O ESTADO DE DIREITO NA UNIÃO EUROPEIA
THE RULE OF LAW IN THE EUROPEAN UNION

Coordenadores

ANABELA MIRANDA RODRIGUES · JÓNATAS MACHADO
PAULO PINTO DE ALBUQUERQUE

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Contactos / Contacts
geral@ij.uc.pt
www.uc.pt/fduc/ij
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PREFÁCIO / PREFACE

On the 17 may 2021 a high-level conference on "Rule of Law in Europe" took place in Coimbra. This conference was co-organized by the Ministry of Foreign Affairs of Portugal, the European Commission and the University of Coimbra.

In the opening session Manuel Machado, Mayor of Coimbra, Amílcar Falcão, Rector of the University of Coimbra, Francisca Van Dunem, Minister of Justice of Portugal, Didier Reynders, European Commissioner for Justice and Augusto Santos Silva, Minister of State and Foreign Affairs of Portugal, took the floor and welcomed the speakers.

The first panel ("The role of civil society for upholding the rule of law") discussed the role of civil society to uphold the rule of law and the ways to involve citizens in decision making.

The speakers in the first panel included Juan Fernando López Aguilar, Member of the European Parliament and Chair of the LIBE Committee, Stef Blok, Minister of Foreign Affairs of The Netherlands, Caroline Fennell, Chair of European Network of Human Rights Institutions, Berber Biala-Hettinga, Senior Executive Officer of Amnesty International, Pepijn Gerrits, Executive Director, The Netherlands Helsinki Committee, Dulce Lopes, University of Coimbra, Faculty of Law.

The second panel ("The role of European and national courts for upholding the rule of law") focused on the role of domestic and international courts as standard-setting institutions and conflict-resolution adjudicators, with a special attention to the implementation of judgments of the European Court of Human Rights and the Court of Justice of the European Union.

The speakers in this panel included Robert Spano, President of the European Court of Human Rights, Koen Lenaerts, President of the Court of Justice of the European Union, António Joaquim Piçarra, President of the Supreme Court of Justice of Portugal, Karoline Edtstadler, Federal Minister for the EU and Constitution at the Federal Chancellery of Austria, Frank Clarke, representing the Network of the

Presidents of the Supreme Judicial Courts, Pedro Caeiro, University of Coimbra, Faculty of Law, Pierre-Dominique Schupp, Vice-President of the Council of Bars and Law Societies of Europe and José Manuel Quelhas, University of Coimbra, Faculty of Law.

The third panel ("Communicating the rule of law") explored the impact of the rule of law in citizens' lives / exercise of rights and the importance of sharing good practices.

The speakers in the third panel included Mark Ellis, Executive Director of International Bar Association IBA, Filippo Donati, President of the European Network of Councils for the Judiciary, Rui Cunha Martins, University of Coimbra, Faculty of Liberal Arts, Michael Meyer-Resende, Executive Director at Democracy Reporting International, Elena Calistru, President of Funky Citizens, Alexandre de Soveral Martins, University of Coimbra, Faculty of Law.

The fourth panel ("The rule of law under the Lisbon Treaty") assessed the impact of the Lisbon Treaty on the implementation of the rule of law in Europe.

The speakers in this panel included Ana Gaudêncio, University of Coimbra, Faculty of Law, Elzbieta Chojna-Duch, University of Warsaw, Alessandra Silveira, University of Minho, School of Law, András Jakab, University of Salzburg, and Nuno Piçarra, Judge of the Court of Justice of the European Union.

The fifth panel ("The rule of law in the context of the COVID-19 pandemic") discussed how the rule of law is important in the context of the COVID-19 pandemic, in particular for the oversight of the emergency measures and to better protect human rights, including those of minorities and most vulnerable groups in Europe.

The speakers of this panel included Clément Beaune, Secretary of State for European Affairs of France, Lúcia Amaral, Portuguese Ombudsman, Juan González-Barba Pera, State Secretary for European Union of Spain, Cláudia Santos, University of Coimbra, Faculty of Law, Nicos Alivizatos, Member of the Venice Commission, André Dias Pereira, University of Coimbra, Faculty of Law, and Paula Veiga, University of Coimbra, Faculty of Law.

The sixth and final panel ("Rule of law, social progress and economic recovery") focused on the link between the protection of the rule of law, economic recovery and the development of social rights in Europe.

The speakers of this panel included Hans Dahlgren, Minister for EU Affairs of Sweden, Lucia Ďuriš Nicholsonová, Chair EMPL Committee, European Parliament, Olivier De Schutter, UN Special Rapporteur on extreme poverty and human rights, Cristian Pîrvulescu, Chair of the fundamental rights and rule of law group of the European Economic and Social Committee, Joana Vicente, University of Coimbra, Faculty of Law, and José Casalta Nabais, University of Coimbra, Faculty of Law.

The closing session was presided by Michael Roth, Minister of State for Europe at the Federal Foreign Office, Germany, Gašper Dovžan, State Secretary at the Ministry of Foreign Affairs of Slovenia, Vera Jourová, Vice-President of the European Commission for Values and Transparency, and Ana Paula Zacarias, Secretary of State for European Affairs of Portugal.

As a co-organizer of this high-level conference, the University of Coimbra took the responsibility of promoting the publication of the available written speeches of the participants. Two articles are also included, by Jónatas E. M. Machado, University of Coimbra, Faculty of Law, and by Paulo Pinto de Albuquerque, Catholic University of Lisbon (co-authored with Nele Schuldt, Ghent University), who were panel moderators at the Conference. Our purpose is to disseminate the contributions of the speakers so that the legacy of this important political and scientific event remains at the disposal of a vast audience. Hopefully the lessons learned during this two-day conference will help the European Union, the Governments and the institutions which came together in Coimbra to find common ground for upholding the rule of law in Europe.

The University of Coimbra will always be by their side in this project.

Anabela Miranda Rodrigues
Jónatas Machado
Paulo Pinto de Albuquerque

HORIZONTAL INTEGRATION AND UNION BASED ON THE RULE OF LAW

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Alessandra Silveira*

On 17-18 May 2021, in the context of the "High Level Conference - Rule of law in Europe", one of the recurrent concerns among speakers was the fact that the rule of law barely says much to citizens, it does not appear as a priority in Eurobarometers, perhaps because citizens do not perceive its importance and the consequences of any transgression of it. Given that what we discuss and research among the academic circle only adds value if it can be understood by civilian society, we start this text with what is a plain and obvious idea for legal scholars, but worth remembering when writing for a wider audience: that there can be no notion of legitimate power without the idea of law, since law legitimizes the exercise of power, in so far as it controls and moderates it.

The expression "the rule of law" means that the exercise of public power is subject to legal rules and procedures (legislative, executive, judicial procedures), which allow citizens to monitor (and eventually challenge) the legitimacy of decisions taken by the public power (that is, the constitutionality, legality, regularity of these decisions). That is why the basic idea of the expression "the rule of law" would be to submit power to law, restraining the natural tendency of power to expand and operate in an arbitrary manner. To position oneself in favour of the rule of law means, these days, to intend that public institutions must aim at guaranteeing fundamental rights.

In any case, the value of the rule of law tends to extend beyond the organizational scheme of the State, as it underlies the defence of its

* School of Law, University of Minho.

citizens against any power – be it the traditional power of the State, or the power of novel political constellations such as the European Union, be it the power of private organizational complexes – such as market forces, internet forces, sports forces, etc. We coexist with countless *de facto* powers, many of them with transversal origins, without any element of connection with the traditional power of the State, in a process identified as the deterritorialization of power. As Gustavo Zagrebelsky, Ulrich Beck and Zygmunt Bauman have explained well, a deterritorialization of power has taken place, and it is no longer exercised exclusively in territorial terms, with a growing divorce between power and politics – or between power and legitimacy. All of this points to the idea of a rule of law beyond the State (in its modern conception), which is why today there is more discussion around the design of a "Union of law" in relation to the European Union.

The principle of the rule of law is mentioned in the preambles of the Treaty of European Union (TEU) and of the Charter of Fundamental Rights of the European Union (CFREU), as well as in Article 2 TEU. However, long before the rule of law principle was expressly enshrined in the constitutive treaties, the Court of Justice had already stated in the *Les Verts* judgment of 1986,[1] that the (then) European Economic Community would be a "Community based on the rule of law", in the sense that neither the Member States that make it up nor the European institutions would be exempted from checking the conformity of their acts with the "basic constitutional charter" to which the constitutive treaties correspond. In *Les Verts*, therefore, we identified the bases for the recognition of the (current) European Union as a Union under law, as well as constitutive treaties such as the Constitutional Treaty of the European Union.

Although there is no definition of the rule of law in the constitutive treaties, from the judgments of the Court of Justice it is clear that this is a fundamental norm, which guides and conditions the exercise of public powers. The rule of law is the source of the principles in force in the Union's legal system, such as the principle of legality, the principle of legal certainty, the principle of the protection of legitimate expectations, the prohibition of arbitrariness by the public authorities,

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[1] Judgment *Parti écologiste Les Verts v European Parliament*, of 23 April 1986, 294/83, EU:C:1986:166.

the principle of the balance of power, the principle of equality before the law, and the principle of effective judicial protection, etc. It is a core rule that requires all citizens to be treated by all decision-makers in a dignified, equitable manner, in accordance with the law, giving citizens the opportunity to challenge such decisions before independent and impartial courts.

In any case, those principles are not (and should not be) purely formal and procedural requirements, as they are the means of ensuring respect for democracy and fundamental rights. The rule of law is re-presenting itself today in a global context – marked by fragmentation, financialization, digitalization – which is not exactly a favourable scenario for it. For this reason, proclaiming the value of the rule of law must be interpreted as an attempt to recover, by western legal-political culture, its most recognized and precious heritage.

Why acknowledge and emphasize this now? The answer to this question lies on the fact that the rule of law has been under increasing pressure in Europe. Indeed, the rule of law is not immune to the recent crises that the EU has gone through and is still going through, from the European debt crisis, the migrant crisis, followed by the constitutional crisis with Brexit and the populist drift, and now, the health emergency due to the Covid-19 pandemic. The rule of law is threatened when a significant number of actors, in different sectors and different Member States, fail to guarantee normative expectations to the point of creating a deficit in confidence in the law and in public institutions. However, public confidence in the legal systems of all Member States is crucial for the functioning of the European Union as a whole.

Currently, decisions in the field of civil and commercial law of any national court must be automatically recognized and enforced in another Member State – and a European arrest warrant issued in one Member State must be executed in another Member State. This clearly illustrates why all European citizens are affected if the rule of law is not fully respected in a given Member State – which threatens the functioning of the European Union as a realm of freedom, security, and justice without internal borders. That is why the European Union's capacity to defend the rule of law is essential, because it is a question of fundamental values; a question of "who we are", as the European Commission's Vice-President, Frans Timmermans, has already stated.

A community of law such as the European Union presupposes the exercise of a jurisdictional function – separate and distinct from any governmental function. Based on the criteria of judicial independence, the Court of Justice has broadened the scope of protection of the principle of the "Union based on the rule of law" (what does it protect? what does it prohibit?), imposed since the *Le Verts* judgment to a rule that *i)* imposes limits on the European institutions and Member States action in areas covered by Union law, and *ii)* provides guarantees of the rights of individuals affected by European provisions.

In the 2018 *Associação Sindical dos Juízes Portugueses*[2] ("Portuguese Judges") judgment, the Court of Justice was asked to determine whether there is a general principle of EU law, according to which the authorities of the Member States are obliged to respect the independence of domestic judges, as well as to maintain their remuneration at a constant and sufficient level so that they can exercise their functions freely.[3] In its response, the Court of Justice underlined that Article 19 TEU obliges Member States to ensure effective judicial protection in areas covered by EU law. This embodies the value of the rule of law stated in Article 2 TEU and recognizes the integrated nature of the EU's judicial system, as national courts play a role which is jointly assigned to them with the Court of Justice with a view to ensuring respect for the law in the interpretation and application of Treaties. Thus, a problem related to judicial independence in Portugal is necessarily a European problem since domestic courts ensure the application of EU law in each Member State.

Moreover, in the "Portuguese Judges" judgment, the Court of Justice stated that judicial independence presupposes that this judicial function is exercised with total functional autonomy, that is, i) without being subjected to any hierarchical or subordinate link, ii) without receiving orders or instructions from any origin, and iii) protected

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[2] Judgment *Associação Sindical dos Juízes Portugueses*, of 27 February 2018, C-64/16, EU:C:2018:117.

[3] Cf. Alessandra Silveira / Sophie Perez, "A Union based on the rule of law beyond the scope of EU law – the guarantees essential to judicial independence in Associação Sindical dos Juízes Portugueses", *Thinking & Debating Europe – The official blog of* UNIO – EU *Law Journal* (3 April 2018), available at <https://officialblogofunio.com/2018/04/03/a-union-based-on-the-rule-of-law-beyond-the-scope-of-eu-law--the-guarantees-essential-to-judicial-independence-in-associacao-sindical-dos-juizes--portugueses/>.

against external interventions or pressures, which may affect the independence of any judgment of its members and influence their decisions. In particular, protection against removal from office of magistrates and remuneration appropriate to the importance of the functions they perform were mentioned by the Court of Justice as guarantees inherent to judicial independence.

To this extent, in the "Portuguese Judges" judgment, the Court of Justice defined judicial independence within the meaning of EU law, establishing criteria and guarantees for its proper exercise. In later judgments, the understanding of the concept was developed, according to which domestic courts and the Court of Justice share the responsibility for ensuring the full application of EU law in all Member States, as well as judicial protection of the rights conferred on individuals by the European Union. On this basis, measures that make it impossible for domestic courts to perform their functions as courts of the European Union ultimately prevent the Court of Justice itself from complying with its jurisdiction under Article 19 TEU, in order to ensure respect for the law in application and interpretation of Treaties.

This has far-reaching consequences within the framework of the European Union's legal-constitutional model. By giving methodical operability to the values on which the European Union is founded, the Court of Justice has faced up to the challenges of "non-rule of law" that makes constitutional courts partisan across Europe, and instrumentalizes the constitutional identity of the Member States in subverting the application of EU law. The case law of the Court of Justice has reflected an extremely sensitive interpretation of the political and institutional balances on which the Union's survival as a project of legal-political integration depends.

It is important to consider that the rule of law is not pursued only through the courts, as all public bodies must live up to their responsibilities. Indeed, in the toolbox for the rule of law within the framework of the European Union there are also instruments of an essentially political character – for example, the European Commission's annual report on the rule of law, discussed and considered in other Union institutions since 2020, in order to identify weaknesses regarding judicial independence, the fight against corruption, media pluralism, checks and balances – that is, regarding the institutional framework for surveillance and scrutiny by public authorities.

In addition to this preventive mechanism, there are two other political tools whose practical consequences remain unknown: one of them would be the Article 7 TEU procedure, which would aim at verifying the existence of a manifest risk of a serious violation of the values of the European Union by a Member-state (in a first phase), as well as the existence of a serious and persistent violation of those values (in a second phase). And another policy tool recently created would be the Rule of Law Conditionality (Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget).

As for the procedure provided for in Article 7 TEU, it is actionable when a sudden deterioration of the rule of law in a Member State requires a stronger and more structured reaction on the part of the European Union. Moreover, this is the most emblematic political instrument available to defend the rule of law in the European Union, despite its weakness of requiring unanimous approval from Member States, in order to decide whether there is a serious and persistent violation of Union values, which would lead to the suspension of the rights of the Member State which prevaricates – and even their right to vote in the Council.

To date, this procedure has only been triggered in two specific cases: in December 2017 against Poland (at the initiative of the European Commission) and in September 2018 against Hungary (at the initiative of the European Parliament). However, the procedure never went beyond the first phase (verifying the existence of a manifest risk of a serious violation of the values of the Union), the deliberation of which does not require the unanimity of the Member States but the qualified majority of 4/5 of the members of the Council. The unanimity of the European Council is only required in a second phase in order to verify the existence of the serious and persistent violation of the values of the Union, which may lead to the suspension of rights of the Member State in a third phase by decision of the qualified majority of the Council – that is, 72% of the members of the Council that make up 65% of the population [Articles 354 and 238(3) b) Treaty of Functioning of the European Union (TFEU)].

The Portuguese Presidency of the Council of the EU finally announced its intention to hold the Hungary and Poland hearings at the end of June 2021 – a procedure triggered under the application of

Article 7 TEU. However, in Hungary's case, this process is only being carried out more than ten years after the first alarms were raised by the European Parliament, which early intervention would have made it possible to act in a timely manner and avoid the worst. What is the point now of verifying the existence of a clear risk of a serious breach, if the risk has already been confirmed – and will both Member States protect each other to avoid the unanimity that would then lead to sanctions? It is only possible to offer some effectiveness to the provisions of Article 7 TEU through the adoption of alarm mechanisms – which oblige the EU institutions to give precedence to the rule of law in all interactions with the government of a Member State that is the target of such a procedure.

Hungary was able to delay the Article 7 TEU procedure by seeking the annulment of the European Parliament's resolution to the Court of Justice under Article 263 TFEU. In the Opinion presented by the Advocate General Michael Bobek delivered on 3 December 2020, no error was identified in the interpretation of the relevant rules or in the practice of the European Parliament, so the Advocate General proposed to the Court of Justice that Hungary's action for annulment should be dismissed.[4] It was in question whether or not the reasoned proposals adopted under Article 7 TEU would be subject to judicial review in the light of Article 269 TFEU, as well as how abstentions in the European Parliament should be considered in order to determine whether the majority of 2/3 of the votes cast required by Article 354 TFEU had been achieved. On June 3, 2021, the Court of Justice dismissed Hungary's appeal as unfounded.[5]

As for the Rule of Law Conditionality (Regulation 2020/2092) – aimed at protecting the Union's financial interests, which are at risk due to the general weakness of the rule of law in a Member State – its application depends on the decision of the Court of Justice regarding

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[4] Cf. Conclusions presented on December 3, 2020 by Advocate General Michael Bobek in Case C-650/18, ECLI:EU:C:2020:985.

[5] Judgment *Hungary v European Parliament*, of 3 June 2021, C-650/18, ECLI:EU:C:2021:426. On the theme cf. Alessandra SILVEIRA / Maria Inês COSTA, "The rule of law and the defence of citizens against any power (on the case C-650/18 Hungary v European Parliament)", *Thinking & Debating Europe – The official blog of* UNIO – EU *Law Journal*, 4 June 2021, available at <https://officialblogofunio.com/2021/06/04/the-rule-of-law-and-the-defense-of-citizens-against-any-power-on-the-case-c%e2%80%91650-18-hungary-v-european-parliament/#more-5218>.

two actions for annulment, namely case C-156/21 (whose applicant is Hungary) and case C-157/21 (whose applicant is Poland) both of 11 March 2021. Regarding the Rule of Law Conditionality Regulation, it is important to highlight the European Parliament Resolution of 16 December 2020, in which the Parliament demarcated itself from the Conclusions of the European Council of 10 and 11 December 2020, according to which i) the guidelines to be adopted by the European Commission regarding the application of the Rule of Law Regulation will be developed in close consultation with the Member States, and ii) until these guidelines have been completed, the European Commission will not propose measures under the Rule of Law Regulation. The European Parliament reacted strongly to the European Council's conclusions by stressing the fact that it does not exercise legislative functions and that a political statement by the European Council does not represent an authentic interpretation of the legislation.

It should be noted that under the provisions of Article 17(3) TEU, the European Commission must act independently, and it shall not receive any instructions from any Government or Union institution/body, meaning the European Council does not have powers to prevent the Commission from acting in defence of the application of EU law.[6] Thus, the European Commission's Vice-President, Vera Jourová, admitted publicly at the "High Level Conference - Rule of law in Europe" that, as soon as the Court of Justice rules on the Rule of law Regulation, it will be applied retroactively from 1 January 2021, with the European Commission vigilant as to any breach of the rule of law after that date.

Are such mechanisms of political control of respect for the rule of law in the European Union enough? Apparently not, since the governments of the Member States play both sides – the national and the European one – and tend to protect each other when they are part of European institutions of an intergovernmental character – namely, the Council of the European Union and the European Council. Perhaps it may be necessary to come up with solutions that have been proposed by the European Parliament for years, such as the establishment of

[6] Cf. Pedro FROUFE / Tiago CABRAL, "Heresy, realpolitik, and the European Budget", *Thinking & Debating Europe – The official blog of* UNIO – EU *Law Journal* (4 January 2021), available at <https://officialblogofunio.com/2021/01/04/editorial-of-december-2021/>.

an independent Copenhagen Commission, which would perform an on-going verification of the rule of law and fundamental rights in all Member States – an idea developed in the European Parliament report of 30 January 2019 on the application of CFREU. Given that there are criteria for the accession of a European State to the European Union under Article 49 TEU – criteria adopted at the Copenhagen European Council in 1993 – these cannot only serve as pre-conditions for accession, but also as references on the basis of which Member States are periodically evaluated.

Furthermore, the Strategy of 2 December 2020 aimed at strengthening the application of the CFREU provides that from 2021 onwards the European Commission will present a new annual report on the application of the Charter in EU. Unlike the Commission's previous reports on the CFREU, this one will look more closely at the application of the Charter in the Member States and will provide the Commission with new elements for assessing the compliance of national legislation with EU law. A recent Eurobarometer survey showed that only 42% of respondents had heard about the Charter and that only 12% actually know what it is and what it stands for. However, six out of ten respondents want to know more about their rights and what bodies and institutions they should turn to, and whether their rights under the Charter have been violated.

Recalling the ideas present at the beginning of this text, why is it important to make citizens more aware of the value of the rule of law and the European values culture in the present historical moment?

Because the entire legal-constitutional construction of post-war Europe is based on the idea that in the absence of the rule of law, democracy becomes the tyranny of the majority. Without the rule of law, we are left with nationalist populism and its disastrous consequences. Nationalist populism seeks to achieve its goals by destroying the dialectical connection between democracy and the rule of law, as if the will of the majority has no limits in a democracy, allegedly because the popular will is above institutions. Such populist movements gain strength and come to power precisely through the instrument of formal democracy – that is, through voting and the majorities that the vote is capable of forming. These phenomena are potentially threatening to democracy, however much they are generated in democracy, from the exercise of fundamental rights that

define and sustain it – such as freedom of expression and association. Therefore, more than ever, it is necessary to explain to citizens how the dialectical relationship between the rule of law and democracy works – and to combat its subversion.

