-border level.²⁴

As a result, the practitioner, when faced with a criminal legal issue involving the safeguarding of defence rights on a transnational level, is able to visually gain an integrated picture of the different sources. The system also makes it possible to calculate the level of compliance that each legal system, of those taken into consideration, presents with respect to the normative standards required by the European sources (the directives and the CFREU). In this way, it should be easier for practitioners to decide whether to raise an interpretative prejudicial question before the Court of Justice, so as to fill gaps and lacunae that may characterise the protection of a fundamental right at the national level hermeneutically in the event of the inadequate transposition of the European source.

Actually, with a final effort, the research team also managed to create an AI system, through which a professional can obtain, by entering data and responding to questions on the platform, an initial orientation to help her find the most appropriate solution for her case. This is the closest step to obtaining an algorithmic legal opinion, a choice which, for the reasons set out above, has been deemed as one to be excluded.

The constituent elements of the AI system described so far, which has been implemented in the course of the project, should enable the following results to be achieved (as already noted at least in part in the previous considerations). Firstly, it allows a simultaneous view of the existing sources of protection of fundamental rights and fair trial rights, including case law and scholarly opinions. Secondly, it encourages an integrated view of the different levels of regulation, thanks to which it is possible to identify the areas in which a national system is not compliant (or, conversely, offers a higher level of protection) with the standards laid down at supranational level. Finally, it is able to guide the legal profession in the elaboration of solutions for a concrete case. These solutions remain, for the reasons set out above, within the interpreter's full intellectual autonomy, but are facilitated by the analysis and learning process enabled by the use of data processed by the AI system.

VI. THE BOTTOM-UP CONSTRUCTION OF A MORE UNIFORM SYSTEM THROUGH THE USE OF LEARNING MACHINES

The objective pursued was to make the legal field of fundamental rights more easily accessible and therefore more predictable in terms of a priori calculability, as a means of achieving greater harmonisation of national systems (and of this with the supranational level) by means of hermeneutics and application.

²⁴The Module assesses in particular: 1) the level of compliance of national instruments with the EU acquis by highlighting potential gaps in the implementation process, and 2) the compatibility between national frameworks resulting from the implementation of EU directives.

Such an approach, if successful, could achieve some significant results. Firstly, it should be able to take into account national normative realities, including the theoretical constructs referred to therein, and better integrate them into the regulatory framework developed at the EU level. In turn, this emphasis on the legal cultures of the Member States, which are able to enter into a dialogue with EU law more quickly and in a greater number of cases, should facilitate the identification of common constitutional traditions. This element is often mentioned in EU sources, such as in Article 6(3) TFEU and Article 52 CFREU. However, thus far, this important component of the European legal edifice has rarely been used to develop new solutions.

In fact, recourse to national traditions has largely been used to stop the effectiveness and pervasiveness of EU law, rather than to expand its scope (or to strengthen its content). An emblematic case in this context is *Taricco*, where recourse to national identity justified the Italian Constitutional Court's choice to oppose the hermeneutic proposal elaborated by the Court of Justice²⁵ (but not to enhance a new interpretative solution that could have improved the general application of Article 325 TFEU for the whole AFSJ).

Indeed, there are signs that this is about to change soon. For example, preliminary rulings have already been submitted on the Directive concerning the interpretation of the presumption of innocence aimed at extending the fundamental rights of the accused to the area of pre-trial detention. These solicitations from purely domestic proceedings have the potential to contribute greatly to strengthening the protection of individual rights throughout the AFSJ. A relevant case in this regard is *Milev*,²⁶ but others have followed (see for instance the case of *RH*).²⁷ Some analogous indications concern the relationship between the practice of plea bargaining and compliance with the same Directive on the presumption of innocence. A relevant decision, in this regard, was adopted by the CJEU in *AH and others*.²⁸ In all these cases, national courts have tried to link, in proceedings with purely domestic relevance, the legal provisions of their own law with a European directive. This is in order to reinforce, or at least to verify, the respect of a fundamental right (that of the accused not to be presented as guilty before final conviction in a pre-trial detention decision, in *Milev* and *RH*, and in a guilty plea decision, in *AH and others*) by their legal system. At the same time, the referral represents an opportunity for the CJEU to promote more effective protection of defence rights.