Maybe the pandemic situation has brought about the decisive timing to tackle the theme of European integration from the standpoint of individuals, in the light of their daily experiences of life, from the horizontal integration perspective – even if in a digital environment because of the health crisis – and not as much (or not only) from the perspective of vertical integration.[7] When we discuss themes such as "EU republican citizenship", "EU polity", and "EU democracy" we are immediately faced with some proposals of institutional reforms in the European Union, always determined by a vertical integration angle. However, perhaps this is the time to tackle the problem from a horizontal integration standpoint – or from a shared horizon of living, in which a collective will can be created through expansive communication. As explained by Ulrich Beck, only when individuals understand the European Union as a project of their own, only when they are in the position to assume the perspective of other Member-States' citizens, only then will there be an adequate environment in which to talk, properly, of a European democracy.[8]

The pandemic we are still living through is particularly propitious to Europeans raising awareness on how we all share the same political destiny. To this extent, "How is it possible to guarantee that a larger number of individuals can have the opportunity of learning to see themselves through the eyes of others?" (e.g., through the eyes of other Member-States' citizens). This question could be broken down into several others: "How can we open privileged channels of communication between individuals? And which channels should be opened? And who would be the translators, i.e., the bodies responsible for intermediation, the agents who communicate the interests and realities of all interested parties?" (in a broader sense of the term, relating concerning

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[7] On the topic cf. Alessandra Silveira *et al.,* "Conference on the future of Europe and the defence of European values", *Thinking & Debating Europe – The official blog of* UNIO – EU *Law Journal* (6 May 2021), available at <https://officialblogofunio.com/2021/05/06/editorial-of-may-2021/>.

[8] On the topic cf. Ulrich Beck, *A Europa alemã – de Maquiavel a «Merkievel»: estratégias de poder na crise do euro*, Lisbon: Edições 70, 2013.

"driving towards us", revealing mindsets and different world views, as we are only interested in what we know).[9]

It is time to scrutinize the European political community, revealing the current Europe of European citizens,[10] and doing it by departing from civilian society, i.e., from what civilian society can do in this sense beyond public authorities. It is important to consider the extent to which trust in European solutions to tackle the health crisis can create a political space that reconciles Europeans, promoting compromises between different visions of Europe. It is important to find solutions of vertical integration and (most of all) of horizontal integration that allow us to choose between different political alternatives to the Union, in detriment to the "lazy" choice of being for or against remaining in the European Union.

Indeed, it is not an easy undertaking – but it is not impossible either. Everything becomes more complicated as European citizens from the north and the south, from the east and the west, from more or less robust economies, etc. aim for different and sometimes contradictory goals. However, looking at things more closely, the differences between European citizens also are reproduced inside the Member States – and it has been possible to manage and to accommodate them democratically.

This is where the concept of solidarity of citizens among citizens emerges, so that they become more responsible with one another. The idea of equivalent cost sharing can be disseminated through learning processes; it can be stimulated by the perception of political and economic needs. And that is how trust is built, and traditions are altered. As more and more citizens find themselves able to understand the influence of European Union decisions on their lives – and the more this is emphasized by the media – the wider their interest in exercising their democratic rights as European citizens will be.

The solution is widely studied and requires a different approach not only from i) national governments (which tend to "nationalize" successes and "Europeanize" failures to win elections), but also from

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[9] Cf. Eduardo Prado Coelho, "Unidos na diversidade?", in Paula Moura Pinheiro, ed., *Portugal no futuro da Europa*, Lisbon: Gabinete em Portugal do Parlamento Europeu/Representação da Comissão Europeia em Portugal, 2006, 75.

[10] The idea is put forward by Ulrich Beck, regarding a social contract for Europe, cf. *A Europa alemã*, 101.

ii) national media (which can contribute decisively to the reciprocal opening up of public opinion in the Member States) and from iii) national political parties (that have sown separationist trends between national and European policy and are now dealing with rising populism).

Perhaps the "Conference on the Future of Europe" could become a forum for reflection and dialogue around multiple issues associated with the development of a European political community. It is relevant to consider how European and national authorities can develop emotional communication with European citizens – communicating with people's concerns, creating more empathy, and deepening European identity – as long as it also unravels to what extent civilian society can proceed with that goal.

CROSS-BORDER INSOLVENCY'S GOOD PRACTICES: SOME ASPECTS AND ONE PROJECT

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Alexandre de Soveral Martins*

1. The importance of the issue

Cross-border insolvency good practices in cooperation and communication are of the utmost importance for citizens' lives because they are crucial to saving businesses and jobs and to maximizing value for creditors, especially when dealing with main and secondary insolvency proceedings in different jurisdictions.

The importance of having a legal environment with tools that may help in avoiding value destruction in insolvency proceedings is clear. A business-friendly context allows enterprises to overcome economic and financial difficulties.

Achieving those goals in cross-border insolvency procedures depends on cooperation and communication between courts, between insolvency practitioners and between courts and insolvency practitioners[1]. The task becomes even more daunting in group member

* Associate Professor, Univ Coimbra, University of Coimbra Institute for Legal Research. Faculty of Law. ORCID ID 0000-0001-6480-3492. <soveralm@fd.uc.pt>.

[1] Problems related with cooperation exist in many jurisdictions. For an analysis focused on East Asia, see Angus Francis, "Cross-border Insolvency in East Asia: Formal and Informal Mechanisms and UNCITRAL's Model Law", in Roman Tomasic, ed., *Insolvency Law in East Asia*, London-New York: Routledge, 2006, 535-551 (at p. 550, the author writes: "national insolvency regimes that encourage cooperation in the resolution of these cases are needed").

insolvencies. Tools are available, but it is necessary to know if and how they are being used[2].

2. EU Insolvency Regulation 2015/848.

EU Insolvency Regulation 2015/848 (Recast EIR) replaced Regulation (CE) 1342/2000[3] (EIR), and applies to all EU member states except to Denmark. Recast EIR may apply not only to liquidation proceedings, but also to pre-insolvency and hybrid proceedings (see Annex A).

Recast EIR contains several provisions on cooperation and communication duties. Recital 48 of the Recast EIR reads that cooperation should take into account best practices, as set out in the principles and guidelines adopted by European and international organisations: "Main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realization of the total assets if there is proper cooperation between actors [..]. Proper cooperation implies the various insolvency practitioners and the courts involved cooperating closely"[4].

Cooperation duties were present in the 2000 EIR, but only addressed insolvency practitioners[5], and there were "no prescriptions

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[2] A discussion about "whether and what sorts of measures may foster or at least not harm cooperation" may be found" in Irit MEVORACH, *The Future of Cross-Border Insolvency*, New York: Oxford University Press, 2018, 169 ff.

[3] See, on the pretexts for the Recast EIR, the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) N.º 1346/2000 on insolvency proceedings COM(2012) 744 Final.

[4] As Reinhard BORK, "The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency", *Int'l Insolvency Rev* 26 (2017) 246-269, at p. 259, access in 25.9.2021, available at <https://onlinelibrary.wiley.com/toc/10991107/2017/26/3>, wrote, the principle of cooperation "has its foundations in the European Law principle of EU member states assisting one another". The author also emphasizes that "UNCITRAL has not published any guidelines on this topic; what could have been meant by this was the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation from 2009". See also, on the principle of (sincere) cooperation, CJEU, *Bank Handlowy w Warszawie SA and* PPHU "ADAX"*/Ryszard Adamiak v. Christianapol sp. Z o.o.*, Case C-116/11.

[5] See Alexandre de Soveral MARTINS, "O Regulamento (EU) 2015/848 relativo aos processos de insolvência", in *Estudos de Direito da Insolvência*, 2.ª ed., Coimbra: Almedina, 2018, 76.

allowing liquidators to conclude agreements and protocols"[6]. Therefore, opinions were divided about their legality[7].

Good practices are well known alternatives to the political unanimity under Article 81 TFEU regarding the development of judicial cooperation in civil matters and they also eliminate obstacles to the proper functioning of civil proceedings[8]. Those issues are still related with the Stockholm Programme in the Area of Freedom, Security and Justice, and with post-Lisbon Treaty concerns.

Some Guidelines and Principles are already available. I would mention here the *Uncitral Practice Guide* (on cross-border insolvency cooperation), the Prospective Principles for Coordination of Multinational Corporate Group Insolvencies, the EU JudgeCo Cross-Border Insolvency Court-to-Court Cooperation Principles, the EU JudgeCo Cross-Border Insolvency Court-to-Court Communications Guidelines, the *Global Principles for Cooperation in International Insolvency Cases*, including *Global Guidelines for Court-to-Court Communications in International Insolvency Cases* (drafted by Ian Fletcher and Bob Wessels), the The American Law Institute's Principles of Cooperation among Nafta Members (ALI/Nafta Principles) and *Guidelines*, and the *European Communication and Cooperation Guidelines for Cross-Border Insolvency* (CoCo Guidelines), developed under the aegis of *Insol Europe* by Bob Wessels and Miguel Virgós. The Judicial Insolvency Network conceived the *Modalities of Court-to-Court Communication*, already adopted by the Bankruptcy Court for the District of Delaware, the Bankruptcy Court for the Southern District of New York, the Su-

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[6] See Renato MANGANO, "From 'Prisioner's Dilemma to Reluctance to Use Judicial Discretion: the Enemies of Cooperation in European Cross-Border Cases", *Int'l Insolvency Rev.* 26 (2017) 314-331, at p. 317, access in 25.9.2021, available at <https://onlinelibrary.wiley.com/toc/10991107/2017/26/3>. Ilya KOKORIN / Bob WESSELS, *Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups*, Cheltenham/Northampton: Elgar, 2021, 30, wrote that the Recast EIR uses agreement and protocol "interchangeably".

[7] See, on the different opinions, Ellen DELZANT, "Article 41", in Eberhard BRAUN, her., *Insolvenzordnung*, 8. Aufl., München: Beck / Beck-online, 2020, Rn. 10, access in 25.9.2021, available at <https://beck-online.beck.de/Dokument?vpath=bibdata%2FKomm%2FBraunKoInsO_8%2Fcont%2FBraunKoInsO.Inhaltsverzeichnis.htm&anchor=Y-400-W-BRAUNKOINSO&opustitle=BraunInsO>.

[8] Bob WESSELS, EU *Cross-Border Insolvency Court-to-Court Cooperation Principles,* The Hague: Eleven, 2015, 38.

preme Court of Singapore and the Seoul Bankruptcy Court.

Last year, the French *École Nationale de Magistrature*, in partnership with institutions from Belgian, Spain and Poland, published *Best Practices Guidelines for Judicial Cooperation in* EU *cross-border insolvency proceedings*.

Protocols mentioned in art. 41 of the Recast EIR[9] are useful to try to avoid opportunistic behaviours[10]. Recital (49) reads that insolvency practitioners and courts should be able to enter protocols, as well as agreements, "for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies".

Agreements on coordination are also accepted by UNCITRAL *Model Law on Enterprise Group Insolvency*. However, Art. 43 of the Recast EIR does not mention cooperation and communication of courts with insolvency practitioners[11], nor does it pay special attention to cooperation and communication with registry offices.

3. The Project

Circumstances will determine how easy cooperation may be. Many issues will depend on a creditor's attitude, as well as on the type of proceedings. Cooperation will probably be easier if all proceedings are liquidation proceedings[12]. But cooperation, protocols and other

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[9] See also arts. 42, 3, 43, 56, 1, 57.

[10] Alexandre de Soveral MARTINS, "O Regulamento (EU) 2015/848 relativo aos processos de insolvência", *Estudos em Homenagem ao Prof. Doutor Manuel da Costa Andrade*, vol. III, Coimbra: Universidade de Coimbra/Instituto Jurídico, (Studia Iuridica 119) 267-299, p. 287; see also Peter MANKOWSI / Michael MÜLLER / Jessica SCHMIDT, *EuInsVO 2015. Europäische Insolvenzverordnung 2015. Kommentar, 2016*, München: Beck / Beck-online, art. 41, Rn. 63, access in 25.9.2021, available at <https://beck-online.beck.de/?vpath=bibdata/komm/MankowskiKoEuInsvo_1/ewg_vo_2015_848/cont/MankowskiKoEuInsvo.ewg_vo_2015_848%2Ehtm>.

[11] "O Regulamento (EU) 2015/848 relativo aos processos de insolvência", *Estudos em Homenagem ao Prof. Doutor Manuel da Costa Andrade*, vol. III, Coimbra: Universidade de Coimbra/Instituto Jurídico, (Studia Iuridica 119), 267-299, at p. 288. See also *EuInsVO 2015. Europäische Insolvenzverordnung 2015. Kommentar*, *2016*, München: Beck, Beck-online, Art. 43, Rn. 2, access in 25.9.2021, available at <https://beck-online.beck.de/?vpath=bibdata/komm/MankowskiKoEuInsvo_1/ewg_vo_2015_848/cont/MankowskiKoEuInsvo.ewg_vo_2015_848%2Ehtm>.

[12] See *EuInsVO 2015. Europäische Insolvenzverordnung 2015. Kommentar*, *2016*,

agreements also depend on the ability to communicate, and, therefore, on establishing common ground. Insolvency practitioners and judges will have to choose the languages that allow them to understand each other, and they will have to learn how to trust[13]. In fact, mutual trust "is considered one of the key principles of the EU cross-border insolvency regime"[14]. The appointment of an insolvency practitioner may also have to take into account if those chosen are knowledgeable of different languages and foreign laws[15]. However, as Renato Mangano wrote[16], if "courts and insolvency practitioners belong to a jurisdiction that has a restricted culture of judicial discretion, they tend to minimise efforts in cooperation".

It has also been said that "the genuine problem lies with the lack of awareness and knowledge of the available soft law instruments and/or their content"[17]. That is why Professors at the Law Faculty of the University of Coimbra[18], together with Professors from the University of Salamanca[19], from the Polytechnic Institute of Leiria[20] and from the Faculty of Economics[21], are developing a research project on good practices in cooperation and communication in cross-border insolven-

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München: Beck / Beck-online, Art. 41, Rn. 46, access in 25.9.2021, available at <https://beck-online.beck.de/?vpath=bibdata/komm/MankowskiKoEuInsVO_1/EWG_VO_2015_848/cont/MankowskiKoEuInsVO.EWG_VO_2015_848%2Ehtm>.

[13] "From 'Prisioner's Dilemma to Reluctance to Use Judicial Discretion: the Enemies of Cooperation in European Cross-Border Cases", *Int'l Insolvency Rev.* 26 (2017) 314-331, at p. 316, access in 25.9.2021, <available at https://onlinelibrary.wiley.com/toc/10991107/2017/26/3>, asks why cooperation faces so many difficulties: "Are they due to a lack of trust or difficulties in communicating in a foreign language? Probably they are, at least partially".

[14] *The Future of Cross-Border Insolvency*, New York: Oxford University Press, 2018, p.

[15] Helmut ZIPPERER, "Artikel 41", in Heinz VALLENDER, her., *EuInsVO. Kommentar zur Verordnung (EU) 2015/848 über Insolvenzverfahren*, Köln: RWS, 2020, Rn. 63.

[16] "From 'Prisioner's Dilemma to Reluctance to Use Judicial Discretion: the Enemies of Cooperation in European Cross-Border Cases", *Int'l Insolvency Rev.* 26 (2017) 314-331, at p. 323, access in 25.9.2021, available at <https://onlinelibrary.wiley.com/toc/10991107/2017/26/3>.

[17] See Burkard HESS *et al., The implementation of the New Insolvency Regulation. Improving Cooperation and Mutual Trust*, Baden-Baden: Hart/Nomos, 2017, 142.

[18] Professors Alexandre de Soveral Martins (PI), Carolina Cunha (co-PI), Maria José Capelo Resende, Mónica Jardim and Rui Dias.

[19] Professors Fernando Carbajo Cascón and Martín Charro.

[20] Professor Ana Filipa da Conceição.

[21] Professor Catarina Frade.

cy procedures[22].

It is crucial to collect data about judges' and insolvency practitioners' familiarity with those tools and methods. In cases where good practices guides and principles have been applied, the advantages for the administration of proceedings, if any, should be identified.

It has been stated that protocols and other tools to improve cooperation are scarcely used[23]. However, they have been known of, at least since the Maxwell case[24]. Cooperation should take place "to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings" (Art. 41, 1, Recast EIR). Consequently, investigations will have to be instigated as to whether Portuguese Law, as *lex fori concursus*, creates any obstacles to protocols or other arrangements.

One should look for evidence of if and how guidelines and principles have promoted value maximisation in order to obtain the maximum aggregate value, and contributed to saving jobs and businesses – this is also a way of protecting the right to employment and of free enterprise. It will also be interesting to see how trust among judges and insolvency practitioners is being built in Portuguese and Spanish courts.

Furthermore, the Project will look for evidence concerning the advantages of future recognition of cooperation and communication

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[22] Project reference: PTDC/DIR-OUT/0389/2021.

[23] Elisa TORRALBA MENDIOLA, "Cross-Border Insolvencies in the European Union: Recent Case Law and New Challenges", *Cuadernos de Derecho Transnacional*, Madrid, 11/2) (2019) 360-378, at p. 373 ("la práctica demuestra lo muy escasamente que se hace uso de ellos").

[24] United States Bankruptcy Court for the Southern District of New York (Hon. Tina L. Brozman), Case No. 91 B 15741, 15.1.1992, access in 25.9.2021, available at <https://www.nysb.uscourts.gov/>. See Lucian BEBCHUK / Andrew GUZMAN, "An Economic Analysis of Transnational Bankruptcies" *The Journal of Law & Economics*, Chicago, 42 (1999) 775 ff., access in 25.9.2021, available at <https://www.journals.uchicago.edu/toc/jle/1999/42/2>; "Cross-Border Insolvencies in the European Union: Recent Case Law and New Challenges", 11/2 (2019) 360-378, at p. 374; and Stefan REINHART, "Artikel 41", in Rolf STÜRNER / Horst EIDENMÜLLER / Heinrich SCHOPPMEYER, her., *Münchener Kommentar zur Insolvenzordnung*, Bd. 4, 4. Aufl., München: Beck / Beck-online, 2021, (Verordnung (EU) Nr. 2015/848 des Europäischen Parlaments und des Rates vom 20. Mai 2015 über Insolvenzverfahren), Rn. 10, access in 25.9.2021, available at <https://beck-online.beck.de/?vpath=bibdata%2Fkomm%2FMuekoInsO_4_Band4%2Fcont%2FMuekoInsO%2E4%2EInhaltsverzeichnis%2Ehtm>. See also, on the importance of SENDO and EMTEC protocols, SAUTONIE-LAGUIONIE dir., *Le règlement (UE) n.º 2015/848 du 20 Mai 2015 relatif aux procedures* d'insolvabilité, Paris: Société de Législation Comparé, 2015, 259.

duties towards public registers' offices. The Regulation pays no attention to those duties, and we want to know if that makes sense.

Finally, the research group wants to see if it would be feasible to have insolvency courts in Portugal and Spain with cross-border jurisdiction in contiguous territories (Coimbra and Salamanca, for example), and if that would help in overcoming local difficulties concerning the application of the Regulation[25].

[25] Updating: the Project was not recommended for funding by the Portuguese Fundação para a Ciência e Tecnologia (the Portuguese national funding agency for science, research and technology). However, the Project received support letters from the APAJ – Portuguese Judicial Administrator's Association, the Union Association of Portuguese Judges, the CAAJ – Court Officers Monitoring Board, IRN – Notaries and Registers Institute, and the Coimbra's Regional Council of the Portuguese Bar Association.

RULE OF LAW FOUNDATIONS AND EUROPEAN UNION CITIZENSHIP: THEORY AND PRACTICE, BETWEEN CULTURE AND POLITICS

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Ana Margarida Simões Gaudêncio*

«Europe will not be made all at once,
or according to a single plan.
It will be built through concrete achievements
which first create a de facto solidarity».
The Schuman Declaration – 9 May 1950.[1]

Excellencies, Ladies and Gentlemen,

I'm very honoured to participate in this Conference, when Portugal holds the Presidency of the Council of the European Union, and is celebrating 35 years as a Member State of the European Union (whilst facing a crucial stage in the fight against the Covid-19 pandemic, and with a programme focused on the main areas of the EU: reinforcing Europe's resilience; promoting confidence in the European social model; promoting a sustainable recovery; accelerating a fair and inclusive digital transition; and reaffirming the EU's role in the world, based on its openness and multilateralism).

Bearing in mind its Rule of Law foundations, on the one hand, and European Union citizenship as specified and projected in the

* Univ Coimbra, University of Coimbra Institute for Legal Research. Faculty of Law Assistant Professor – Faculty of Law – University of Coimbra – Portugal; UCILeR – University of Coimbra Institute for Legal Research; <anagaude@fd.uc.pt>; <https://apps.uc.pt/mypage/faculty/anagaude; ORCID 0000-0001-6398-6864; Ciência ID E51D-6191-3DBF

[1] *The Schuman Declaration* – 9 May 1950, available at <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en>.

Lisbon Treaty, on the other, I propose a very brief reflection on the cultural and political meaning of Europe, and of the European Union within it. Which implies, both theoretically and practically, emphasizing such a meaning as a civilizational *acquis* and the inner meaning of law as a civilizational project; and, therefore, starting from the analysis of the word Europe as a *signifier*, and regarding the requirement of the recognition of an identifiable meaning of a European *ethos*, and the consequent cultural and political understandings of the *rule of law* in the context of the European Union, from the question of the primacy of supranational law over the national law to the specific autonomy of each Member State.

Such an approach involves regarding, globally, the contemporary pulverization of axiological *reference horizons*, meaning the ideas of *logos* and of *ethos* as foundations of nuclear cultural representations, and, specifically, reflection on the existence of a constitutive *ethos* of Europe, and, within this, on the special cultural and political significance of the European Union. Accordingly, a historically constituted intersubjective *ethos* – not just institutionally affirmed – progressively included within the framework of the European Union, and particularly in the light of the Lisbon Treaty –, but effectively representing the sharing of different *forms of life,* with a culturally-intersubjectively aggregating intention[2].

The splintering of the axiological elements aggregating the *logos* that sustain the *praxis*, confirmed by the diagnoses of European crises, leads to an analysis of the signifier *Europe*, with the requirement to think about the (im)pertinence(s) of the recognition of the (in) existence of a multiply identifiable *signified*, carved out of a European ethos, and of the consequent (im)possibilities of intersubjectivity – between (in)tolerance and hospitality –, and, on such ground, of the (de)limitation of intersubjectivity, which law – and the relations between law and politics – must undertake. Rarefying the axiological referents aggregating the sustaining *logos* – or, at least, the ideal – or the imaginary – of a certain nuclear aggregating cultural representation –, the constitutive *ethos* of the signification Europe seems today to be

[2] Also the title of the new book edited by Loïc Azoulai, *European Union Law and Forms of Life: Madness or Malaise?*, Bloomsbury Academic, 2022 (forthcoming).

progressively fading, in *liquid time(s)*[3]... and the law, as a result, seems to be diluting itself, intentionally and institutionally – whether from a legislative or from a judicial point of view –, in *regulation*, at the service of a harmonization(-unification) and of a reciprocal confirmation of rights whose only link is of an economic-financial nature, veiled by an (inter)subjectively traced (dis)aggregation. In this *diagnosis of crisis*, (inter)subjectivity - also juridical– seems to allow itself to be dominated by finalist *pragmatisms*, under a (merely) discursive summoning of *values*, at the same time being blurred out by the *undefinition* of identity, and, above all, by the *fear of difference*, all of these presented as essential presuppositions of the *peace/security* binomial.

Far from the mythological image of Europe carried on the back of Zeus – *L'enlèvement d'Europe*[4]… – somehow, given the cultural reference it generated (which generated it…) and represents, we have been witnessing the rarefaction of the culturally axiological referents, in recurrent diagnoses of a European crisis, or crises[5]… Which constitute the motto for this reflection, from a juridical -philosophical point of view, on the (im)pertinence(s) of recognizing the meaning of the signifier Europa, and the consequent understanding(s) of juridical intersubjectivity.

The possibilities of a constitutively intersubjective *ethos* of Europe seem currently to be fading away – and this is not just an institutional *ethos*, of which Andrew Williams talks about, for example, in *The Ethos of Europe*[6], but the effective sharing of *forms of life*, within a culturally-intersubjectively aggregating sense. And, within this, the cultural meaning of law also vanishes, intentionally and institutionally, both from the legislative and from the judicial point of view, progressively diluting into regulation, at the service of the harmonization (unification) and the reciprocal (con)formation of rights, veiled by a (inter) subjectively plotted (dis)aggregation. In these continuous and accelerated *metamorphoses*, as also stated by Ulrich Beck[7] – of increasingly

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[3] Zygmunt Bauman, *Liquid Times. Living in an Age of Uncertainty*, Polity, 2006.

[4] Remember, e.g., *L'enlèvement d'Europe*, by Rembrandt (1632), by Jacob Jordaens (1643), by Noël-Nicolas Coypel, (1727), by Valentin Serov, (1910), and others.

[5] Eduardo Lourenço, *A Europa desencantada: para uma mitologia europeia*, Lisboa: Visão, 1994.

[6] Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU*, Cambridge University Press, 2010.

[7] Ulrich Beck, *The Metamorphosis of the World. How Climate Change Is Transforming Our Concept of The World*, Polity, 2016.

problematic definition and sedimentation, in itself and in its material references of meaning, as foundation and value –, several axiological and political-ideological paradigms are daily at stake, and, so, the position of the self vis-à-vis the other becomes increasingly distant, in a devouring individualization[8], in the absence of pondering and of dialogue, which may reflect the senses that, as historically mobilized reference horizons, in their self-transcendentality – whether of intention of justice or validity –, may critically guide the *praxis*. In a human condition of permanent confrontation with *difference*, with the *otherness* of the *other* – positively or negatively considered, depending on the ethical option assumed. Though, independently of all that, the otherness remains – in its equality and its difference –, appealing to a *friendship* that may attend the other in its specificity, as proposed by Jacques Derrida[9]. And, however, an otherness, which, in the words of Zygmunt Bauman, mirrors itself both positively and negatively – and thus bi-fronted (Janus-faced…)[10]. In a determination of post-modernity, within a gradation of being-aside/being-with/being-for, as inspired in Bauman by Emmanuel Levinas[11]. In the

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[8] «Dans les sociétés contemporaines, les individus agissent et se représentent comme libres de toute allégeance, mobiles, solitaires, s'éloignant sans cesse les uns des autres». – François Ost/Michel van de Kerchove, *De la pyramide au réseau?: pour une théorie dialectique du droit*, Facultés Universitaires Saint-Louis: Bruxelles, 2002, 513.

[9] «C'est peut-être dans une région ainsi soustraite à la subjectivité métaphysique que résonne alors, pour Heidegger, «la voix de l'ami». Peut-être s'agit-il de ce que nous appelions plus haut la «communauté» minimale – mais aussi incommensurable à toute autre, parlant la même langue ou priant, ou pleurant pour la traduction dans l'horizon d'une seule langue, fût-ce pour y manifester un désaccord: amitié d'avant les amitiés. Il faudrait ajouter: d'«avant» l'inimitié». – Jacques Derrida, *Politiques de l'amitié*, Paris: Galilée, 1994, 273-274 (9. "En langue d'homme, la fraternité…", 253-300). *Vide* Idem, 339 (10. "Pour la première fois dans l'histoire de l'humanité", 301-340).

[10] See Zygmunt Bauman, *Life in Fragments. Essays in Postmodern Morality*, Oxford: Cambridge –Massachusetts: Blackwell, 1995, 126-138 (5. "The Stranger Revisited – and Revisiting"), mostly 135-137 ("The Stranger ante portas"), and 137-138 ("The Stranger, Janus-faced").

[11] See Zygmunt Bauman, *Life in Fragments*, 44-71 ("2. Forms of Togetherness"), especially p. 49 ff., referring to Emmanuel Levinas. See also Ana Margarida Gaudêncio, *O intervalo da tolerância nas fronteiras da juridicidade: fundamentos e condições de possibilidade da projecção jurídica de uma (re)construção normativamente substancial da exigência de tolerância*: Coimbra, Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, 2019, Part II, 3.2.1.

European geographical-cultural context – Europe is far from being reduced to the geographical area within which it is physically located – the question has arisen with special acuteness: setting Europe before the *Other* seems an inevitable exercise, thus setting Europe before itself. An exercise carried out, between utopia, dystopia and *retrotopia*, as sought, in recent times, in several allegories around Thomas More's – such as by Zygmunt Bauman and Philip Alott[12].

Indeed, the progressive *atomization* of social relations and of their *subjects*, and, therefore, of *intersubjectivity*, illustrate multiple scenarios of at least apparent (and paradoxical...) *deconstructions* of *subjectivity*... As if, in a *critical* reflexivity-retrospectivity, with *individuality* overcoming *personality*, the whole cultural construction, as the generator of *intersubjectivity*, in general, and *juridical intersubjectivity*, in particular, could only be seen as a reflex of the *macroscopically* critical convictions splintering... And as if, in a (compensatory...) counterpoint, (*postmodern*) densifying *communitarian* aggregations are *voluntarily* (re)raised (still *individualistically*...), in *microscopically* substantiated *forms of life*. And the axiological bounds of intersubjective action wavering, then, between supposedly referential hegemonic conservatism(s) and supposedly identity-based vanguardism(s). In the still continuously growing *globalization* movements, generating a *homo communicans*[13] in a *Telepolis*[14], it is the cultural significance of European that is at stake. As we can see, for instance, in the reflections on the *Idea of Europe*, as proposed by George Steiner[15], but also by many other Authors – just for instance, and though differently, in *cosmopolitan approaches*, by Jürgen

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[12] See Zygmunt Bauman, *Retrotopia*, Polity, 2017; Philip Allott, *Eunomia: New Order for a New World*, Oxford: Oxford University Press, 1990; Philip Allott, *Eutopia: New Philosophy and New Law for a Troubled World*, Cheltenham, Northampton: Elgar, 2016, *Foreword*, vii ff.

[13] See, in this sense, João Maria André, "Pluralidade de crenças e diferença de culturas: o ecumenismo do século xv e a educação intercultural na actualidade", in Idem, *Diálogo intercultural, utopia e mestiçagens em tempos de globalização*, Coimbra: Ariadne, 2005, 13-64, 53-54; and Idem, "As utopias do Renascimento e o renascer das utopias", in Idem, *Diálogo intercultural, utopia e mestiçagens em tempos de globalização*, 65-100, 93.

[14] João Maria André, "As utopias do Renascimento e o renascer das utopias", 94, quoting Javier Echeverria, *Telépolis*, Barcelona: Destino, 1994, 19.

[15] George Steiner, *The Idea of Europe*, Nexus Institute, 2004.

Habermas[16], and in Ulrich Beck, and Edgar Grande[17]. Europe, as also Joseph Ratzinger said, is, above all, a cultural and historical concept[18]. In the globalization movement, the meaning of European is discussed, from the free movement of Europeans of the most diverse origins and cultures across the continent to the multiplicity resulting from the immigration of extra-Europeans[19]: Europe, therefore, in its historical-cultural balance, as Beck and Grande state, in a *culture of divided ambivalence* ("Kultur der geteilten Ambivalenz"), which a *reflexive constitutionalism* could foster[20]. With two different models of *cosmopolitanization*: one based on the principle of cosmopolitan integration and the other on the principle of differentiated integration[21]. Which,

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[16] See the crucial reflection proposed by Habermas, in Jürgen Habermas, *Der gespaltene Westen: kleine politische Schriften*, Frankfurt am Main: Suhrkamp, 2004, mostly 52-58 (4. "Gegenmacht Kerneuropa? Nachfragen"), and *ibidem*, 68-82 (6. "Ist die Herausbildung einer europäischen Identität nötig, und ist sie möglich?"): «Eine politische Identität der Bürger, ohne die Europa keine Handlungsfähigkeiten gewinnen kann, bildet sich nur in einem transnationalen öffentlichen Raum. Diese Bewusstseinsbildung entzieht sich dem elitären Zugriff von oben und lässt sich nicht wie der Verkehr von Waren und Kapital im gemeinsamen Wirtschafts- und Währungsraum durch administrative Entscheidungen »herstellen«». – *Ibidem*, 82. See also Seyla Benhabib, "Who are 'We'? Dilemmas of Citizenschip in Contemporary Europe", in Idem, *The Claims of Culture: Equality and Diversity* in *the Global Era*, Princeton: Princeton University Press, 2002, 147-177.

[17] Ulrich Beck/Edgar Grande, *Das kosmopolitische Europa. Gesellschaft und Politik in der Zweiten Moderne*, Frankfurt am Main: Suhrkamp, 2004; and Ulrich Beck, *Der kosmopolitische Blick oder: Krieg ist Frieden*, Frankfurt am Main: Suhrkamp, 2004.

[18] Joseph Ratzinger, *Europa. I suoi fondamenti oggi e domani*, Milano: San Paolo, 2004.

[19] See Michael Walzer, *On Toleration*, New Haven, London: Yale University Press, 1997, 48-51 (3. «*Complicated Cases*», p. 37-51). See also, considering the implications of the diverse European cultural roots in the secularity of the State, Silvio Ferrari, "The New Wine and the Old Cask. Tolerance, Religion and the Law in Contemporary Europe", *Ratio Juris*, 10/1, March 1997, 75-89; and, specifically on the cooperative model and the separatist model concerning relations between Churches and State, recognizing the nature of the cultural diversity underlying the term "European", Iván C. Ibán, "Religious Tolerance and Freedom in Continental Europe", *Ratio Juris*, 10/1, March 1997, 90-107, specially p. 93 ff.: «There is no such thing as a pure European; Europe's greatness lies, in effect, in its assimilation of different cultures». – *Ibidem*, 98.

[20] Ulrich Beck / Edgar Grande, *Das kosmopolitische Europa*, 338-344, 392-393. See also Ulrich Beck, *Der kosmopolitische Blick*, 10 (*Einleitung*: «*Warum des kosmopolitische Blick »kosmopolitisch« ist*», 7-25).

[21] See Ulrich Beck / Edgar Grande, *Das kosmopolitische Europa*, 360-371; Ulrich Beck, *Was ist Globalisierung? Irrtümer des Globalismus – Antworten auf Globali-*

without definitively solving it, could relieve some of the dilemmas of cosmopolitan Europe: universality, integration, insecurity, borders, foreigners[22]… Thus, aiming to overcome the dichotomy between conflicts over inequality and conflicts over the *recognition of difference*[23]. Distinguishing globalization from cosmopolitanization, Beck pragmatically assumes the need for a *cosmopolitan realism*[24]. This cosmopolitan perspective is not intended to be reduced to the establishment of universal brotherhood ties between peoples, or to the emergence of a world republic[25], or to a floating global perspective, or to a supplement that will relocate nationalism and provincialism. It means rather that, in a world of global crises and dangers caused by civilization, traditional differences lose their validity, stating , in such a view, a new *cosmopolitan realism* («(…) es bedarf eines neuen, kosmopolitischen Realismus (…)») necessary for survival[26]. And, thus, a Europe which is not reduced to its cultural and religious roots, and which, beyond Kantian perpetual peace, within those roots, is open to diversity – in an internal *cosmopolitanization of Europe* ("eine innere Kosmopolitisierung Europas")[27].

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sierung, Frankfurt am Main: Suhrkamp, 1997, 2007, mostly VII. Europa als Antwort auf Globalisierung", 259-265. «(...) um eine *exklusives* Europa, also um den Bau der Festung Europa? Oder (...) um ein *inklusives* Europa, das sich als politischer Dompteur wirtschaftlicher Globalisierung begreift, diese aktiv politisch gestaltet. (...) *Ohne Europa gibt es keine Antwort auf Globalisierung*». – *Ibidem*, 261.

[22] Ulrich Beck / Edgar Grande, *Das kosmopolitische Europa*, 385-391.

[23] Ulrich Beck / Edgar Grande, *Das kosmopolitische Europa*, 280-284; Ulrich Beck, *Der kosmopolitische Blick*, 10 ff.

[24] «*Globalismus* vertritt die Idee des Weltmarkts (...).

Kosmopolitisierung muß demgegenüber als *multidimensionaler* Prozeß entschlüsselt werden (...)». – Ulrich Beck, *Der kosmopolitische Blick*, 18.

[25] Differently, in the sense of establishing a global justice, protected, in a subsidiary way, by a *world federal republic* (*Subsidiäre und föderale Weltrepublik*), see Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, München: C. H. Beck, 1999, mostly Zweiter Teil – "Subsidiäre und föderale Weltrepublik", and specially p. 422-426 (16.1 "Eine complexe Weltordnung").

[26] «Kosmopolitischer Blick meint: In einer Welt globaler Krisen und zivilisatorisch erzeugter Gefahren verlieren die alten Unterscheidungen von innen und außen, national und international, Wir und die Anderen ihre Verbindlichkeit, und es bedarf eines neuen, kosmopolitischen Realismus, um zu überleben». – Ulrich Beck, *Der kosmopolitische Blick*, 25.

[27] Ulrich Beck, *Der kosmopolitische Blick*, 249, and 262-266 (Zweiter Teil: *Konkretisierungen, Ausblicke*, VI. "Kosmopolitisches Europa: Realität und Utopie", 245-266).

A *new figure* of Europe, which Derrida himself also drew – as a deconstruction, which, paradoxically maintains the *idea of Europe*, started with the Enlightenment –, in the aftermath of the analysis of the attacks of September 11, and of the occurrence of terrorism in general[28]. Waiting for a *democracy to come*[29], based on the *absolute otherness* – as an immeasurable friendship, or even *of* the immeasurable, on *fraternity*[30], with no exclusions, and always in *hyperbolization*[31].

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[28] Jacques Derrida, in Giovanna Borradori, "Autoimmunity: 'Real and Symbolic Suicides'", in Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, Chicago: University of Chicago Press, 2003, 85-136, 116-118: «I would like to hope that there will be, in "Europe" or in a certain modern tradition of Europe, at the cost of a deconstruction that is still finding its way, the possibility of another discourse and another politics, a way out of this double theologico-political program. "September 11" – whatever is ultimately put under this title – will thus have been at once a sign and a price to pay, a very high price, to be sure, without any possible redemption or salvation for the victims, but an important stage in the process». – *Ibidem*, 118.

[29] «"Democracy to come" does not mean a future democracy that will one day be "present". Democracy will never exist in the present; is it not presentable, and it is not a regulative idea in the Kantian sense. But *there is the impossible*, whose promise democracy inscribes – a promise that risks and must always risk being perverted into a threat». – "Autoimmunity: 'Real and Symbolic Suicides'", 120. On the *democracy to come*, see Jacques Derrida, *Politiques de l'amitié*, 126-127 (specially 4. "L'ami revenant (au nom de la 'démocratie')", 93-129; 10. «Pour la première fois dans l'histoire de l'humanité», 301-340) : «Car la démocratie reste à venir, c'est là son essence en tant qu'elle reste: non seulement elle restera indéfiniment perfectible, donc toujours insuffisante et future mais, appartenant au temps de la promesse, elle restera toujours, en chacun de ses temps futurs, à venir: même quand il y a la démocratie, celle-ci n'existe jamais, elle n'est jamais présente, elle reste le thème d'un concept non présentable». – *Ibidem*, 339.

[30] «*Il s'agirait donc de penser une altérité sans différence hiérarchique à la racine de la démocratie.* (…) cette démocratie libérerait une certaine interprétation de l'*égalité* en la soustrayant au schème phallogocentrique de la *fraternité*». – Jacques Derrida, *Politiques de l'amitié*, 259 (9. «En langue d'homme, la fraternité…», 253-300). «Une démocratie à venir devrait donner à penser une égalité qui ne soit pas incompatible avec une certaine dissymétrie, avec l'hétérogénéité ou la singularité absolue, les exigeant même et y engageant depuis un lieu qui reste invisible mais qui m'oriente ici, de loin, sans doute au-delà du propos heideggerien». – *Ibidem*, 372 ("L'oreille de Heidegger. Philopolémologie (Geschlecht IV)"), 341-419 (2. "L'avoir, l'être et l'autre: Tendre l'oreille, accorder ce qu'on n'a pas", 367-390).

[31] Jacques Derrida, *Politiques de l'amitié*, 264-265. «La fraternisation est toujours prise, comme l'amitié même, dans un processus vertigineux d'hyperbolisation». – *Ibidem*, 267. «(…) ce que nous relevons ici de la fraternité, comme scheme dominant de l'amitié, transporte en celle-ci, comme dans toutes les valeurs sémantiques associées, sa déroutante hyperbole». – *Ibidem*, 268.

And also a *new figure* of the *world*, in a crucial transition in law and juridical institutions[32]. As a context of globalization-*mondialisation* in which *difference* proliferates at all levels of subjectivity, repositioning the problem of the tension between tolerance and intolerance[33]. And a *democracy to come*, beyond the limits of cosmopolitanism, oriented towards a *life together*, in which citizenship is not merely formal, but substantially constructed[34], and in which human rights – as historical, non-natural rights – may become effective[35]; despite specifying cosmopolitanism and world citizenship, for Derrida, the *commitment to justice* may not be fully fulfilled within the limits of law and of cosmopolitanism[36].

The fast horizontal levelling promoted by so-called *globalization* has provoked the most disparate reactions, in all directions, from the most radical optimism within the creation of a market on a global

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[32] «I do not wish to grant too great a privilege to the juridical sphere, to international law and its institutions, even if I believe more than ever in their importance». – Jacques Derrida, in Giovanna Borradori, "Autoimmunity: 'Real and Symbolic Suicides'", 119.

[33] «Borradori: What is the relationship between globalization – or what you call *mondialisation* – and tolerance?

Derrida: If the term and theme of tolerance have come back of late, it is perhaps to accompany what is called in a rather simplistic and confused fashion the "return of the religious". (…) In tolerance, then: how old is that concept? Can one still ask the question, "What is tolerance?" as Voltaire did in the first sentence of his article on the subject in the *Philosophical Dictionary*? How would this article be written today? Who would write it, with and without Voltaire?». – Giovanna Borradori, "Autoimmunity: 'Real and Symbolic Suicides'", 124-125, referring Voltaire, "Tolerance", in *The Philosophical Dictionary*, E. R. Dumont, 1991, 10: 100-112.

[34] Jacques Derrida, in Giovanna Borradori, "Autoimmunity: 'Real and Symbolic Suicides'", 130-131.

[35] «We must (*il faut*) more than ever stand on the side of human rights. *We need* (*il faut*) *human rights*. We are in need of them and they are in need, for there is always a lack, a shortfall, a falling short, an insufficiency; human rights are never sufficient. Which alone suffices to remind us that they are not natural. They have a history (…)». – Jacques Derrida, in Giovanna Borradori, "Autoimmunity: 'Real and Symbolic Suicides'", 132.

[36] *Vide* Giovanna Borradori, "Deconstructing Terrorism", in Giovanna Borradori, *Philosophy in a Time of Terror*, 137-172, 163. On the notion of law in Derrida, and the discussion between law and justice, mostly the consequences of the Modern identification of *law* as *legality*, see José Manuel Aroso Linhares, "Dekonstruktion als philosophische (gegenphilosophische) Reflexion über das Recht. Betrachtungen zu Derrida", *Archiv für Rechts- und Sozialphilosophie* 93/1 (2007) 39-66.

scale to the fear of cultural uprooting and insecurity[37], from the possibility of democratization of a growing number of countries to the increasing of material inequality, and of conflicts, and even of terrorism. Which, as analysed by Derrida and Habermas, taking different plans and options, though converging in some criticisms and results – such as inequality and the link between globalization and the Enlightenment –, will undertake different assumptions, as Derrida understands globalization either as a *factor* of modernization and as its *result* – in an *autoimmune crisis* –, or as a *rhetorical illusion of modernization*, and Habermas states that *reason* – a *transparent non-manipulative communicative act* – is a response to the challenges of modernization, and of a culturally peaceful *globalization* – economically inevitable –, demanding a self-reflection of the West on itself[38].Which, materialized in the so-called "September 11", imported unprecedented cultural, social and political consequences, in a cosmopolitanism of increasingly different and more diffused contours, and, therefore, in some moments and readings, the restatement of a cosmopolitanism, in some sense also inspired by Kant[39] – in Habermas's reading, at a *supranational level*, in view of the manifest insufficiency of the Nation-State in the face of the pluralism implied in globalization, and of the concomitant risks[40]. The

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[37] See José Manuel Aroso Linhares, "Jus Cosmopoliticum e Civilização de Direito: as 'alternativas' da tolerância procedimental e da hospitalidade ética", *Boletim da Faculdade de Direito* 83 (2006) 135-180, 153-156.

[38] Giovanna Borradori, *Philosophy in a Time of Terror*, 20 ("Introduction. Terrorism and the Legacy of the Enlightenment", 1-22).