²⁵C. Amalfitano and O. Pollicino, 'Two Courts, Two Languages? The Taricco Saga Ends on a Worrying Note' (*Verfassungsblog*, 5 June 2018), available at <https://verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note/>; V. Mitsilegas, 'Judicial Dialogue in Three Silences: Unpacking *Taricco*' (2018) 9 *New Journal of European Criminal Law* 38.

²⁶See Case C310/18 PPU *Milev* (CJEU, 19 September 2018).

²⁷See Order in Case C-8/19 *RH* (CJEU, 12 February 2019).

²⁸See Case C-377/18 *AH and Others* (CJEU, 5 September 2019).

A case in which the search for a common constitutional tradition was evident was in *DB v Consob*,²⁹ concerning the presumption of innocence and the right not to be punished for choosing to remain silent in a formally administrative but criminally coloured procedure. In that case, the preliminary reference of the Italian Constitutional Court, which was followed by a decision of the Court of Justice accepting the prospect of a national referral, very effectively highlighted the search for common ground. In fact, the Italian Court strongly pointed out that the right to silence could already be considered part of the right of defence and the presumption of innocence in the light of the text of its own Constitution. However, given the transnational nature of the issue (the sanction for not responding to the administrative authority conducting the investigation had been introduced also in compliance with an EU directive), the Italian Court requested that the CJEU also express its opinion on the point, with the aim of reaching a shared view. The decision to opt for a preliminary ruling proved to be successful, since the CJEU accepted the perspective of the referring court. The overall result, if you look at the case as a whole, is that a fundamental right, that of not being punished for choosing not to answer in proceedings of a punitive nature, has now been strengthened in two different ways. First, it is protected in a clearer and more unambiguous manner by the CJEU decision. Second, it is recognised at the supranational level, by enhancing the solicitation coming from the jurisdiction of a Member State (thus enshrining that tradition as part of a common constitutional heritage). It would appear, by looking at the cases mentioned so far, that the referring national court is seeking a common ground between its own legal system and that of the EU in order to give a new, fuller meaning to the principle of the presumption of innocence.

Ultimately, it is not difficult to discern an attempt, in the references for a preliminary ruling on which the above-mentioned decisions were based, to find a common tradition, which allows the national court to interpret and develop its own system while respecting its identity – at the same time improving the protection of a certain fundamental right of the individual at the EU level.

Against this background, the use of an AI system designed to improve the knowledge of EU law, and its level of integration with individual national systems, could also be of significant help in fostering dialogue between the Courts. In turn, a clearer dialogue will be able to foster the development of the doctrine of common traditions which seems to be crucial for the harmonisation of national systems.

Ultimately, the targeted use of the platform should be able to help the creation of a legal reasoning method common to all practitioners in the area at

²⁹Case C-481/19 *DB v Consob* (CJEU, 2 February 2021). See G Lasagni, ‘Consob – The Court of Justice on the Right to Remain Silent in Criminal Matters (and Beyond ...)’ (*EU Law Live*, 3 November 2021), available at <https://eulawlive.com/op-ed-consob-the-court-of-justice-on-the-right-to-remain-silent-in-criminal-matters-and-beyond-by-giulia-lasagni/>.

stake, without which no vertical regulatory instrument adopted by the EU legislator will be able to produce the desired effects (a more effective and uniform protection of individual rights).

VII. LIMITATIONS OF THE RESEARCH

The research conducted has some unavoidable limitations. The first is the use of English as a *lingua franca*. The problem of languages, in relation to the objective of achieving a better harmonisation of systems, is crucial. Legal reasoning is in fact so influenced by the characteristics of the language that expresses it, that it is very often impossible to separate, in its most intimate essence, the legal question from the way in which it is conceived and presented on a linguistic level.