[39] «Perhaps at a later point important developments will be traced back to September 11. But for now we do not know which of the many scenarios depicted today will actually hold in the future. The clever, albeit fragile, coalition against terrorism brought together by the U. S. government might, in the most favorable case, be able to advance the transition from classical international law to a cosmopolitan order». – Jürgen Habermas, in Giovanna Borradori, "Fundamentalism and Terror. A Dialogue with Jürgen Habermas", in Idem, *Philosophy in a Time of Terror*, 25-43, p. 27 (see also Jürgen Habermas, *Der gespaltene* Westen, 1. "Fundamentalismus und Terror", 11-31).

[40] «Die Globalisierung des Verkehrs und der Kommunikation, der wirtschaftlichen Produktion und ihrer Finanzierung, des Technologie- und Waffentransfers, vor allem der ökologischen und der militärischen Risiken stellen uns vor Probleme, die innerhalb eines nationalstaatlichen Rahmens oder auf dem bisher üblichen Wege der Vereinbarung zwischen souveränen Staaten nicht mehr gelöst werden können. Wenn nicht alles täuscht, wird die Aushöhlung der nationalstaatlichen Souveränität fortschreiten und einen Auf- und Ausbau politischer Handlungsfähigkeiten auf su-

(factual) inevitability of the growing pluralism process of coexistence, and of conviviality, within an also growing number of different *forms of life*, would refer, in this sense, to a *constitutional patriotism* ("Verfassungspatriotismus"), as an alternative to the declining *nationalism*[41]. And which, as an expression of a *post-national constellation*, inspires the *idea of Europe* as an *unfinished adventure*, as also in the words of Bauman[42]. Moreover, as Williams assumes[43], affirming a European *ethos* requires the identification of *the* corresponding cultural meaning, on the one hand, and of *the* political meaning, on the other, both intentionally and institutionally. And, concomitantly, projecting both into their corresponding juridical meaning and relevance... Which allows us also to recall the decisive reflection proposed by Habermas, in *The*

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pranationaler Ebene nötig machen, den wir in seinen Anfängen schon beobachten». – Jürgen Habermas, "Der europäische Nationalstaat – Zu Vergangenheit und Zukunft von Souveränität und Staatsbürgerschaft", in Idem, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Frankfurt am Main: Suhrkamp, 1996, 128-153, p. 129-130. See also Idem, "The European Nation State – its Achievements and its Limitations", *Ratio Juris* 9/2 (June 1996) 125-137, specially p. 133-137.

[41] «Die politische Kultur eines Landes kristallisiert sich um die geltende Verfassung. Jede nationale Kultur bildet im Lichte der eigenen Geschichte für dieselben, auch in anderen republikanischen Verfassungen verkörperten Prinzipien – wie Volkssouveränität und Menschenrechte – eine jeweils andere Lesart aus. Auf der Grundlage dieser Interpretationen kann ein »Verfassungspatriotismus« an die Stelle des ursprünglichen Nationalismus treten. Ein solcher Verfassungspatriotismus erscheint manchen Beobachtern für den Zusammenhalt komplexer Gesellschaften als ein zu schwaches Band». – Jürgen Habermas, "Der europäische Nationalstaat", 143. On the cosmopolitan order proposed by Kant, see Immanuel Kant, in the *determination of the cosmopolitan law* (*Das Weltbürgerrecht*): «(…) Dieses Recht, so fern es auf die mögliche Vereinigung aller Völker, in Absicht auf gewisse allgemeine Gesetze ihres möglichen Verkehrs, geht, kann das weltbürgerliche (ius cosmopoliticum) genannt werden». – Immanuel Kant, *Die Metaphysik der Sitten*, Königsberg: Friedrich Nicolovius, 1797-1798, in Wilhelm Weischedel, Hrsg., *Immanuel Kant. Werkausgabe*, Band viii, Frankfurt am Main: Suhrkamp, 1977, Erster Teil. "Metaphysische Anfangsgründe der Rechtslehre", ii. Teil, "Das öffentliche Recht", 3. Abschnitt. "Das Weltbürgerrecht", §62, A 229, B 259, 475-477, 476. *Vide* também Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf*, Königsberg: Johann Friedrich Nicolovius, 1795, in Wilhelm Weischedel, Hrsg., *Immanuel Kant. Werkausgabe*, Band xi, Frankfurt am Main: Suhrkamp, 1977, 191-251. See also José Manuel Aroso Linhares, "Jus Cosmopoliticum e Civilização de Direito", specially 135-151.

[42] See, referring Habermas, Zygmunt Bauman, *Europe: An Unfinished Adventure*, Cambridge: Polity, 2004, mostly 124-142.

[43] Andrew Williams, *The Ethos of Europe*: *Values, Law and Justice in the eu*: Cambridge University Press, 2010, 70 ff..

Crisis of the European Union: A Response (*Zur Verfassung Europas. Ein Essay*), in which, considering the successive integrative steps undertaken – culminating in the Lisbon Treaty –, the Author highlights a tension between the *system* established by the European Union vis-à-vis the *lifeworld* Europe constitutes[44]. Considering the intentionally material densification of juridicity within such divergences, it is crucial to reflect on the conditions of possibility of the axiologically material foundations of the institutionally binding juridical regulations, in view of the functionalization of law derived from the increasing imposition of externally presented goals, on the one hand; and, on the other hand, in view of the assimilation of the growing divergent affirmations of *identity* and *difference*, or, in other words, of the currently noticeable splintering of identities, eventually in *communities of communities*.

The continuous changes in *paradigms* which we have seen since the beginning of the 21st. century – considering the meaning of *paradigm* proposed by Thomas Kuhn[45] –, now not only in a strictly scientific sense, but rather in socio-economic, technological and geo-strategic senses, and, within these, also in political, sociological, philosophical, cultural and political, and, still, juridical ones – reveal a *new world*, not more the one that the 20th century knew. And, within it, theoretically, and practically, the juridical and political new institutionalizations of the Rule of Law play a crucial role, as the frameworks for immediate solutions to the urgency of *praxis*, in order to give it the ground for valuation and guidance criteria, and, consequently, considering the corresponding intersubjectivity approaches that European Union citizenship combines, in its democratic construction, from the cultural, political and juridical points of view. And also reflecting on the decisive impact of the effective realization of the Rule of Law principles in the lives of European Union and of their citizens in the different Member States. Which means, consequently, the improvement of the individual and of the collective representations of the intention and content of European Union citizenship. Take article 20 of the Lisbon

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[44] Jürgen Habermas, *The Crisis of the European Union: A Response* (*Zur Verfassung Europas. Ein Essay*, Suhrkamp: Berlin, 2011), trad. Ciaran Cronin, Polity, 2012.

[45] See Thomas S. Kuhn, *The Structure of Scientific Revolutions*, Chicago: The University of Chicago Press (1962), 1970, specially 10-51 and 208-210.

Treaty[46]: «1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship». Concerning the meaning of such a form of citizenship, as the effective reciprocal recognition of each citizen by the community and in the community, concentrating the reflection on the binding propositions of the Treaty, in article 2, a crucial assumption of the normative principles of European Union citizenship is at stake: «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail». And, referring to article 6, following the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In the European civilizational *matrix* – from pre-Modern times, and first of all, from Roman Law, and, then, Modern, and, still, in late-/post-Modern times –, juridical intersubjectivity expresses the relationships in which rights are correspondingly affirmed towards duties – and, therefore, within a specific *comparability* and *reciprocity* –, dialectically assimilated, between autonomy and responsibility, and presupposing a foundational structure, constituted by normative principles, due to the corresponding accent of the *tertiality* of law towards juridical subjects and juridical reality – within such a continuous historical *construction* and *densification*, allowing for the proposition of an *axiologically normative foundation* of a *materially autonomous meaning of law*[47]. In this assumption, the understanding of the intention and

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[46] *Consolidated Version of The Treaty on European Union*, Official Journal of the European Union, 26.10.2012, available at <https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF>.

[47] See António Castanheira Neves, "Uma reconstituição do sentido do direito – na sua autonomia, nos seus limites, nas suas alternativas", *Revista da Faculdade de Direito da Universidade Lusófona do Porto* 1/1 (2012) available at <http://revistas.ulusofona.pt/index.php/rfdulp/issue/current/showToc, 20-21>; and also Idem, "O direito interrogado pelo tempo presente na perspectiva do futuro", in António Avelãs Nunes / Jacinto de Miranda Coutinho, coord., *O Direito e o Futuro. O Futuro do Direito*, Coimbra: Almedina, 2008, 9-82, p. 42-51 (also in *Boletim da Faculdade de*

content of the binding values set out in article 2 of the Treaty, in their substantive meanings, requires a dialectically continuous constitution within the corresponding meaning of law, re-densifying and renewing their substantial and regulative bindingness. Playing a reflexive and practical role, as a cultural project[48], Law, as a substantially established, and targeted, plural support, and as a binding normative dimension of social practice[49], establishes a crucial normative order in social construction, both for laying on – asserting, at the same time as discussing – axiological foundations – therefore, providing an autonomous normative contribution –, and for structuring political projects. And, therefore, Law constitutes the keystone of the development and of the reinforcement of the substantially and institutionally characterized Rule of Law, as the specifically essential framework for the European Union[50].

Direito 83 [2007] 1-73); Ana Margarida Gaudêncio "From Centrifugal Teleology to Centripetal Axiology(?): (In)adequacy of the Movement of Law to the Velocity of Praxis", *Boletim da Faculdade de Direito* 88/2 (2012) 91-103.

[48] José Manuel Aroso Linhares, "Law's Cultural Project and the Claim to Universality or the Equivocalities of a *Familiar* Debate", *International Journal for the Semiotics of Law* 25 (2012) 489-503.

[49] António Castanheira Neves, "O problema da universalidade do direito – ou o direito hoje, na diferença e no encontro humano-dialogante das culturas", in Idem, *Digesta – Escritos acerca do Direito, do pensamento jurídico, da sua metodologia e outros*, iii, Coimbra: Coimbra Editora, 2008, 101-128, 127-128; Idem, "Pensar o direito num tempo de perplexidade", in Augusto Silva Dias *et al.,* org., Liber Amicorum *de José de Sousa e Brito, em comemoração do 70.º Aniversário*, Coimbra: Almedina, 2009, 3-28, 25-28.

[50] Theodore Konstadinides, *The Rule of Law in the European Union. The International Dimension*, Oxford / Portland: Hart, 2017.

MITIGATING THE COVID-19 PANDEMIC: A PORTRAIT OF THE EXPERIENCE FROM THE LUSOPHONE WORLD*[1]

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André Dias Pereira / Maria do Céu Patrão Neves / Ana Raquel Gonçalves Moniz / Ana Gaudêncio / Inês Godinho / Luís Meneses do Vale / Ana Elisabete Ferreira / Carla Barbosa / Fernando V. Borges/ Vera L. Raposo / Armindo G. Jelembi/ Sandra Alves/ Carlos Serra / Catarina Zamith de Almeida

Abstract: This article aims to provide a reflection on the World Health Organization sponsored Project: "Responsibility for Public Health in the Lusophone World: Doing Justice In and Beyond the Covid Emergency". This initiative was designed to gather experiences and data regarding the preparedness and response to the sars-CoV-2 Pandemic in Angola, Brazil, Mozambique, Portugal and the Macao Special Administrative Region. Launched in November 2020, it combines the in-depth analysis of the most recent legislation and bibliography on the matter with data obtained through a Questionnaire, addressed to a significant number of participants (from healthcare workers to academics and non-government organisations (NGOs), of which there were 41 respondents), which aims to gather different experiences and analyse ethical difficulties, identified in the response to the Pandemic.

Key words: World Health Organization, Public Health, sars-CoV-2, Pandemic, Health Law, Lusophone Countries.

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[1] The Team would like to thank everyone who took part in this Research Project, namely all participants who responded to the Questionnaire, whose contribution was a decisive factor for the success of this Project. We are also incredibly grateful to the guest speakers at our Workshop and Final Seminar: their participation was an important element for the drafting of the Recommendations and Proposals and provided the Team with specialized knowledge from different fields of Law, Medicine and Public Health.

1. Overview

Since the outbreak of SARS-CoV-2, and as the pandemic has crossed borders and spread around the world, the international community has begun to show increasingly intense signs of concern. Successively and cumulatively, national health systems have been confronted with unexpected and very complex problems of allocation of increasingly scarce resources and health professionals have been forced, in a short period of time, to adapt to the profound changes and characteristics of the new pandemic reality.

Some hospitals have adopted patient prioritization protocols, with the potential for dramatic impact on the elderly, excluding them from access to intensive care units; even more severe was the fact that most hospitals did not have the opportunity to establish criteria for access to intensive care, leaving the burden of decision making to health professionals[2]. Both the scarcity of health resources – human (lack of physicians and nurses, especially intensive care professionals) and equipment (ranging from masks and gloves for health care professionals, to ventilators and oxygen for patients, and tests and vaccines to the population in general) - and the impossibility of taking care of all patients and having to make casuistic choices, raised important ethical questions.

As circumstances worsened and more difficulties arose, in every corner of the World, the World Health Organization (WHO) launched, in October 2020, an initiative directed at researchers interested in public health issues, inviting them to present proposals that focused squarely on the ethical assessment of preparedness and response to public health emergencies[3]. Within this broad topic, the research team aimed to specifically highlight the State's political responsibility in the field of public health, with a focus on vulnerabilities and inequalities, as well as resource allocation[4]. As with any 21st century study, the opportunity

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[2] Maria do Céu Patrão Neves, *et al.*, Statement of the World Emergency COVID 19 Pandemic (WeCope) Committee on "Ethical Triage Guidelines for COVID-19", May 2020, available at: <https://www.eubios.info/yahoo_site_admin/assets/docs/WECOPETriage_Statement_for_COVID.151172039.pdf>,last access: 8/05/2021.

[3] The *Call for Proposals* is available at <https://www.who.int/docs/default-source/ethics/call-for-proposals-phephren-oct2020.pdf?sfvrsn=acd14ef2_6>, (ast access: 23/01/2021.

[4] Maria do Céu Patrão Neves, "Ethical health resources allocation: Why the distinction between 'rationing' and 'rationalization' matters", *Revista de Bioética y Derecho* 50 (Nov. 2020) 63-79.

to obtain more diverse results was seized through involving specialists from different countries (Angola, Brazil, Mozambique and Portugal) and the Macao Special Administrative Region, united by the bond of a common language and a long standing relationship, strengthened by a shared history, but each with their own experiences of dealing with the Covid-19 Pandemic and standing at different levels of economic and social development, with very distinct experiences in relation to general politics, health policies and healthcare systems. These allowed for fertile reciprocal learning, between the countries involved, as well as contributing to international sharing of this heterogeneous testimony. An international approach to the subject reflected what was perceived as the most characterising element of the SARS-CoV-2 challenge: its universal nature, which mirrors the reality of an interconnected world, where international travel and commerce depend on internal politics. This attests to the evolution of the pandemic – with legislation being country-specific, as per healthcare. For these reasons, the project was developed under the title: "Responsibility for Public Health in the Lusophone World: Doing Justice In and Beyond the Covid Emergency".[5]

As the team of strongly committed researchers worked to lay the groundwork for this project, several priority objectives were outlined: (A) providing an analysis of theories of justice as social and institutional responsibility, polarized in issues of distribution and in the inherent debates between doctrinal currents (such as prioritisation, sufficiency, distributive and relational egalitarianism); reflecting it (B) within the systematically revised Portuguese-language literature; (C) in order to allow a comparison with the empirical data collected in Lusophone countries and Special Administrative Region (S.A.R.) of Macao essential to (D) the proposition of adjusted and effective recommendations, in terms of capacity building and resource training for a correct and successful response to public health emergencies.

2. Methodology

To attain these objectives, a seven-step process was devised. The team prepared an in-depth *legislation analysis*, identifying the main

[5] Online site available at <http://direitodasaudepublicanomundolusofono.net/>. The Project's online site contains the main case law and legislation regarding the Pandemic in the mentioned countries.

legislative references on public health policy, both those which were in force prior to the SARS-CoV-2 pandemic outbreak and the regulations that were drafted during the months following the first WHO alerts to countries and individuals.

As the main empirical research tool, to collect the necessary novel data, related to concrete experiences of difficulty in responding to the pandemic, a *Questionnaire* was created and made available through the project's online site. It included 44 questions and, while most of them merely entailed yes/no answers, some required a more detailed response from participants. The Questionnaire was sent to a varied array of stakeholders, from health institutions and patients' advocacy non-government organisations (NGO's), to lawyers, doctors, government officials and academics, from the different participant countries/Special Administrative Region (S.A.R.). It addressed various subjects, including an objective line of questioning which required a more descriptive contribution from participants – identifying factual elements, such as whether hospital visitation rights were suspended and digital tracing mechanisms where implemented – as well as questions requiring a more subjective appreciation of the country's experience in mitigating the pandemic. These questions included aspects, such as the evaluation of the implemented allocation of resources (such as personal protection equipment as well as vaccines or Covid-19 detection tests), the participants' individual perceptions on any potential restrictions to the right of freedom of movement, as well as religious rights and access to in-person education formats, and their experience regarding other pressing ethical issues, such as the impact of lockdown on mental health and the challenges that vaccination brings (trials, establishing priorities and vaccination passports). The questionnaire was anonymous, as responses could not be traced back to individuals and participants were at liberty to choose to identify the legal framework to which their responses referred, as well as their occupation. The response process was preceded by an informed consent process, where detailed information, regarding participants' rights, the project's aims and its methodology were presented through an approved form. The research project went through a peer review process, as required by the WHO and was approved by Ethics Committees from the different participant countries/S.A.R., such as the Ethics Committee at the Huambo's General Hospital in Angola, University of Coimbra's

Faculty of Medicine, Portugal, the Ethics Committee at the University of Macao, P.R.C. (People Republic of China), the Ethics Committee from the Health Ministry in Mozambique and the Ethics Committee at the Oswaldo Cruz Foundation, in Brazil.

3. Main Findings and Issued Recommendations[6]

3.1 Reporting Population - Characterisation

The Team received 41 Questionnaire responses, 39 in Portuguese and 2 in English: 15 from Brazil, 8 from Angola, 7 from Portugal, 6 from the Macao S.A.R. and 5 from Mozambique. By occupation, 15 responses were from law related jobs/institutions, 12 from health-related fields and 3 from professionals from government administration posts. The remaining participants either did not submit information regarding their occupation (7), or had other occupations (4).

3.2 Background – The reasoning behind the Recommendations

The drafted recommendations took into account a specific rationale, which explained the priorities set out by the team, as well as the overall approach that was made to the project and the outcomes that were expected to be achieved. It is the States' political responsibility for the structuring, organisation and implementation of just health care systems within just societies[7]. This responsibility is likely to position itself at the forefront of health care provision, as there is a predicted increased intensity of the emergence of infectious communicable diseases. Such probability is detected by academics but also perceived by the general public, of which the participants in this project represented a clear example. Among the 37 respondents who positioned themselves on the subject, about 78% considered the possibility of another

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[6] As the scope of the Project is very broad, this article will only focus on the main findings and provide a brief overview of the issued recommendations. We invite readers to refer to the Project's White Book for a more in-depth analysis of the responses to the Questionnaire.

[7] Sridhar Venkatapuram, *Health Justice: An Argument from the Capabilities Approach*, Cambridge / Malden: Polity, 2011; Norman Daniels, *Just Health: Meeting Health Needs Fairly*, Cambridge: Cambridge University Press, 2007; Daniel Dawes, *The Political Determinants of Health*, Baltimore: John Hopkins University Press, 2020.

pandemic happening with an equally destructive magnitude to be real, stating climate change, international travel, commerce and biological warfare as some of the reasons for their stance on the matter. There is a public and civic responsibility to contribute with proposals, catered towards the need to adopt prevention and surveillance measures, which allow for quick, adequate and proportional action, combined with measures designed to monitor these situations. All these considerations need to consider the relevance of intersectional and flexible health care systems, and integrating these aspects in all policies[8] which must observe respect for Human Rights, upholding the ethical structuring principles of human dignity and social justice, on an individual and social level respectively, especially regarding the very relevant process of resource allocation. Whilst most of the following proposals can be applied to all the studied countries/S.A.R., there are important geographical, socioeconomic, political, legal and cultural differences between them, and distinct legal systems and backgrounds that must be taken into account. The team evaluated, with specialists, the advantages and drawbacks of the proposals, as it was important to maintain a certain broadness to the recommendations, allowing each country to introduce the specifications needed to better suit a certain legal system, moulding the proposals to the social framework of each territory.

3.3 Recommendations

The first of 12 recommendations pertains to the possibility of *drafting a Sanitary Surveillance Law.* The launch question that was put to stakeholders concerned public health: respondents were asked to discuss whether they considered public health of particular importance in their countries/S.A.R.. Despite multiple studies, showcasing the vital importance of this sector, the public's perception of its relevance to healthcare and overall guarantee of social cohesion and well-being was heightened in the months that led up to the global crisis[9]. As the

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[8] Cf., for example, The United Nations *2030 Agenda for Sustainable Development*, especially considering the objectives listed in Goal 16: "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".

[9] WHO, *The World Health Report 2007 – A safer future: global public health security in the 21st century*, Geneva: WHO, 2007; Michael MARMOT, *The Health Gap: The*

pandemic spread from China (PRC) to the adjacent eastern countries and quickly into other continents and regions, following the outbreak of a contagious virus, participants reported that there was need for a State controlled action to prevent infections and collapse of health care systems. Although the broadness of the State intervention required may be arguable, some concerns with the possibility of pandemic emergencies, presenting threats to the population, were detected in legal frameworks prior to the 2020 SARS-CoV-2 emergency, allowing for the implementation of restrictions in the so-called constitutional state of emergency and administrative state of calamity[10]. Such legislation does not take into account the specific State requirements to combat a pandemic, in contrast with the case of the Macao S.A.R.. In this Region, following the 2001-2003 SARS epidemic, Law no. 2/2004 (updated by Law no. 1/2016), for the prevention, control and treatment of communicable diseases was enacted. The mechanisms set out in this law were immediately activated at the end of January 2020[11].

By proposing the enactment of a National Surveillance Law, the team hopes to guarantee that parliaments maintain control over the adoption of restrictive measures concerning fundamental rights (in particular, rights, freedoms and guarantees), avoiding the necessity to declare legally exceptional situations or declarations. This is particularly urgent because in all the territories studied, participants detected restrictions on religious freedom[12]; in the collective dimension of the freedom of worship, a subject widely discussed in Brazilian Courts throughout the pandemic[13]. The right of movement within each

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Challenge of an Unequal World, Bloomsbury Press, 2015. N. Dragano *et al.,* „Public Health – mehr Gesundheit für alle Ziele setzen – Strukturen schaffen – Gesundheit verbessern" (White paper), in *Gesundheitswesen* 78 (2016) 686–688.

[10] Ana R. G. Moniz, "A crise sanitária e os problemas da excepcionalidade normativa: reflexões juspublicísticas", *Revista do Ministério Público* 165 (jan.-mar. 2021) 23-61; João C. Loureiro, Bens, Males e (E)stados (In)Constitucionais: Socialidade e Liberdades(s). Notas Sobre Uma Pandemia", *Revista Estudos Institucionais* 6/3 (2020) 787-832

[11] Vera L. Raposo / Man Teng Iong, "The Struggle Against CoViD-19 Pandemic in Macao", *BioLaw Journal, Rivista di BioDiritto* special 1 (2020) 747 ff..

[12] Piotr Mazurkiewicz, "Religious Freedom in the Time of the Pandemic", *Religions* 12/103 (February 2021).

[13] As an example, cf. the decision from the Court of Justice of the State of São Paulo, *Ação Civil Pública Cível*, Digital Process no. 1015344-44.2020.8.26.0053, by Randolfo Ferraz de Campos, 20/03/2020. In Portugal, the subject was addressed in

country/S.A.R. and internationally has been one of the most affected rights in all countries, with the imposition of stay-at-home regulations throughout the peaks of infection, and with borders closed to international travel. Never had the World experienced such a restriction of movement[14]. The proposed diploma should endow government with agile and responsive mechanisms that can be activated in situations of pandemic crisis, whilst guaranteeing full respect for human dignity and promoting a preventive, rather than a punitive, approach, in the adoption of an eminently pedagogical policy. The strict nature of the measures imposed which deprived a generation of young children of contact with their families and peers and isolated the elderly in care homes, with the restriction or suspension of fundamental rights and freedoms, must uphold the principle of proportionality[15]. State intervention must be limited to the minimum necessary and the indispensable (both in the breadth of the measures adopted and regarding the time frame for which they are to be in force) to guarantee the common good; restrictions and interdictions must be scientifically justified and presented with objectivity and transparency (the type and content of the intervention must be subordinate and limited to the established purpose).

The second recommendation focuses *on reinforcing the creation of public health teams and investing in their qualifications.* The team noticed that each country had a very particular experience, with different professionals playing different roles, many of them with a specific academic background, as public health needs varied substantially in each territory. In Brazil, collective health professionals do not have a degree in Medicine, undergoing a different form of academic training resulting in a Bachelor's Degree in Collective Health. These professionals work in health institutions, carrying out administrative tasks and recommending articulated action in different areas. In Brazil there

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Supreme Administrative Court decision on process no. 0122/20.1BALSB, by Maria do Céu Neves, 31/10/2020.

[14] In Portugal, cf. decisions by the Guimarães Court of Appeals, Process no. 119/20.1PBCHV.G1, by Maria Teresa Coimbra, 9/11/2020 and Constitutional Court decision no. 424/2020, on process no. 403/2020, by José António Teles Pereira, 31/07/2020.

[15] Vera L. Raposo, "Quarantines: Between Precaution and Necessity. A Look at COVID-19", *Public Health Ethics* (January 2021) 1-21.

are teams that specialise in public health, known as the "family health teams" which are composed of family health doctors, nurses, nursing technicians and a community health agent. In Portugal, these teams have doctors, specializing in public health, community health nurses, environmental health technicians and, at other levels, clinical analysis and public health technicians. Increasing the number of professionals and investing in their training should be promoted. The team recommended that both the Portuguese and Brazilian examples be studied to be potentially transposed, with the necessary adaptations, as a solution to be implemented in Angola and Mozambique, as programmes currently in force – such as the "Kwenda" in Angola, which has agents for sanitary and community development (ADECOS) whose mission is to register areas and people with severe levels of poverty and to catalogue areas at risk of contamination by Covid-19 – and is deemed insufficient by respondents and specialists.

In line with these proposals, *preparing institutions, especially health care institutions (including elderly care homes) for epidemiological/ pandemic emergencies* was established as a priority. Within this category, the main focus was on providing personal protection equipment (PPE) stocks, namely masks, alcohol disinfectants and body temperature measurement equipment, especially in health care institutions. In most of the institutions, surveyed through the questionnaire, prior to the SARS-CoV-2 pandemic, there were no emergency preparedness nor response mechanisms implemented. The team recommended that companies keep a constantly updated pandemic contingency plan, anticipating the possibility that remote working and working on rotation may be required, thus also preparing modes to guarantee physical distancing between workers and implementing meticulous hygiene in the workplace.

As vaccine and treatment trials were identified in Portugal and Brazil, the team emphasized the need to *launch or reinforce the national pharmaceutical industry, meeting the highest standards of product safety and efficacy and protection of health data and genetic data of people and communities,* taking advantage of the bond that links Lusophone countries and strengthening it, extending technical and scientific know-how to African countries. Genetics and artificial intelligence played a central role in this field as they allowed for the formulation, in record time, of vaccines and treatments, and the identification and

characterization of new variants of the virus[16]. With the strengthened interaction between genetics, public health and the global digital connection, it is expected that the law will increasingly assume a more prominent role in these issues. It is recommended that special attention be given to cases of sale of genomic information by research agencies, and the protection of personal data[17]. All countries could benefit from the commitment to academic training and long-term scientific research (namely in virology) and increasing public funding for research. Within the realm of vaccination, and as a precautionary measure, it was recommended that each State provides a model of civil liability rules to deal with the risk of vaccination.

With reports of thousands of surgical operations delayed and many more medical appointments rescheduled or cancelled, it is important that the *health system is organised so that, in an epidemic/pandemic situation, the ability to care for non-infected patients is maintained.* The large increase in the mortality rate, in several countries[18], is mostly due to the increase in death attributed to non-COVID causes[19]. Discrimination against non-infectious patients is ethically unsustainable and can be prevented by granting further flexibility to the systems and building up integrated care, which are crucial for coping with pandemics. The digitalization of the health system must be reinforced, together with adequate training of health professionals, in order to maximize their benefits, which translates into improvements in the health of people and communities.

Regarding the dissemination of information on the pandemic, according to the responses collected, criticisms of contradictory (26%), untimely (13%) and difficult to understand (18%) information were

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[16] Heloísa SANTOS, "A evolução no campo da genética tem sido essencial no combate à pandemia", interview to *Gradiva Publicações.*

[17] Sandra M.C. ALVES, *et al.*, "Sensitive Personal Data and the Coronavirus Pandemic: Disclose to Protect?", *Revista Eletrônica de Direito do Centro Universitário Newton Paiva*, Belo Horizonte, 42 (sep./dez. 2020) 240-257.

[18] In Portugal, data from the *Instituto Nacional de Estatística* (National Statistics Institute) reports that in January 2021 *19.628 deaths* were registered. In the same month, the previous year *11.712 deaths* were recorded. Cf. *Boletim Mensal de Estatística* – March 2020 and March 2021.

[19] André Dias PEREIRA / Heloísa SANTOS, "Reflexões Éticas e Normativas a Propósito do Artigo: 'Direitos Humanos e Mortes Evitáveis'", *Revista Gestão Hospitalar* 21 (abril/maio/jun., 2020) 70-76.

prevalent. The team considered that there is a need to *improve the accuracy of information, the quality of communication and the level of health literacy, including public health.* It is important that official authorities produce an information plan (which takes into account the psychology that underlies each organisation and addresses the contribution of communication professionals) which reaches the various sectors of society (the elderly, adolescents, minorities and migrants). Health literacy should be a priority, with campaigns and practical actions aimed at promoting hygiene, healthy lifestyles, with the involvement of the social sector and local authorities. An overreaching issue, common to all analysed countries/S.A.R., is the fragile role played by the third sector (such as the social sector and charitable institutions). Participants recognise that it could play a more substantial role in health care provision, especially within the more vulnerable sectors of the population, and help lift the burden placed on the public systems.

Another proposal concerns *the role played by the Armed Forces and security forces in situations of epidemiological/pandemic emergencies, which should be established by law.* Experiences from Portugal and Brazil reveal that the Armed Forces may have an important interventional role in public health emergency situations, namely in the screening of infections, organising field hospitals in their facilities, receiving patients in their hospitals, having military laboratories process tests, conducting epidemiological surveys, tracking contacts of patients with Covid-19 and in the development and implementation of the vaccination plan. A more active involvement of the Armed Forces, in the practical logistical organisation during pandemic outbreaks (equipment management, support for the administration and organization of vaccination centres) should be established, as well as defining the role of the security forces in preventing infections and inspecting compliance with health standards in a pandemic.

Few or insufficient measures were adopted throughout the pandemic to support the elderly population: isolating this group, sheltering it from the virus, and providing it with priority vaccination were the most commonly implemented measures and did not seem to protect against the terrible death toll among the over-80's, particularly in Portugal[20]. For this reason, there is a need to *reinforce the protection of the*

[20] Of the more than 16.000 deaths recorded in Portugal (data up to May 10th,

people most vulnerable to the particular infectious agent, namely the elderly (in their homes, institutions and public spaces). This involves the contribution of both social and private sectors, and municipal authorities and parish councils, in supporting the most vulnerable people (namely the elderly), advocating healthy living habits, social and intergenerational interactions and combatting situations of abandonment or isolation. These can be achieved if governments actively avoid the closure of elderly Day Care Centres and institutions that support people with disabilities, which, in addition to depriving the elderly and people with disabilities of the necessary stimulation and social interaction, put additional pressure on caregivers and families, and avoid a (complete) ban on visits to nursing homes and hospitals (opting instead to reinforce connections which can be made without direct contact, namely through transparent structures, such as windows). These institutions should have access to thorough testing systems and must be protected by legislation that fosters exclusivity regimes for employees in residential institutions and enables rotational internment by teams. Legislation should also be amended to ensure more robust work provisions in order to provide assistance to members of the household, other than just children (namely assistance to the elderly or dependants with disabilities).

One of the issues that proved to be very important for respondents was the restriction of hospital visits and limits on funerals[21]. Families were not allowed to visit loved ones in the hospital, nor accompany them to medical appointments. In Angola and Mozambique, a different solution was adopted: visits to Covid patients were suspended but other patients were allowed visits, albeit with increased restrictions. The team considers it is necessary to *preserve the affective and spiritual experience of people and communities, namely with regard to visits to hospitals and residential care homes, as well as religious and specifically funeral rites.* Despite being two very different subjects, they are of great ethical, anthropological and social significance. The constraints imposed on these dimensions led to a destruction of the essence of families, with disruptive effects on individuals, communities and the

2021), more than 11.000 were among people over 80 years old. Cf. *Daily Report Bulletin*, available at <https://covid19.min-saude.pt/wp-content/uploads/2021/05/434_dgs_boletim_20210510.pdf>, last access: 10/05/2021.

[21] Cf. André Dias Pereira / Ana Elisabete Ferreira, "Vítimas Colaterais da Covid-19", *Revista Gestão Hospitalar* 20 (jan./fev./mar. 2020) 42-47.

ethical and spiritual framework of the population. When enacting regulations, strictly upholding the principles of legality and of proportionality must prevail in this area, not allowing de facto powers (of health professionals and funeral companies) to override the rule of law and the primacy of fundamental rights.

In all countries/S.A.R. studied, profound interference was recorded with regards to education, namely the suspension of in-person education, which was not always successfully replaced with online learning, especially in countries lacking internet coverage and whose populations are particularly vulnerable and have no access to essential technology[22]. There has also been an impact on young people's mental health, an issue which should be covered when addressing education related policies. It is necessary to *prepare educational establishments, teachers, students and families for teaching regimes adapted to epidemic/pandemic situations, namely distance learning.* Educational institutions, at the beginning of each school year, should be encouraged to identify whether the requisite pre-conditions exist, in the school community, to conduct teaching activities at a distance, and prepare solutions to overcome any difficulties that are encountered. There is a need for equipment and social internet plans to be made available to students and for the adoption of a combined system of both in-person and distance teaching methods, implementing psychological, social and financial support for families, maintaining sports activities, investing in the training of teachers, in the use of technological equipment, and transmitting school classes on an open channel on television.

The pandemic highlighted the *need to invest in territorial planning and urban planning, as well as building housing for the protection of health and disease prevention.* A stay-at-home policy, besides being highly disparate and harmful to people with co-morbidities, given the housing conditions in several countries, induces other serious pathologies. It is necessary to mitigate this through the organization of cities that offer facilities for people to spend time outdoors, with the

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[22] Andreas Schleicher, *The Impact of Covid-19 on Education: Insights From Education At A Glance 2020*, OECD, 2020. Also, the United Nations has published extensive Policy Recommendations, among which are measures designed to strengthen the resilience of education systems for equitable and sustainable development as well as to protect education financing. Cf. *Policy Brief: Education during* COVID-*19 and beyond,* United Nations, August 2020.

necessary social distancing. States must assume the responsibility of guaranteeing that people (1) live in healthier homes and (2) live in cities with greater environmental sustainability and which allow for better living conditions, including taking part in sporting activities, avoiding the creation of overcrowded suburbs that lead to large flows of public transport and commercial areas with large population concentrations. This is especially important as urban areas are often hotspots for higher rates of infection, highlighting the possible link between cities and infectious diseases[23].

A final objective, which must be adopted in the short term, is *to reinforce the importance of international cooperation in health matters, through a re-evaluation of the role of the* WHO *and promoting respect for international regulations*. As the eyes of the World stare at Public Health as a valuable asset, doctrines are emerging proposing to label it a global public good. Infectious disease control could be considered a global public good, as one witnesses the advantages of resource sharing and cooperation, which, in many cases, is still lacking[24]. There is an urgent need to revalue international rules that aim to promote the protection of human rights in situations of health emergencies, namely Article 43 of the International Health Regulations (IHR) and Article 4 of the International Covenant on Civil and Political Rights, which was subject to the detailed General Comment No. 29, by the Human Rights Committee, and specified through the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, as well as at continental level, Article 15 of the European Convention on Human Rights and Article 27 of the American Convention on Human Rights.

4. Final Remarks

The project was drawn up and conducted in order to achieve two major goals. The first was to trigger reflection and debate in

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[23] On this topic, cf. Ayyoob Sharifi / Amir R. Khavarian-Garmsir, *The* COVID-*19 pandemic: Impacts on cities and major lessons for urban planning, design, and management*, in *Science of The Total Environment*, Vol. 749, December 2020, pp. 1-14.

[24] Gordon Brown / Daniel Susskind, "International cooperation during the COVID-19 pandemic", in *Oxford Review of Economic Policy* 36/Supplement 1 (2020) 64-76.

Portuguese-speaking countries, involving communities from four different continents, about the public health challenges raised by the current pandemic, bearing in mind that public health emergencies will tend to increase in the near future. That is why it is so important to invest in preparedness to prevent deaths in the future, promote health, protect the economy and contribute to social sustainability. The second was to actively contribute to the preparation of national health systems and to the revision of public health policies for future global emergencies. The team gathered facts, data and perceptions from around the world which could be included in global recommendations for national governments worldwide, and for international authorities and regulatory bodies, expressing the main concerns identified by the respondents to the questionnaire. The team hopes that its recommendations might be useful in improving the current health care system, also inspiring authorities, agencies and associations to act on different levels to prepare the response to future public health emergencies.

A PANDEMIA DE COVID 19 E O ESTADO DE EMERGÊNCIA COMO INSTRUMENTO PARA SUSPENDER (OU PROTEGER?) DIREITOS HUMANOS

The Covid 19 Pandemic and the State of Emergency as a tool to suspend (or protect?) Human Rights

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Cláudia Santos*

Apesar de o Estado de Emergência só ser obrigatório para a suspensão de direitos fundamentais[1], e não para a sua restrição, o confinamento obrigatório e o recolher obrigatório foram medidas adoptadas em Portugal que maioritariamente se considerou que só seriam admissíveis em Estado de Emergência. Idêntico problema pode suscitar-se a propósito do internamento compulsivo de pessoas doentes com Covid 19.

O primeiro Estado de Emergência foi declarado em Portugal a 18 de Março de 2020 e creio que todos nos recordamos da incredulidade

* Professora Associada da FDUC.

A brevidade e a singeleza destas notas justificam-se pela circunstância de terem sido o suporte de uma comunicação de 10 minutos apresentada na High-Level Conference *Rule of Law in Europe* organizada pela Comissão Europeia e pela Presidência Portuguesa da União Europeia, em colaboração com a Universidade de Coimbra, nos dias 17 e 18 de maio, no Convento de São Francisco, no painel "The rule of law in the context of the covid-19 pandemic".

[1] Nos termos do artigo 19.º, n.º 1, da Constituição da República Portuguesa "os órgãos de soberania não podem, conjunta ou separadamente, suspender o exercício dos direitos, liberdades e garantias, salvo em caso de estado de sítio ou de estado de emergência, declarados na forma prevista na Constituição". O n.º 2 dispõe que "O estado de sítio ou o estado de emergência só podem ser declarados, no todo ou em parte do território nacional, nos casos de agressão efetiva ou iminente de forças estrangeiras, de grave ameaça ou perturbação da ordem constitucional democrática ou de calamidade pública".

desse momento. Foi a primeira vez que se declarou o Estado de Emergência na vigência da Constituição de 1976. O Estado de Emergência era uma figura que se estudava nos manuais de direito constitucional mas que, numa democracia consolidada e aparentemente tão distante de qualquer cenário de catástrofes, parecia arrumada numa prateleira da história.

Passou mais de 1 ano e foram aprovados 15 Estados de Emergência, entre declarações (Março e Novembro de 2020) e renovações. E há quem ache que se banalizou a figura. Entre aqueles que assim pensam, talvez possamos distinguir duas perspectivas diversas, ambas suportadas por argumentos poderosos mas não totalmente convincentes.

Num primeiro grupo estão aqueles que acham que houve uma limitação excessiva de direitos fundamentais e que não se deveriam ter encurtado tanto certas liberdades. Mas não sabemos quantas mais vidas se teriam perdido se nos tivéssemos mantido mais livres. E como não o sabemos com certeza, o que prevaleceu foi a prudência.

Outra opinião é a daqueles que entendem que se deveriam suspender ou restringir os mesmos direitos fundamentais mas com um diverso enquadramento jurídico. Uma espécie de lei-chapéu, adiantaram alguns, que permitisse maior flexibilidade na resposta. Com menos invocação do Estado de Emergência. Mas será que é isso que nos deve preocupar, a banalização do Estado de Emergência? Talvez não deva ser essa a nossa principal preocupação. O que nos deve preocupar é a banalização da suspensão de direitos fundamentais. Um maior facilitismo associado a essa suspensão. Se o Estado nos quiser impor um recolher obrigatório, na sua formulação clássica ou em declinações mais suaves, num contexto de calamidade pública, então talvez seja preferível que o faça através de um procedimento carregado de simbolismo, que exija a intervenção do Presidente da República, do Parlamento e do Governo[2]. O que não podemos banalizar é a suspensão de direitos

[2] O regime jurídico do estado de sítio e do estado de emergência está previsto na Lei n.º 44/86, de 30 de setembro (alterada pela Lei Orgânica n.º 1/20111, de 30 de novembro e pela Lei Orgânica n.º 1/2012, de 11 de maio). Logo no n.º 2 do seu artigo 1.º, dispõe-se que são "declarados pela forma prevista na Constituição". No artigo 10.º, n.º 1 prevê-se que "A declaração do estado de sítio ou do estado de emergência compete ao Presidente da República e depende da audição do Governo e da autorização da Assembleia da República ou, quando esta não estiver reunida nem for possível a sua reunião imediata, da respectiva comissão permanente".

fundamentais – como, aliás, não permite, e bem, o artigo 19.º da nossa Constituição.

Coisa diferente é saber se houve verdadeira suspensão de direitos fundamentais que justifique os estados de emergência ou se existiram meras limitações que se teriam bastado com outros enquadramentos jurídicos. Não há dúvida de que a maioria das medidas adoptadas poderia tê-lo sido sem declaração do estado de emergência (tomem-se como exemplo as restrições à liberdade de circulação). Mas o problema suscita-se essencialmente a propósito do internamento compulsivo e do confinamento/recolher obrigatório. Para tais medidas, teria sido ou não indispensável a declaração do estado de emergência?

A questão não é isenta de dúvidas, sobretudo quando ao binómio suspensão ou restrição de direitos fundamentais acrescentamos a figura de certo modo intermédia da suspensão parcial de direitos fundamentais – nos termos do n.º 1 do artigo 9.º da Lei n.º 44/86, de 30 de setembro, "o estado de emergência é declarado quando se verifiquem situações de menor gravidade, nomeadamente quando se verifiquem ou ameacem verificar-se casos de calamidade pública", acrescentando-se no n.º 2 que "na declaração do estado de emergência apenas pode ser determinada a suspensão parcial do exercício de direitos, liberdades e garantias".

Daqui resulta uma questão para a qual não se tem encontrado uma resposta unânime: para se determinar um confinamento obrigatório ou um internamento compulsivo em contexto pandémico, é necessário que se decrete o Estado de Emergência porque há uma suspensão parcial de direitos fundamentais? Ou tais medidas poderiam ser impostas sem declaração do Estado de Emergência por se tratar de uma limitação de direitos fundamentais imposta pela protecção de outros valores com dignidade constitucional? A resposta pressupõe uma opção sobre se o direito a não ser total ou parcialmente privado da liberdade é um direito absoluto ou se é um direito passível de juízos de ponderação.

É conhecida na doutrina portuguesa uma interpretação menos estrita do artigo 27.º da Constituição, vendo-se nas alíneas do seu n.º 3 (que exceptuam oito hipóteses do princípio segundo o qual ninguém pode ser pode ser total ou parcialmente privado de liberdade a não ser em consequências de sentença condenatória) um catálogo não taxativo, na medida em que o reconhecimento do direito fundamental à liberdade não precludiria, mesmo em hipóteses não expressamente

previstas, a sua restrição para salvaguarda de outros interesses públicos como seja a saúde pública.

Perspectiva diferente têm aqueles que defendem uma interpretação estrita do artigo 27.º da nossa Constituição, afirmando a taxatividade das hipóteses previstas no seu n.º 3. E na alínea *h)* do n.º 3 do artigo 27.º só se admite o internamento compulsivo de portador de anomalia psíquica. Inexistindo previsão que legitime o internamento/tratamento ou o confinamento compulsivo de pessoas que tenham ou possam ter doença que põe em causa a saúde pública, tal suspensão do direito à liberdade só seria possível em Estado de Emergência.