This problem, which has been well known to EU law scholars for a long time, also emerges clearly in the research carried out, in which, due to a practical necessity, the predominant choice was to make general use of English.³⁰ However, in order to balance the limitations of this decision, an attempt was made to supplement the AI system by implementing official translations of texts in the platform whenever possible (ie mainly for CJEU judicial decisions and EU normative texts).

A second limitation concerns the number of Member States involved, only 11 compared to the 27 that make up the EU. An attempt was made to select countries that would in some way represent the different geographical, legal and cultural areas of the EU, in a fair balance. However, it is clear that the work carried out, although of considerable size, represents only partially the variety of legal cultures that characterises the EU area as a whole. A system that aspired to represent all the national systems of the EU in terms of protecting the rights of the accused in criminal proceedings would require more time and resources.

VIII. CONCLUSIONS

The research carried out by the CrossJustice project leads to a number of conclusions. Among them, the first one, already known, is that the EU legal sources on defendants' rights are developing significant effects on the level of protection of the rights involved, both at the national level and within EU law itself. The process of development in this field is still in its infancy as some institutions are

³⁰ Actually, the need to use English as a *lingua franca* is not only a limitation, but also a strength in some respects. In this way, it is in fact possible to have access to regulations other than those of one's own reference languages.

far too recent to constitute an effective benchmark (this is a particular reference to the EPPO). There is no doubt, however, that these supranational normative sources will progressively be able to develop a relevant impact in the three dimensions that characterise the AFSJ: That of horizontal judicial cooperation in criminal matters; that of vertical cooperation, between EU institutions and national courts; that of the protection of fundamental rights at a purely or predominantly domestic level. It should also be added that a fourth relevant level concerns the extension of fair trial rights from the criminal sphere *stricto sensu* to the punitive administrative sphere. The Directives as a whole oblige the Courts, both those of the Member States and the Court of Justice, to take a position on numerous significant aspects concerning the protection of the accused in matters which lie at the crossroads of these two areas of law. This, in turn, shall be done through a constant cultural dialogue with the case law of the ECtHR.

The second result is that the use of a system of AI for gaining a more effective knowledge of this legal field appears to be significant. It provides an integrated view of the problems, meaning an understanding of the multilevel nature of legal sources and the role played by both judicial decisions and theories developed by scholars. An AI system also makes it easy to identify the level of compliance of a national system with European standards. It also makes it possible to promote issues related to the identification and transposition of common constitutional traditions faster and more effectively, which is in turn a key area for the success of the whole AFSJ.

The third result is that such an AI system helps interpreters to find their bearings in specific individual cases with a supranational and multilevel dimension, offering first rudimentary solutions (which will subsequently have to be properly developed by practitioners). This implies that the use of AI has a practical problem-solving function, although it leaves the responsibility (and the resolution of the legal issue in its entirety) to the practitioners.³¹

In other words, the assistance of an AI system is objective, in that it aids faster and more integrated knowledge of a complex and multilevel legal system. It is also subjective, in that, by proposing solutions that must then be developed and suitably adapted to the case in question, it acts as a dialectical interlocutor for the jurist. In a nutshell, the selection of the questions (the legal issues) and the final solutions remain firmly in the hands of the jurist. The AI system, however, can play an effective role in helping to identify the problem and, above all, in planning and developing the solution.

The challenge of the contemporary generation of jurists is twofold. On the one hand, they must help solve the translation problem, ie guide the transition

³¹ CrossJustice outcomes will be developed in a new EU funded project, Facilex, designed to bridge gaps in the field of criminal judicial cooperation and EU mutual recognition. Facilex aims to provide a multilevel online platform based on a comprehensive comparative legal analysis on the implementation of EU mutual recognition instruments by Member States (see <https://site.unibo.it/facilex/en>).

of fundamental principles, conceived in a less integrated and non-automated world, into the modern world, characterised by a high level of integration between legal systems and through a constant interaction between machines and individuals. On the other, they need to ensure that the ultimate choices concerning key decisions remain in the hands of human beings, exploiting the potential offered by AI systems and ML to make legal systems more responsive to people's needs.