Ambos os entendimentos têm defensores na doutrina portuguesa[3], mas esta última parece ser a perspetiva maioritária. Aquela segundo a qual as pessoas só podem ser privadas da liberdade nas hipóteses expressamente previstas no artigo 27.º da Constituição. Assim sendo, sobram-nos duas hipóteses, tendo em conta a possibilidade de sermos confrontados com novas crises pandémicas. Uma é voltar a recorrer ao Estado de Emergência e ao seu procedimento de declaração especialmente garantístico. A outra pressupõe uma alteração do artigo 27.º no âmbito de um processo de revisão constitucional que legitime a consagração por via legal de confinamentos ou internamentos compulsivos no contexto de crises pandémicas de especial gravidade. Qualquer solução legislativa a que presida tal propósito deve, porém, ser encarada com os maiores cuidados e com enorme prudência.

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[3] Para uma consideração das duas perspectivas, cfr. Jorge Reis Novais, "Direitos fundamentais e inconstitucionalidade em situação de crise – A propósito da epidemia Covid-19/ Fundamental rights and unconstitutionality in a situation of crisis – regarding covid-19 epidemic", *e-Pública* 7/1 (Abril 2020) 78-117.

THE ROLE OF PARTICIPATION FOR UPHOLDING THE RULE OF LAW

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Dulce Lopes*

1. Rule of law and the role of participation[1]

I should start by stating what is already known: participation is a mainstay of democratic political systems and also an integral part of the rule of law. Not only are rule of law systems based on representative democracy, which entails participation in electoral votes, they also promote several forms of direct participation (deliberative and participatory democracy) as a way to engage citizens in public affairs. Indeed, introducing significant elements of public participation into the system ensures it opens up to society and makes public action more relevant, democratic and trustworthy.

This is recognized in article 10 of the Treaty on European Union. Not only is the European Union founded on representative democracy (direct representation in the European Parliament and "levelled" representation through Heads of State or Government at the European Council and Governments at the Council); but the third paragraph also states that "every citizen shall have the right to participate in the

* Univ Coimbra, University of Coimbra Institute for Legal Research. Univ Coimbra, Faculty of Law.

[1] This article corresponds, with some additions, to a brief memory of the Author's oral intervention in the High-Level Conference on the Rule of Law in Europe (session "The role of civil society for upholding the rule of law"), held at Coimbra, on the 17th of May 2021. Therefore, the oral speech is dominantly maintained, with no references, and the informations provided are referred to that date. The Author's reflections stem from her work as a Professor of Law at the University of Coimbra, Portugal, a former assistant at the European Parliament and are in line with the Commission's Erasmus + project ECI: From A to Z (agreement number 2020-1-PT-01-KA203-078546) which she coordinates.

democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen".

Article 11 goes further to establish some "exit" and "entry" ways regarding the relationship between the European Union and its citizens, civil society and representative associations, the most innovative of which is the European Citizen's initiative (paragraph four).

The European Union thus recognizes that participation is a means of contributing to better decision making, once all affected by or interested in an ongoing discussion are able to have their say before a decision is taken. With the involvement of citizens and a variety of other social actors, public policy, legislation and decisions can be made from a wider and richer perspective, with more knowledge of relevant situations, better balancing of interests and more adequate solutions to problems, even one's of sensitive political nature.

This shows that participation is intrinsically linked to ensuring the rule of law: it is a way to counterbalance the majoritarian rule or mainstream groups, by ensuring that individual persons and minorities are able to make their voices heard and influence policies, and also evidence that representation cannot be the sole means of legitimizing European Union actions. Given the increasing significance of threats to the rule of law leading to a "rule of law backsliding", participation is all the more important since this "citizen-centred" approach also balances the dominantly "State-centred" approach to rule of law taken by the European Union (visible from the rule of law toolbox or from instruments such as the Recovery and Resilience Facility or the conditionality mechanism).

In the 2021 rule of law report from the Commission [COM(2021) 700 final], there is a reference to civil society organisations as essential actors for the rule of law, both as spokesperson for persons whose rights are infringed by violations of the rule of law and as agents that provide relevant and grass-root information and that raise-awareness to the importance for the respect of the rule of law.

This proposed strengthening dialogue with stakeholders at national and European Union level is naturally welcomed, but it is equally important to dig deeper and further engage citizens in European Union affairs and in all areas that impact the rule of law, since they are the root from which all policies (either seen as good or bad) stem.

2. Why participate and why promote participation?

The first stance we would like to make is that *participation matters*. It is a means of contributing to solving small- and large-scale problems (ranging from local issues to transnational and world-wide concerns). It brings new ideas to the floor and allows for a wider and more relevant discussion on all subjects, bridging gaps and creating common spaces for discussion, eventually overcoming long-term differences and misconceptions.

It is a way to increase membership and empowerment and to contribute to a stronger democracy. In the short, medium or long run – whichever applies – participation is beneficial to all involved, public powers, natural or legal persons and society as a whole.

Furthermore, *participation matters in all areas*. There should be no area immune to participation.

There are of course fields where such participation is more limited, such as security and defence policies, given the need for secrecy and the political, strategic and/or operational nature of some options taken. However, no field should, on the whole and in general terms, be free from public participation and debate, either formal or informal, individual or collective.

There are in addition other areas, more technical, where participation can be more difficult given the need to understand specific requirements (for instance in medical and pharmaceutical regulations and, nowadays, in the fields of international intelligence and algorithms). However, in these cases, technical support should exist, for instance by the adoption and disclosure of non-technical reports or summaries, and public powers should remain open to the possibility that participation might also generate new knowledge and create forums for debate.

There are moments in time where participation may be harder to accomplish, such as in times of emergency (as seen in the recent Covid-19 crisis). Nonetheless, in such a case, procedures must either be suspended until participation is possible or increased forms of participation should be envisaged with a focus on e-participation. Indeed, it is in times of emergency and crisis that participation is more useful given the restrictions imposed upon private and legal persons, and their need to speak out to allow for a higher level of accountability and control over public decisions.

There are also areas where participation is an essential requirement for the adoption of policies, legislation, plans, programmes and projects, since their relevance crosses borders and generations, impacting the very conditions of sustainability and existence. It is noteworthy that the Sustainable Development Goals[2] build strongly on participation and capacity-building as a way to achieve the objectives of ending poverty and other deprivation, improving health and education, reducing inequality, and encouraging economic growth – all the while tackling climate change and working to preserve oceans and forests.

Moreover, *participation matters to all*. Participation enables citizens, civil society associations and organised interest groups to (try to) influence policy and decisions regarding society, the environment and the organisation of economic life. At the same time, participants assert their rights and interests, publicising them and allowing for their balancing in plural political and societal settings.

People are no longer viewed as mere passive users or addressees of public decisions; they are seen as important influencers or partners in decision taking. As citizens become more affected by public policy, their participation in democratic processes should be reinforced and valued: a transition from passive or stand-by to active citizenship – in which one's actions contribute to democracy and promote its vivacity – is therefore desirable.

Younger people are very important policy makers. Although they may organise themselves differently to what used to be considered usual, resorting more to social media use and new participatory contexts, they are also politically engaged as future custodians of present-day policies. Participation should evolve with them by taking full advantage of the importance of networking, building relationships and developing new forms of communication.

Participation should also be promoted to and facilitated for those who have a more difficulty accessing it or are more disengaged from it (for instance ethnical and language, minorities, persons with disabilities, persons with limited digital access, under-represented local communities, etc.), so that it is far-reaching and far more meaningful.

From the point of view of public entities, participation should also be promoted, even in cases where it is not legally binding already. Par-

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[2] Available at <https://sdgs.un.org/goals>.

ticipation is a way of introducing plurality into decision making procedures, allowing for a better balancing of interests and a more thorough deliberation of policies, from the point of view of their effectiveness, efficiency, inclusiveness, legitimacy and accountability.

Despite the fact that introducing participatory moments can make procedures lengthier, more complex and unpredictable, this might be regarded as a small price to pay in order to reach the best decisions possible. Also, such shortcomings can be abridged by a competent and serious design of the participatory process and by a well thought over continuous process of citizen and civil society engagement.

We believe a roadmap should be set and followed in order to integrate participation into public decision-making processes, by defining systematic and not only *ad hoc* forms of participating. They should be practical to use, engaging and adjusted to local communities and stakeholders, who vary immensely in each case. Selecting the right level of public participation is therefore a pre-condition for its success, as is:

- the definition of clear and attainable goals entailed in each participatory stage;
- establishing a clear structure and processes for participation, by defining techniques to be used and audiences to be reached;
- informing interested parties at any given point about the conduct of the procedure; and,
- ensuring inclusive and effective participation, opening the procedure to the full range of relevant stakeholder interests and overcoming any eventual difficulties they may have in participating.

In the aftermath of participation, the repercussions of civic and public involvement should also be discernible, making clear how it translates into decision-making (even if their contribution has not been accepted) and how they have contributed to improving the quality of decision making. Indeed, it is important to avoid participatory frustration and disfranchisement of participants, by the apt design of participatory mechanisms and clear definition of participation outputs.

Two other thoughts before we move further. Participation should be an end in itself, having an intrinsic value (both political and personal) of its own. Public powers should launch participatory instru-

ments and initiatives as a way to recognise and promote citizen's rights, welcome their input and balance it in an unbiased way without any manipulative or hidden motives (which might include simply the will to confirm their initial positions or exploring public divergences on a certain issue).

However, from another standpoint, participation could also be seen a means to an end, since it aims – more or less remotely – to contribute to the best decision possible and to render public powers responsive and responsible for their decisions. It is also true also that participation may increase the acceptability of decisions taken and reduce conflict which, however, must be seen as a mere indirect effect of participation rather than its main purpose.

Balancing these two dimensions is not easy and takes a lot of commitment from Institutions to respond adequately to participation. Translating the ideals of participatory democracy into practical institutions is challenging, but sorely needed especially in times of distress and concern.

3. Participation at the European Union Level

The European Union has developed a framework for participation in which several pathways for citizens to engage with the European Union have been developed, in line with the treaties. Although this is not a closed catalogue and other forms of involvement exist, either at citizen's and civil society initiative (open letters, rallies, etc.) or within the European Union's own organisation and forms of action, the following forms of participation (fig. 1) are the most commonly resorted to.

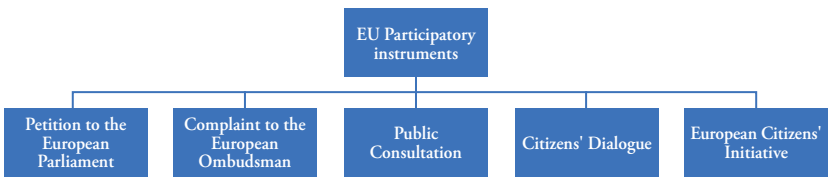

Fig 1: Participatory instruments within the EU.

It is undeniable, however, that it is the European Citizens' Initiative that has received the most attention from all quarters given its

nature, structure and function. Not only is this the first supranational instrument that tends to lead to some sort of direct democracy (in line with the status of citizenship of the European Union, which is also a first in terms of transnational legal forms of citizenship), but also it is highly structured from a procedural point of view in order to function properly (now encapsulated in Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative, and also in other complementary provisions). In addition, from a functional point of view, this an instrument that aims to mobilise European Citizens and groups and has the potential to transform the existing relations between European civil society and European Union institutions, involving them further in European affairs and policies.

The European Citizens' Initiative represents a step forward in the implementation of democratic principles within the European Union, promoting participation on a larger scale, by the required adherence of many (at least one million citizens of the European Union) to a common or shared cause, which is set out and detailed in a joint proposal from a diverse group of organisers. Where successful it will prompt a response from the European Commission and the involvement of other Institutions and organs (mostly the European Parliament), bridging the gap between citizens and the organisational architecture of the European Union.

Through this Initiative, the European Union has moved closer to the citizens of the Union by including them in a (pre)decision-making process on the issues that are important for them, giving them the opportunity to contribute to the amendment, development, and shaping of European Union policies, and to be part of the construction of a more democratic European Union.

The aim of the European citizens' initiative is to enable Europeans to launch a debate and influence the EU agenda by calling on the Commission to propose legislation.

However, this is not tantamount to a legal obligation for the Commission to propose any concrete line of action. The Commission enjoys a good deal of discretionary power in analysing the initiative's substance and whether it requires a line of action and, in the affirmative case, which. So, for a European Citizens' Initiative the term successful can be better translated as "accomplished", since what it means is that

the procedures established in Regulation (EU) 2019/788 are conducted until their finish and are examined and responded by the Commission.

This does not mean that the initiative is without purpose or ineffective, since the Citizens' Initiative is an agenda-setting tool that obliges the Commission to give serious consideration to requests made by European citizens.

Therefore, if the Commission decides not to act (or not to act in the way proposed in the European Citizens' Initiative), it must clearly explain its reasons and give feedback on its stance.

If the Commission decides to put forward a proposal, then the normative procedure begins. The Commission proposal will be sent to the European Parliament and the Council (or, in some cases, only to the Council), depending on the procedure applicable. If adopted by those Institutions, the proposal becomes a legal act of the European Union.

Since the European Commission is the Institution in charge of promoting the general interest of the Union and taking appropriate initiatives to that end [article 17(1) of the Treaty on European Union] and given the fact that Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise, it is reasonable that the European Citizens' Initiative has the Commission as its "pivotal" institutional figure, fulfilling a multitude of functions synthesised in fig. 2.

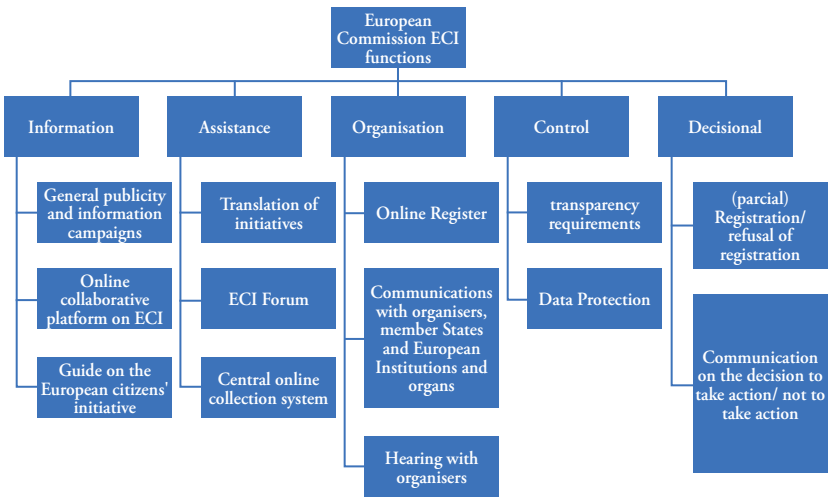

Fig. 2: Powers of the Commission under the European Citizens' Initiative

However, it is also important to ascertain if the role of other institutions and organs, mostly the one's with a more Democratic resonance, should not be increasingly valued within the European Citizens' Initiative framework.

And although the regulation does not itself refer to the role of the Court of Justice of the European Union within the framework European Citizens' Initiative, this does not mean that it should be or has been irrelevant. On the contrary, the Court of Justice of the European Union has already clarified how the Commission should exert its powers in line with the Treaties and the Regulation itself and has prompted waves of change in how the participation under the European Citizens' Initiative should be taken into due consideration and followed up by the Commission.

In fact, at the registration phase, the Commission confines itself to checking the requirements established in article 6(3) of the Regulation, However, challenges have been brought before the General Court, and under appeal, before the Court of Justice (for instance, in cases T-646/13; C-589/15 P; T-361/14; T-754/14; C-420/16; C-336/17), and they have concluded that the lack of registration is subject to judicial control, particularly taking into consideration the principle of good administration and the duty to provide adequate reasons for the decisions taken, and also the judicial oversight of errors of law by the Commission (regarding the scope and extent of its own competences). Nonetheless, following the Court's appraisal, the Commission has lost only once in substance, in the "Stop TTIP" case (T-754/14), and once for the procedural reason of lack of justification, in the "Minority SafePack" case (case T-646/13).

Moreover, the Communication of the Commission, in which it defines the steps to take (if any), is also a reviewable act, despite the fact that it involves discretionary powers and political choices.

This was confirmed by the Court of Justice in case C-418/18 P [the *Puppinck* Judgement, of 19 December 2019 (ECLI:EU:C:2019:1113)]. On 11 May 2012, the Commission registered the proposed European citizens' initiative entitled 'One of us' which aimed at the '(p)rotection in law of the dignity, the right to life and the integrity of every human being from conception in those areas of (Union) competence where such protection is relevant'. On 28 May 2014, following the submission by the organisers and their public hearing by the European

Parliament, the Commission adopted a communication in which it indicated that it would not undertake any action following the contested European Citizens' Initiative.

In this case the Court confirmed that the European Citizens' Initiatives constitutes an agenda setting tool and not a way to formally initiate the adoption of a legal act, since the right of initiative remains solely with the Commission. However, the Court went on to add that a referred Communication is subject to judicial review, limited nonetheless to manifest errors by the Commission, given the wide margin of discretion it enjoys. In short, the Court of Justice, in *the Puppinck* judgement, struck a general balance: while the success of the citizens' initiative does not create any obligation of legislative initiative on the Commission, the communication presented by the Commission (containing its legal and political conclusions on the citizens' initiative) is challengeable under Article 263 of the Treaty on the Functioning of the European Union.

The European Citizen's Initiative as an innovative tool in the European Union is still "in the making". With only six successful initiatives to date from the many that have been presented, it seems that it is still a long way from developing its full potential. But change is undergoing and the enthusiasm and engagement with European Union policies within this mechanism seems not to be getting any weaker; compensating, to a certain measure, some lesser degree of political commitment at State level.

4. Where to go from here?

Despite the fact that the European Union understands – sometimes at a much deeper level than Member States – that citizen participation is a much-needed reality and establishes a vast array of participation instruments, the consequences of this approach continue to be frail.

In the very recently available Eurobarometer about the Future of Europe, the vast majority of Europeans (92%) across all Member States demanded that citizens' voices were "taken more into account in decisions relating to the future of Europe"[3].

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[3] Available at <https://www.europarl.europa.eu/at-your-service/en/be-heard/eurobarometer/future-of-europe>.

This generalized feeling has accompanied the European Union since its inception. And despite the fact that the European Union offers several points of access and dialogue for influencing European Union policies, it seems not to have a full effect in practice.

From our point of view, and as others have already put it, this *deficit* results mainly of a mismatch between policies increasingly operating at the European level while politics still mainly operates at the national level. Therefore, any communication and participation policy regarding the European Union cannot be tackled only by the European Union itself. It demands a continuing effort from Member States to try to give relevance to the role of the European Union in policy making, which however could be imperilled in a moment where some State policies are under strain and do not value dimensions of fundamental rights and the rule of law as an integral part of Democratic systems.

But, more than that, it is important that participation is seen both by public entities and by citizens not as a hurdle but as a promise: a promise of effective joint work and joint results.

If this is not the case, citizens and civil society organizations will not be attracted or even dissuaded from making their voices heard, moreover when some Member-States are themselves disengaged from the European Union and do not internally promote its promise. Enabling, therefore, a path where there is under-representation of some actors, interests and discourses (such as fundamental rights) that might push the European Union forward in the social, political and environmental fields; and an over-representation of other actors, interests and discourses, mostly of a pure economic nature or of certain geographical areas that contribute dominantly to setting the agenda of the European Union.

Therefore, the European Union should develop further its pathways for Citizens to Engage in European Union policies. We are not advocating that the European Union has not done a lot. But it has to improve its policies through better communication and participation that highlights the relevance of the role of citizens and civil society within European Union policy making.

A policy directed at all, no matter whom, and particularly focused on the ones more affected by its decisions such as vulnerable groups, younger and older citizens and representatives of sometimes "silent" or "silenced" interests.

A policy that evidences results, by regularly opening up new participation *fora* or participatory moments as policies are developed and tested and not only at its inception stage.

A policy that shows that participation is not only welcomed, but relevant and effective in influencing European Union policies, for instance by producing reports that evidence clearly and in an understandable way how participation, and particularly some instances of participation, have influenced (or not) the decision-making process.

Also, a focal element of participation should be "consideration"; going beyond merely consultation. The European Citizen's Initiative has this element at its heart. Nonetheless, it should be perfected in order to set aside some "blocking trends" that render it less relevant.

Recently with the *Puppinck* case of the Court of Justice it was clarified that not only the registration phase of a European Citizens' Initiative but also the Communication of the Commission according to which it intends or not to take legal action is subject to (albeit limited) judicial control. This represents a great leap in the proper understanding of the European Citizens' Initiative mechanism and prompts the Commission to be more open to initiate legislative procedures after a successful European Citizens' Initiative, giving the floor more easily to the European Parliament and the Council so they can have the final decision in what the matter of concern of at least one million citizens (a number which is not easy to reach) was.

Let's move forward and let the people pave the way.

RULE OF LAW AND THE EUROPEAN PILLAR OF SOCIAL RIGHTS: THE WORK-LIFE BALANCE DIRECTIVE: BALANCE FOR WHAT, BETWEEN WHAT AND FOR WHOM?

https://doi.org/10.47907/livro/2022/RuleofLaw/cap07

Joana Nunes Vicente*

I. The reconciliation of work and family life, or to use the most current concept, the balance between work and private life *(work-life balance)* is today a principle and a fundamental value with legal reach at an international, European and national level and has become a central objective of national and European policies.

Over the past few decades, the European Union has developed a wide range of policy instruments and legislative measures in the area of reconciliation of work and family life, aimed at enabling working parents to balance their work and caring responsibilities.

This legal framework began to be created in the 1990s, firstly with the adoption of Directive 92/85/EEC of 19 October on pregnant workers, which granted maternity leave at least 14 weeks to working mothers after childbirth, with the aim of protecting the health and safety of women in the workplace. Secondly came Directive 96/34/EC of 3 July 1996 on parental leave, which provided for an individual right to three months' parental leave for each parent in order to care for a child up to the age of eight. In addition, Directive 2010/18/EU of 8 March 2010, which repealed Directive 96/34/EC, extended the duration of parental leave to a minimum of four months, with one of the months not

* Faculty of Law, IJ, Univ Coimbra.

transferable between the parents. Also back in the 1990s the European Union had put in place specific measures to facilitate access to part-time work for men and women, in order to reconcile work and family life, through Directive 97/81/EC of 15 December 1991 on part-time work. Later, the revised Parental Leave Directive of 2010 established the right to request part-time work for parents who work and return to work after a period of parental leave[1]. Recently, the topic of work-life balance has undergone a new impetus and it is on this current approach that we will focus on this article.

We refer to Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on the work-life balance for parents and carers, adopted by the Council and the European Parliament, which repealed the revised Parental Leave Directive of 2010. The new directive contributes to the implementation of the European Pillar of Social Rights, proclaimed in 2017 at the Gothenburg Summit, which sets out in point 9 the principle of the work-life balance, or to be precise that "parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services"[2].

In this article we will analyse the Directive on work-life balance, examining the Directive from three different angles: the objectives of the directive; the work-care model that runs through the directive; and the personal scope of the directive, considering three questions: 1) A directive for conciliation or a directive for equality? 2) A directive on reconciliation of work and parental and family care or a directive on reconciliation of work and care relationships? 3) A directive on work-life balance for all categories of workers, in particular, for the most vulnerable workers?

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[1] For a general view of this topic, see Rosário Palma RAMALHO, "Tempo de trabalho e conciliação entre a vida profissional e a vida familiar – algumas notas", *Tempo de Trabalho e Tempos de não Trabalho: o regime nacional do tempo de trabalho à luz do Direito europeu e internacional*, Lisboa: AAFDL, 2018, 101-116.

[2] There is, of course, a connection between the Work-Life balance Directive and of the EU Charter of Fundamental Rights. The Preamble of the Work-life Balance Directive refers to two provisions of the Charter: article 23 on equality between women and men and article 33 on family and professional life.

II. One of the most original features of this directive is the intersection established[3] between European social law and the law of equality and non-discrimination.

On the one hand, the directive creates rights that apply to all employed workers, men and women, in order to facilitate the reconciliation between one's professional and private life. From this point of view, the balance between professional and private life emerges as an objective whose beneficiaries are workers, both men and women, as everyone has an interest in achieving this balance.

On the other hand, we can argue that it is a Directive for equality since its goal is to create conditions that facilitate equality between men and women in the labour market[4]. In this regard, the objective of the Directive, more than conciliation itself, it is to achieve equality through the individualization of conciliation rights and flexible working formulas.

In fact, according to the problem represented in the Directive, the unequal participation of women in the labour market is closely related to the unequal distribution of responsibilities for the care of children/childcare. The fact that women continue to assume a predominant role in most of these cares and responsibilities is identified as a factor that prevents women from fully participating in the labour market, where they remain under-represented or are forced to come up with strategies that make it possible to reconcile their professional activity with family responsibilities (absences from the market that are relatively prolonged due to childcare or the option to provide part-time work) with high costs in terms of career progression and remuneration.

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[3] See Álvaro Oliveira / Miguel de la Corte-Rodríguez / Fabian Lütz, "The New Directive on Work-Life Balance: Towards a New Paradigm of Family Care and Equality?", *European Law Review* 3 (2020) 317. This intersection might not be easy because, as noted by Christina Hiessl, "Work-life balance – Introduction", *The International Journal of Comparative Law and Industrial Relations* 36/1 (2020) 56, "policy approaches to work-life balance must be aware of the delicate balance between two aims which are mutually exclusive to a certain degree: valuing and supporting care work adequately vs. discouraging women from shouldering a disproportionate burden as informal carers".

[4] This is explicitly mentioned in article 1 of the Directive: "This Directive lays down minimum requirements designed to achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life for workers who are parents, or carers."

In order to reverse this scenario, the new Directive challenged the gender assumptions about care, reinforcing the legal framework of incentives for men to assume an equal division in these responsibilities. In this context, two measures stand out in particular[5].

For the first time at an EU level, fathers, or recognized second parents[6], may take a paid 10-working-day paternity leave to be enjoyed on the birth of the worker's child. Although it can be said that this right alone does little to change the secondary *status* of the male figure in this context[7] – it is not as extensive as maternity leave[8] – it represents a positive step forward in recognising fathers as carers and as independent rights holders[9]: it does not require minimum seniority requirements or minimum periods of work; it is independent of marital or family *status*, with the clear aim of avoiding any discrimination between married and unmarried couples and between heterosexual and homosexual couples; and it is a form of paid leave, or paid at least at national sick pay level, which is fundamental in encouraging men to take such leave.

The second response as regards improving a new father's rights concerns parental leave itself. In fact, the analysis carried out during

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[5] Some of these measures (compulsory leave periods; flexible and well-compensated leaves; "father quotas"; flexible work arrangements) were already indicated by the International Labour Organization in its study, Laura Addati / Naomi Cassier / Katherine Gilchrist, *Maternity and paternity at work: law and practice across the world*, Geneva: International Labour Office, 2014.

[6] This gender-neutral wording was adopted following an amendment introduced by the European Parliament, and is intended specifically to clarify the eligibility of adoptive parents to paternity leave. As a result, in countries where same-sex couples can access adoption, same-sex partners of the mother are entitled to paternity leave – see, Elisa Chieregato, "A work-life balance for all? Assessing the inclusiveness of EU Directive 2019/1158", *The International Journal of Comparative Law and Industrial Relations* 36/1 (2020) 11.

[7] Marta Fernandez Prieto, "Conciliación de responsabilidades de progenitores y cuidadores y igualdad de oportunidades en la Directiva (UE) 2019/1158", *Revista de Derecho Social y Empresa* 12 (2020) 13. In the European Economic Social Comitee's view, a longer period – e.g. up to one month – to be agreed between employer and employee would be more appropriate to achieve the proposal's goal. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017AE2275&rid=6>, accessed 27th September 2021.

[8] And taking it is not compulsory, in contrast to the compulsory minimum two weeks of maternity leave which, owing to health and safety reasons, are obligatory.

[9] Michelle Weldon-Johns, "EU work-family policies revisited: finally challenging caring roles?", *European Labour Law Journal* 12/3 (2020) 9.

the preparation of the Commission proposal showed that Directive 2010/18/EU was not sufficient to allow both parents to exercise their rights on an equal basis. Since it did not guarantee any payment during parental leave, many families simply could not afford to take it. Moreover, the majority of fathers do not use their parental leave entitlement, and transfer a significant portion of their rights to mothers. In this context, the new directive, while maintaining the right of each parent to a minimum of four months of parental leave, strengthens the mechanism of non-transferability of parental leave from one parent to the other from one to two months at least. By extending the non-transferable period to two months, EU law ensures that parents will have to share their license if they want to use everything. The paid nature of the leave also recognizes and values their role as carer for each parent, although in this field the European Union has acted to a sufficient degree with the requirement for an adequate income without any minimum limit, which will naturally have an impact on the effectiveness of the measure.

These two changes suggest tentative moves towards a more genuine recognition of shared gender roles. But, given that much is left to the discretion of Member States, as noted by Michelle Weldon-Johns[10], it remains to be seen whether the specific rights for working fathers and other second parents, provide them with genuine choices regarding their work-family responsibilities.

III. Another angle that is worth noting concerns the work-care model that the directive incorporates. What care situations are covered by the directive? Post-natal care, early child care/care of young children, care for sick or disabled dependents, eldercare, end-of-life care? Furthermore, are we facing a model focused on family members who work? Or more generally, on caregivers who work?

From that point of view, the Directive advances a genuine change in the approach underlying care roles.

First of all this is because care situations are no longer focused on parental care for children[11], but extend to the complex and continuous

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[10] "EU work-family policies revisited", 15.

[11] With regard to parental care for children, there have been some positive developments too. The right to request flexible working arrangements has also undergone a certain extension, as it becomes an independent right and not linked to the situation

care relationships that people who work with throughout their lives – caring for sick dependents, the elderly and end-of-care of life; and on the other hand, because the care relationship between the working carer and the person being cared for is not identified only as a parental relationship, not even within the family.

This extension is reflected, with particular accuracy, in the category of working carer that will be able to take five working days of leave per year[12] and to request flexible working arrangements (including the use of remote working arrangements, flexible working schedules, or reduced working hours).

If we look at the definition of carer for the purposes of leave (and flexible work arrangements), the Directive defines him or her as a "worker who provides personal care or support to a family member or to a person who lives in the same household as the worker and who needs significant care or assistance for a serious medical reason, as defined by each Member State" (article 3 (1) (d)). The worker-carer relationship with the person being cared for can therefore be a family relationship – "children, parents and spouses or civil partners, when recognized by national legislation" – but also includes people not related to the worker, who only live with the carer and who need care.

When it comes to family care relationships, despite the recognition of family diversity (Recital no. 37 of the Directive), the Directive still reflects a traditional model of the family. According to Elisa Chieregato, "parental rights are still premised on the assumption of a two-adult family, as they are limited to caring relationships resembling the nuclear family"[13]. Michelle Weldon-Jones observed that the definition

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of returning to parental leave, as provided for in Directive 2010 18/ EU. In addition, it can now be exercised by working parents, with children up to a certain age, at least eight years old, which most likely has the effect of extending the care situations to older children.

[12] Carers' leave is different from force majeure leave, which is a leave for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable. This right already existed under the 2010 Parental Leave Directive and is maintained in the new Directive.

[13] "A work-life balance for all?", 71. According to the Author, the Directive does not take into consideration the needs of other families, such as single parents, reconstituted families or extended families, which could benefit from measures providing for longer leave or the ability to choose a person with whom care responsibilities may be shared. Also The European Women's Lobby has argued that "limiting the definitions to the nuclear- family model is not only obsolete as it does not reflect the reality

focus on traditional bonds and presumed relationships of care rather than focusing on responsibilities for care that may extend beyond defined familial roles[14]. Even so, it is surprising that the categories of grandparents and grandchildren are absent, although in the recitals of the Directive, Member States are encouraged to extend the carers' leave to these categories.

In the second case, the Directive extends a care situation to people who are not related, but who live in the same house, which means that it does not fully recognize the diverse and complex relationships and responsibilities of care that may exist, such as taking care of other family members, neighbours or friends[15].

In summary, from this angle, the work-care model that supports the EU Directive takes some steps towards recognizing a broader range of carers and care situations, even though the work-care model remains focused on the nuclear family and in the care responsibilities assumed therein. On the other hand, although some progress has been made towards providing carers who work more opportunities to remain in the labour market, the limited period of carers' leave (only five days) and the fact that the request for flexible working arrangements is not an absolute right but only a right to request such arrangements (where the request is refused, the employer has to provide reasons for the refusal or postponement of such arrangements)[16] indicates that more

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of the diversity of families, it could result in the exclusion of many workers who are effectively carrying out parenting and caring responsibilities without being biologically related to the person(s) they are caring for" – see European Women's Lobby, "Work-Life Balance Directive, The EWL Assessment of the recently adopted Directive on work-life balance for parents and carers", June 2019.

[14] "EU work-family policies revisited...", *cit.*, 16. However, according to Marta Fernandez Prieto, "Conciliación de responsabilidades de progenitores", 21, although nothing is mentioned in the preamble of Directive 2019/1158, relationships by affinity will also be admitted.

[15] Michelle Weldon-Johns, "EU work-family policies revisited...", *cit.*, 16.

[16] Michelle Weldon-Johns, "EU work-family policies revisited", 16. Lisa Waddington / Mark Bell, "The right to request flexible working arrangements under the Work-life Balance Directive – A comparative perspective", *European Labour Law Journal* (2021) 20, available at <https://journals.sagepub.com/doi/full/10.1177/20319525211038270>, accessed 27th September 2021, note that "it remains uncertain whether, and to what extent, the CJEU might interpret the Directive as permitting scrutiny of the employer's reason for declining a request." The gains might be seen as pyrrhic victories if employers retain an unlimited prerogative to reject such requests for even the most flimsy or unpersuasive reasons.

will need to be done to support and complement the Member States' efforts to help families cope better with growing care responsibilities.

IV. This last section is about the personal scope of this Directive. After all, which workers will benefit from the directive's measures? Which workers are entitled to rights such as paternity and parental leave or flexible work arrangements such as flexible working hours and distance work? All categories of workers, standard workers and non-standard workers, in particular, the most vulnerable workers such as domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees?

If we look at the formula used in article 2 to define the personal scope of the Directive, it seems that the Directive provides protection to a broad category of workers. In fact, according to article 2, the Directive applies "to all workers, men and women, with an employment contract or other employment relationship as defined by the legislation, collective agreements and national practices in force in each Member State, taking into account the jurisprudence of the Court of Justice.".

The appeal to the European Court of Justice case law is significant, since it suggests the possibility that the directive may apply to a wider range of employment relationships than that covered by the domestic Labour law of each Member State or at least prevents the use of more restrictive concepts than the concept of worker community.

Moreover, it should be noted that Directive 2019/1158 uses the same personal scope clause used by Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, which has been adopted precisely to improve working conditions by extending existing minimum standards to new forms of employment such as occasional contracts, on-call contracts, zero hour contracts, workers involved in the platform economy, etc. Since the personal scope clause of Directive 2019/1158 is based on that of the Directive 2019/1152, this is also an important point for arguing that Directive 2019/1158 provides protection for a wide category of workers.

Although we very much welcome this intention to create a potentially broad scope for Directive 2019/1158, it is important to note some weaknesses.

First of all this is because the concept of 'worker' developed by the Court of Justice is not a very ambitious concept. Despite being an autonomous concept, at the core of the definition lies the element of subordination or personal dependency. Martin Risak and Thomas Dullinger argue that the European Court of Justice has not yet used economic factors to extend the scope of application beyond those persons working not in a relationship of "personal" subordination but in one based on some form of economic dependency, since they are not really performing on the market but are working in person for only one or a very small number of contractual partners. In only a few cases, most of which concerned competition law, have such elements been taken into account[17]. And if so, it is not so clear that the concept of worker for the purposes of the Directive and access to conciliation measures includes these new categories of precarious workers[18].

Secondly, even assuming that Directive 2019/1158 responds to this broad protection concern and covers these precarious relationships, the fact that the Directive allows Member States to limit access to flexible work arrangements and leaves it to those who have been employed for a minimum work period may undermine the effectiveness of conciliation rights. In a context of increasing precariousness and atypical jobs, as mentioned by Elisa Chieregato[19], the setting of these criteria will mean that more and more workers across the EU can be excluded from parental rights and related benefits, precisely because of the occasional, intermittent, unstable nature of the activity they provide.

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[17] *The concept of worker in* EU *law – Status quo and potential for change*, Report 140, *European Trade Union Institute*, Bruxels (2018) 45, available at <https://www.etui.org/publications/reports/the-concept-of-worker-in-eu-law-status-quo-and-potential-for-change>, accessed 27th September 2021. For a more general and critical perspective of the evolution of EU concept of worker, see Joana Nunes VICENTE, "O conceito de trabalhador no Direito da União Europeia: a jurisprudência do Tribunal de Justiça e a evolução legislativa recente", in Ricardo *et al.,* coord., *Diálogos com Coutinho de Abreu*, Coimbra: Almedina, 2020, 395-413. In contrast, Emanuele MENEGATTI, "Taking EU labour law beyond the employment contract: The role played by the European Court of Justice", *European Labour Law Journal* (2021), available at <https://journals.sagepub.com/doi/full/10.1177/2031952519884713>, accessed 28th September 2021, considers that the Court has built a common European concept of 'worker', broader than that of 'employee'.

[18] For an optimistic view, see Francisco Liberal FERNANDES, *O conceito de trabalhador no direito social comunitário*, Coimbra: Gestlegal, 2019, 108.

[19] "A work-life balance for all", 14.

Thirdly, it is important to note that these precarious workers are the ones who, in practice, will have the greatest difficulties in accessing conciliation measures. Measures such as the implementation of flexible hours or the use of telecommuting may respond to the aspirations of many highly qualified intellectual workers, but may be poorly suited to meet the needs of less qualified workers, not only because the sectors of activity in which they are concentrated will be less suitable to this adaptability (e.g. restaurants, the tourism sector, domestic service, etc.), but also because, normally being workers with precarious ties, they will face, due to a lack of negotiating power, greater difficulties in requesting such conciliation measures. In addition, this greater difficulty of workers with precarious or occasional jobs in accessing conciliation measures is also relevant in that it can reflect and exacerbate other existing inequalities, due to discriminatory factors, such as age, race, ethnic origin or nationality.

V. In conclusion, this is undoubtedly a directive for equality and through it important measures are being implemented in the right direction. This is also a directive that takes some provisional steps towards recognizing a wider range of caregivers and situations of care. However, a fuller picture is even more necessary today, given the great heterogeneity of workers existing in the labour market. Since the Work-Life Balance Directive is a directive for equality, which wants to create conditions that facilitate equality between men and women in the labour market, it is part of a broader agenda on equality in the European Union, an aspect that cannot be undermined.

MEDIA REGULATION, DEMOCRACY AND THE RULE OF LAW IN THE EUROPEAN UNION

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Jónatas E. M. Machado*

1. Introduction

In the Preamble to the Treaty on European Union is the way in which the cultural, religious and humanist inheritance of Europe provided the basis on which the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law have developed[1]. These values constitute the founding legal-political axioms of the entire structure of normative principles and rules that underpin the process of integration and union of the European peoples. The process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen, as referred to in article 1 of the TEU, must, at the same time, rely on defensive protection and the active promotion of human rights, democracy and the rule of law.

The Constitutions of the Member States of the European Union have long paid tribute to these values and principles in their first articles. Likewise, the first part of article 2 of the TEU expressly states that "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights". This is not a mere proclamation of political liturgy or an

* Univ Coimbra, University of Coimbra Institute of Legal Research, Faculty of Law.

[1] Treaty of the European Union, Preamble § 2.

officious formula, to be enunciated in the ceremonies that mark important dates of the European integration processes. Rather, these are normative propositions that generate legal imperatives that are binding on EU law and the national law of each Member State. The violation of these values and principles cannot fail to have legal consequences. First, they must be protected, respected and promoted by all institutions, bodies and agencies of the EU. Second, all political, legislative and administrative institutions of the Member States must guarantee the primacy and effectiveness of these values. Third, national courts, in conjunction with the Court of Justice of the European Union, have a fundamental role in neutralizing all national acts that constitute a violation of them.

As can be seen from article 7 of the TEU, the existence of a clear risk of serious violation of the values referred to in article 2 can be, with certain assumptions verified, determined by a majority of 4/5 members of the Council. On the other hand, the European Council, by unanimous deliberation, under certain political and procedural presuppositions, can verify the existence of a serious and persistent violation, on the part of a Member State, of these same values, with the possibility of suspending some of the rights resulting from the application of the Treaties to the Member State concerned, including the right to vote of the representative of the Government of that Member State in the Council, in accordance with the principles of adequacy, necessity and proportionality. It is no wonder, furthermore, that the European Court of Justice (ECJ) has been called upon several times to proclaim and defend the values inherent in the rule of law. In this brief article we will try to highlight a normative fact that has long been established in the law of the media: the protection and promotion of the various communicative freedoms, namely, of expression, information, press, broadcasting and social networks, constitutes a fundamental element of the structure of human rights, democracy and the rule of law. European and national institutions and procedures that are concerned with safeguarding these values must necessarily be concerned with guaranteeing those freedoms.

2. EU regulation of the audiovisual sector

2.1. Normative framework

The European Union's interference in the regulatory framework of the audiovisual media has been a reality for several decades, prior to the Maastricht Treaty itself, which created the EU. It focused mainly on two angles of the single market. On the one hand, it was expressly recognized that television, radio and telecommunications constituted the provision of services at a distance, which could be extended to the normative scope of the freedom to provide services and to the corresponding normative rule prohibiting restrictions and discrimination[2]. On the other hand, it was clear that these communicative activities were inseparable from the freedoms of movement of goods, workers, establishment and movement of capital. They also are inextricably connected to topics such as intellectual property and taxation. In addition, EU competition law and the corresponding rules on agreements between companies, abuses of a dominant position, mergers and State aid applied to them. Many legal cases in the ECJ dealt with conceptual and technical issues concerning this broad normative framework[3].

In these areas, Articles 28, 45, 49, 56, 63, 101, 102, 106 and 107 of the TFEU apply today, in so far as they have to do with issues concerning the media. However, it was already clear that European media regulation could not only obey economic and market criteria, but should also favour non-economic interests, of a political, social and cultural nature, related to the guarantee of freedom of expression – enshrined in Article 10 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by all Member States – of the access to political and socially relevant information, the integrity, diversity and European origin of media content and the protection of minors and right of reply. The EU supports, coordinates and completes the action of States in the fields of culture, contributing

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[2] Television Without Frontiers Directive (TVWF Directive), Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities.

[3] See for instance, C-445/19, Viasat Broadcasting UK Ltd, 25.01.2020; C-347/14 New Media Online GmbH of 21.10.2015; C-403/08 and C-429/08 Football Association Premier League, 04.10.2011.

to cultural and linguistic diversity. In the last three decades, the European Union has developed an important activity for the promotion, strengthening and protection of European audiovisual production[4]. The protection of the European cultural and linguistic heritage justifies the unanimity rule when it comes to agreements signed with third States in the scope of audiovisuals.

Among the relevant TFEU articles, 6, 165, 167 and 207 stand out. Protocol No 29, on the public broadcasting service of the Member States adheres to the principle that public service broadcasting in the Member States is directly associated with the democratic, social and cultural needs of each society, as well as with the need to preserve pluralism in the media. It upholds the power of Member States to provide funding for public service broadcasting, in so far as such funding is granted to broadcasters for the purpose of carrying out their public service mission, as entrusted, defined and organized by each Member States, and in so far as such financing does not affect trading conditions or competition in the Union in a way that would be contrary to the common interest, account should be taken of the fulfilment of that public service mission. The enshrining of the right to freedom of expression in Article 11 of the European Union Charter of Fundamental Rights definitively establishes the relationship between freedom of expression and democracy and the rule of law. Freedom of expression, opinion and information is recognized for all individuals, without interference by public authorities and without regard to borders. At the same time, respect for freedom and pluralism of the media is affirmed. As we will see below, these are fundamental rights and principles in a democratic rule of law.

2.2. Communicative freedoms in a democratic society

Freedom of expression in a broad sense has deeply subjective roots, as an expression of dignity, rational and moral-practical autonomy,

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[4] According to the EU Commission, "[s]ince 1991, Creative Europe MEDIA has invested over €2.6 billion in the film and audiovisual industries to support the development, promotion and distribution of European works within Europe and beyond". Creative Europe: 30 Years of Support to European Films and creative media works, Press Release, 21.01.2021, available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_104>, accessed on 25.08.2021. As an example of the litigation in this area, see T-369/84 and T-85/95, DIR International Film Srl, et. al, 19.02.1998.

authenticity and integrity of the human being. Since the latter is uniquely endowed with the capacity for abstract thinking and cultural creation itself, communicative freedoms are inseparable from the free development of personality and the flourishing of each individual. However, these fundamental rights have a strong objective dimension. On the one hand, it is essential for the search for truth and knowledge, allowing the formulation of hypotheses and refutations and testing, in a dialogical and critical way, the validity and truth of arguments and counter-arguments. On the other hand, it ensures the free development of all social activities, in so far as politics, law, economics, religion, science, art and culture are structured in a communicative way. In addition, freedom of expression in a broad sense is indispensable for the protection of democracy and the rule of law.

Communication is something inherent in democratic political process and the dialectic between political majorities and minorities. Democracy presupposes an open and plural discussion of issues of public interest, in terms that allow the early diagnosis of problems, the argumentative consideration of alternative solutions, the public elaboration and justification of public policy choices and the critical evaluation of the results achieved. At the same time, it assumes the possibility of electing, evaluating and deposing the political actors to whom democratic authority is delegated. In all these moments, the availability of information on the data relevant to the self-government of the community is essential, together with the freedom to propose different interpretations and evaluations of these data and to formulate proposals for collective action. The universal vote and democratic dialogue only make sense if the rights of thought, opinion, expression and information are guaranteed, because only in this way is it possible to form public opinion and political will in a free and informed manner.

Freedom of expression is also of crucial importance for guaranteeing the rule of law. Journalists and the media play a supervisory role, on behalf of the entire political community, and they are required to exercise permanent vigilance that allows the detection and public denunciation of the pathologies of all social powers (e.g. arrogance, arbitration; corruption; nepotism; incompetence, waste, bad governance) and contributing to the accountability of government officials to public opinion. Some recent cases have shown how even in Europe investigative journalism can be a risky and lethal activity. To this end,

European Union law must be concerned with the regulatory conditions of the Member States in terms of guaranteeing freedom, independence, pluralism and transparency of the ownership of media companies. Journalists must be given legal guarantees of independence and confidentiality of the newsroom, editorial freedom and confidentiality of sources of information. The protection of whistleblowers must also be ensured[5].

When fulfilling their informative function, media companies must be duly protected from judicial actions, of a criminal or civil nature, instituted with the sole or main objective of intimidating and silencing journalists and media companies, removing them from their function. surveillance and referring them to culturally empty and civic anaesthetizing forms of entertainment. The activity of journalists duly accredited and subject to a code of ethics in the newsroom, based on truth, rigour and objectivity, must be protected in relation to all those who, taking advantage of social networks, deliberately intend to disseminate false news and disinformation in order to serve political, economic or ideological agendas, sometimes at the service of non-European political and economic forces. The guarantee of the European Union as a community of values and law, calls for special attention to be paid to the role of media regulation.

3. Regulatory challenges

3.1. Television, radio and internet

As previously mentioned, at the end of the 1980s, with the 1989 TVWF Directive[6], the European Economic Community began to regulate radio and television activity, framing it as an economic service with freedom within the single market. At the same time, it was fundamental for the affirmation of European identity and cultural unity, with special rules for the production, promotion and dissemination of culturally diverse European audiovisual content[7], as a response to American and Latin-American content. The rule was the freedom to

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[5] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

[6] Council Directive 89/552/EEC of 3 October 1989.

[7] Arts. 4 ff of Directive 89/552/ EEC.

provide audiovisual services, although with some restrictions, namely those concerning advertisements and the protection of human dignity, equality, ideological pluralism, health, safety and the environment, as well as the protection of minors[8]. Especially interesting was the guarantee of the right of reply[9]. It gave individuals the right to respond to any erroneous statements of fact produced by a programme broadcast by any broadcaster under the jurisdiction of a Member State. This right had, from the beginning, a subjective function, to protect the good name and reputation, and an objective function, to contribute to the truth and the reliability of speech in the public sphere. This aspect is very significant, in so far as it rejects falsehood and manipulation as legitimate forms of public discourse.

The regulatory system was improved, through the adoption of a new television directive, in 1997, addressing issues such as jurisdiction, tele-shopping and the protection of minors. Particular attention was paid to the dissemination of programmes of special interest to society, although the emphasis was on sporting events, such as the final of the European football championship or the Olympic Games[10]. Topics such as protection of the public interest in terms of television's role as the provider of news and information, education, culture and entertainment, along with the guarantee of pluralism of the media were left to the States, provided they did not violate EU Law.

The development of digital technologies and the convergence of audiovisual outlets gradually brought forward the need for new changes in the regulation of the media, which would happen, after extensive consultations, in 2007, with Directive 2007/65/EC[11]. Its main goal was to adapt the existing regulatory framework to the structural impact of the spread of information and communication technologies (ICT) and new technological developments and business models,

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[8] Arts. 12 ff and 22 of Directive 89/552/ EEC.

[9] Art. 23 of Directive 89/552/EEC.

[10] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

[11] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

optimizing competitiveness and legal certainty for Europe's media, as well as respect for cultural and linguistic diversity. This Directive affirmed the connection between the audiovisual sector the Charter of Fundamental Rights of the European Union, in particular Article 11. It recognized the internal connection between the media and the constitutional principles of democracy and the rule of law, leaving it for the Member States to apply their constitutional rules relating to freedom of the press and freedom of expression in the media.

Although audiovisual media services are perceived as essentially cultural and economic services, they are very important for societies and democracy. Media regulation should ensure freedom of information, diversity of opinion and media pluralism. This same idea was later reaffirmed by Directive 2010/13/EU[12]. Gradually, the political and constitutional dimension of the media took its prominent place alongside the economic, social and cultural dimensions. This trend was to be considerably enhanced, some years later, with Directive (EU) 2018/1808, the New Audiovisual Media Services Directive (AVMSD)[13]. This normative instrument reinforced the independence of audiovisual regulators, by ensuring that they are legally distinct from their government and functionally independent from the government and any other public or private body. This institutional guarantee of independence of national media regulatory bodies, with requirements similar to those normally associated with the courts or the public prosecutor's office, expresses the recognition that media regulation is inseparable from the guarantee of fundamental rights, democracy and the rule of law.

The protection of equal dignity and freedom of all members of the political community, from which peaceful and democratic coexistence depend, can also be perceived in the increased protection, on TV and video on demand, against incitement to violence or hatred and public

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[12] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)

[13] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

provocation to commit terrorist offences. These positive developments should translate, in the future, into tighter normative requirements, at European level, of aspects of media regulation such as ownership, pluralism, transparency, editorial autonomy, editorial pluralism, the provision of news on issues of general interest at local, regional, national or European level, the legal status of journalists and the protection of investigative journalism.

3.2. Social media

In the digital environment, the same audiovisual content can be transmitted through different platforms, which is why the structural and regulatory distinction traditionally existing between them has lost much of its raison d'être. The 2018 revised AVMSD[14] extended certain audiovisual content rules to video sharing platforms (e.g. Youtube) and social media platforms (e.g. Facebook). Among these are rules concerning appropriate measures to protect people from incitement to violence or hatred and content constituting criminal offences.

The AVMSD also ensured stronger protection of minors against harmful content in the online world, including video-on-demand services and video-sharing platforms. However, despite the enormous possibilities of inclusive communication that they created, social networks and video sharing platforms have proved to be a very serious threat to democracy and the rule of law, far beyond inciting radicalization, extremism, hatred and violence. They have come to allow and facilitate orchestration, often in a subtle and insidious way, of systematic campaigns to spread misinformation, manipulation, conspiracy theories, fake news and alternative facts.

There is now abundant evidence of the destabilizing and disintegrating power of systematic disinformation campaigns. It is possible to create fake profiles and form highly organized digital militias, with the objective of sowing confusion and distrust in the public sphere, thereby eroding the decision-making capacity, credibility and legitimacy of legislative, administrative and judicial institutions and of the main

[14] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

political and social actors. In some cases, the pursuit of conjunctural political or electoral objectives at national level may be at stake, as was the case with the spread of populist and nationalist ideas around before and after Brexit. In other cases, power games and hybrid threats may be at stake, in the pursuit of geo-political and geo-strategic objectives, with structural impact on the Member States and the European Union as a whole, with external political, economic and social actors committed to achieving the goal.

The 2018 Joint Action Plan Against Disinformation[15] shows that EU institutions and bodies are well aware of the challenges to be faced, requiring a coordinated response. It calls for "urgent and immediate action to protect the Union, its institutions and its citizens against disinformation". While recognizing that "[f]reedom of expression is a core value of the European Union enshrined in the European Union Charter of Fundamental Rights and in the constitutions of Member States", the Action Plan goes on to define disinformation as "verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm". In this context, public harm includes "threats to democratic processes as well as to public goods such as Union citizens' health, environment or security". The threat to the integrity of the European Union is also included in this category. Most importantly, disinformation does not include "inadvertent errors, satire and parody, or clearly identified partisan news and commentary". While freedom of expression is essential to the free formation of public opinion and political truth, disinformation prevents this process from occurring in an informed and authentic manner. A political system based on lies and deception is incompatible with democratic ideas of citizenship and popular self-government and with the substantive and formal dimensions of the rule of law.

The Action Plan stressed the key role played by civil society and the private sector (notably social media platforms) in tackling the problem of disinformation, and lead online platforms and the advertising industry to agree on a Code of Practice in September 2018. Among

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[15] Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 5.12.2018 JOIN (2018) 36 final.

its most salient points are the creation of an independent network of fact-checkers, the implementation of a rapid alert system, the promotion of media literacy, the cooperation with national election networks, fostering a secure, trust-worthy and accountable on-line ecosystem, as well as support to independent media and quality journalism. Even before the Covid-19 pandemic, misinformation in the field of health and vaccination was already a serious problem in the EU, expressly dealt with in the 2018 Action Plan. With it, the problem became much more pressing.

Although voluntary self-regulation in the private sector can play an important role, it most probably insufficient. It is important that the public authorities of the various Member States adopt a more hands-on approach, based the effective protection of digital citizenship rights against manipulation and disinformation.[16] Special attention must be paid to the conduct of social media platforms in different areas such as transparency, reporting obligations, provision of information, algorithmic design and content selection, indicators of trustworthiness or professional requirements.

The intentional and systematic dissemination of facts proven to be false, beyond any reasonable doubt, with the aim of achieving political, ideological or economic objectives can and should be restricted, provided that in accordance with the principles of legality, equality, the protection of legitimate expectations and proportionality. This demands greater determination in the coordinated response to disinformation at the level of media regulation requires a greater dependence on co-regulation and hetero-regulation at the European level, in order to ensure the application of a more structured regulatory framework and to promote fact-based and effective communication in all media outlets. Stronger cooperation between Member States' media regulation bodies and EU's institutions is needed.

It is in this context that it is important to stress the importance of recent proposals by the European Union to systematically regulate the

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[16] In Portugal, Act n.º 27/2021, of 17.05, approved the Charter of Human Rights in the Digital Age, building on the European Union Action Plan. According to its article 6º/2 disinformation is defined as "any demonstrably false or misleading narrative created, presented and disseminated to obtain economic benefits or to deliberately mislead the public, and which is likely to cause public harm, namely threat to democratic political processes, to policy-making processes public goods and public goods."

online content of digital platforms, including major search engines and live-streaming services, within the framework of the future Digital Markets Act and the Digital Services Act[17]. The aim is to strengthen the protection of the fundamental values of the European Union by creating a regulatory framework on digital content that is clear, adequate, attentive to risks, transparent, and independently applicable. Pursuing this objective makes the institutional dialogue that has been established on this matter within the scope of ERGA, involving national media regulators, decisive[18].

3.2. ERGA

With the aim of assuring the coherent application of Directive 2010/13/EU and of developing the internal market for audiovisual media services, the Commission established, in 2014, the European Regulators Group for Audiovisual Media (ERGA) as an advisory body[19]. ERGA, composed of national independent regulatory bodies in the field of audiovisual media services, intends to facilitate a closer and regular cooperation between the competent independent regulatory bodies of the Member States and the Commission.

Article 30 of Directive (EU) 2018/1808 came to establish the principle that all Member States should establish a media regulatory body that is legally autonomous, impartial, transparent and totally independent from political and economic power. The main regulatory objectives are ensuring "media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition." Member-States must provide regulatory bodies with the material and human resources necessary for the effective performance of their functions and their contribution to the work of ERGA. Article 30b of the Directive (EU) 2018/1808 establishes ERGA, giving it the status of an entity created by EU legislative act.

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[17] The Digital Services Act Package, available at <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>.

[18] ERGA Statement on the European Commission's proposals for a 'Digital Services Act' (DSA) and a 'Digital Markets Act' (DMA), March 29th 2021, available at <https://erga-online.eu/wp-content/uploads/2021/03/ERGA-DSA-DMAStatement_29032021.pdf>.

[19] Commission Decision, Brussels, 3.2.2014, C (2014) 462 final.

Initially, ERGA's activity was designed to assume a predominantly economic and cultural dimension, with special attention to topics such as the audiovisual market, cross-border distribution, on-demand services and consumer rights. However, little by little the need to pay attention to the dimensions of media regulation related to democracy and the rule of law has intensified. The growing awareness of the way conventional media and social media have been used, in various countries (e.g. USA, UK) by powerful interest groups, both internal and external, to polarize and deceive public opinion, undermine electoral processes and erode the democratic legitimacy of political institutions, has led ERGA to openly discuss the need for greater regulation in areas such as transparency in political advertising and fake news[20]. The 2018 Joint Action Plan Against Disinformation, envisions that ERGA will play a critical role monitoring the implementation of the Code of Practice and in the assessment of its overall effectiveness[21].

Considering the various relevant cross-border issues regarding online content regulation, the possibility that ERGA will evolve in the future to become a European media regulator is not excluded. However, until this happens, it is clear today that the European Union cannot fail to pay attention to conventional media operators and social media platforms which, while ostensibly abusing freedom of expression and information, promote national and transnational agendas of deliberate and systematic attack on democracy, the rule of law and the stability of the political system of the European Union and its Member States.

4. Protecting democracy and the rule of law

The principles of respect for human rights, democracy and the rule of law are positively constitutive of the European political and legal order. For this reason, they must structure the European regulation of the press, audiovisual communication and social media, which are

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[20] ERGA calls for uniform definitions and European rules for transparency of political advertising ERGA's contribution to the public consultation on political advertising, 16.04.2021, https://erga-online.eu/wp-content/uploads/2021/04/210416_PR_ERGA_PoliticalAdvertising.pdf

[21] ERGA Report on disinformation: Assessment of the implementation of the Code of Practice, available at <https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf>.

increasingly brought together by digitalization and the convergence of technologies. The political and legal dimensions of communicative freedoms must be considered alongside the economic, social and cultural dimensions. This requires a robust protection of the freedoms of information, thought and expression and the guarantee of the smooth functioning of the free marketplace of ideas[22]. However, it also needs recognition of the existence of market failures and the adoption of reasonable corrective measures by the public authorities. Within EU law freedom is the rule and the restriction on freedom is the exception. For this reason, restrictions on freedom of expression and information must be exceptional, substantively limited, duly justified and subject to restrictive interpretation. Even so, they are inevitable in a marketplace of ideas invaded by deliberate and systematic disinformation. This reality raises difficult but unavoidable legal issues for the European Union's legislative and judicial powers.

No one doubts that a democratic society welcomes a variety of world views or ideologies and different and even contradictory opinions. This results in legitimate differences of opinion in areas such as freedom, equality, dignity, solidarity, authority, family, sexuality or gender. Democratic political discourse is inherently dialogical, dialectical and confrontational. In many cases it is important to agree to disagree and seek compromise solutions, rather than polarizing and radicalizing. In an open society, there will be intense discussions about which set of facts should be considered relevant, the extent of their relevance and the possibility of different interpretations of the same facts. Likewise, various hypotheses, theories, models, value-judgements or proposals for public policy will be based on the same facts. In some cases, hypotheses, theories and models are deliberately presented as facts or naively confused with them. In some cases, ideology will attempt to deny some facts and distort others. History has also taught us that, in different areas (e.g. politics, economics, religion or science) the

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[22] "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." Oliver Wendell Holmes, Abrams v. US, 250 U.S. 616 (1919).

minority may turn out to be correct and the majority may be wrong. In a liberal democracy, the imposition of a single line of thought by the public or private power must be rejected outright. Discussion and confrontation of ideas should be accepted as something normal and beneficial. The political community must be open to discussion and very cautious in its restriction. Each idea must be able to be tested against opposing ideas.

However, this is only possible if there is a common pre-commitment to the investigation and rigorous dissemination of the factual truth and to the logical validity of the arguments. Media regulation must guarantee a wide diversity of ideas and opinions. Ideas that were once considered erroneous and absurd have turned out to be correct and self-evident. The reverse is also true. However, regulation must also be attentive to public and private conduct that may distort the functioning of the market for ideas. This aspect is of great importance considering the attempts to control, intimidate and weaken the public radio and television services, as have occurred in countries as different as Poland, Hungary, Sweden, The Netherlands or Slovenia[23].

Most importantly, some have denounced the worrying trend in some conventional, very powerful media, such as that dominated by the Murdoch family, of having created a "market for crazy"[24], in the United States, Australia and Europe, being deliberately committed to the broadcasting of propaganda, strategic lies, disinformation, alternative facts and alternative realities, thereby undermining public trust in electoral processes and democratic political institutions and constituting a serious threat to democracy and the rule of law. It has rightly been pointed out that Brexit was, to a significant extent, the result of Murdoch's powerful media manipulation[25]. The COVID-19 crisis,

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[23] "Europe's Public Broadcasters, The people's voice", The Economist, April 10th, 2021.

[24] A market for crazy': Turnbull serves cold fury for the Murdochs", The Sydney Morning Herald, Tony Wright, April 12, 2021 — 4.10pmfirst published at 2.43pm available at <https://www.smh.com.au/politics/federal/a-market-for-crazy-turnbull--serves-cold-fury-for-the-murdochs-20210412-p57ihc.html>, 19,04.2021.

[25] "Murdoch and his children have toppled Governments on two continents and destabilized the most important democracy on earth. What do they want?", Jonathan Mahler, Jim Rutenberg, New York Times Magazine, April, 2019, available at <https://www.nytimes.com/interactive/2019/04/03/magazine/rupert-murdoch-fox--news-trump.html>.

increasing the appetite for disinformation and conspiracy theories, only worsened this situation. It is clear that the problem of manipulation does not arise only in relation to social media, but also in newspapers, radio, television and websites. In the domain of private media, this requires greater attention to the problems of media concentration and pluralism, transparency of ownership, subjecting journalists to codes of ethics, and ensuring the independence of the newsroom from media owners, advertisers and sponsors.

Regarding the public media, respect for human rights, democracy and the rule of law currently requires the strengthening of national and European public radio and television services, guaranteeing the factual objectivity of their reporting, the pluralism of ideas and opinions, the diversity of points of view, the openness to the majority and opposition and the independence of investigative journalism, trying, in this way, to avoid, at all costs, their capture by political power, be it liberal or illiberal, or by populist forces and fighting propaganda, disinformation and manipulation. A public television service cannot be a government or state propaganda agency. In this context, the existence of a broadcasting fee is important because it protects the public service from government political pressure.

On the other hand, a public service is an important counter-power in relation to large private mass media groups who do nothing more than promote their ideological agenda and their own political interests, of a different nature, even when it implies sowing disinformation and political instability in the states where they operate, as is currently observed in the United States and the United Kingdom. It is important to ensure European coordination of all public television services, placing them at the service of European identity and integration, and to strengthen the European Union's public television service. National communication regulators must be institutionally structured with guarantees of independence from political and economic power, and ERGA should act proactively as a surveillance and control system.

5. Conclusion

The European Union has undergone major structural changes in the field of audiovisual communications. On the one hand, these have proved early on to be important instruments of economic integration,

inseparable from an internal market. On the other hand, they were immediately seen as fundamental pillars for the rapprochement and mutual knowledge of the European peoples and for the consolidation of European cultural identity, in its internal and external aspects. The media no longer had a national interest, scope and legal regime, appearing as fundamental elements in the construction of European unity. Traditional regulatory issues such as ownership, transparency and media independence or positive and negative norms about content and its limits have acquired a European relevance. Added to this is the profound technological transformation of audiovisuals resulting from the digitization and convergence of technologies and the generalization of social media. If it is true that this facilitated communication between people and access to information, it is also true that it had a disruptive effect on media companies, public and private, and created new opportunities for manipulation and disinformation, very dangerous for the viability and legitimacy of democratic processes. This reality created new legal and political problems, of a European constitutional nature, forcing a much more intense collaboration and articulation of European institutions and Member States in regulating the media, in order to preserve fundamental rights, democracy and the State of law throughout the European Union.

A REALIZAÇÃO JUDICIAL DO ESTADO DE DIREITO NA TRIBUTAÇÃO

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José Casalta Nabais*

Vamos fazer algumas reflexões sobre a realização do estado de direito pelos tribunais em sede da tributação – o domínio matriz da acção do estado no que respeita ao funcionamento económico-financeiro das sociedades contemporâneas. Por outras palavras, vamos responder à questão: em que medida a acção dos tribunais, nacionais e europeus, vem contribuindo para assegurar os direitos e liberdades dos contribuintes.

O que implica que comecemos por aludir ao contexto em que a resposta à questão pode ter lugar, isto é, ao quadro que nos permita ter uma ideia do lugar verdadeiramente institucional que o estado, os contribuintes e os tribunais ocupam na dinâmica da tributação.

I. O estado fiscal como via de financiamento do Estado

E a primeira ideia a convocar é a de que estamos perante um estado fiscal. Um tipo de estado de que importa dar conta do seu sentido, como forma mais lograda de sustentação financeira das comunidades estaduais modernas, e do seu alcance, como especialmente revelador do específico lugar das pessoas, do mercado e do estado nessas comunidades e da dinâmica dialéctica que enforma a sua actuação.

* University of Coimbra, Faculty of Law.

1. Sentido do estado fiscal

Não constitui novidade que os estados actuais, do ponto de vista do seu financiamento, são estados fiscais[1]. Significa um estado financiado basicamente através de impostos, e não com base em outros tributos ou outros tipos de receitas. O que exclui tanto o *estado patrimonial*, que constituiu a forma de financiamento do estado na Idade Média, assente nos rendimentos proporcionados pelos bens do Monarca ou da Coroa, como o *estado empresarial* que, tendo tido expressão no estado iluminista, se concretizou sobretudo nos estados socialista do século XX. Duas formas de estado que, no essencial, assentam no autofinanciamento decorrente de uma economia dirigida pelo próprio estado.

Diversamente, no estado fiscal, temos fundamentalmente um hétero-financiamento concretizado na figura dos impostos, inerente a uma sociedade económica autónoma, cujo funcionamento assenta numa economia de mercado ou economia livre. O que se tem expressão eloquente na célebre afirmação de Oliver Wendell Holmes: «os impostos são o que pagamos por uma sociedade civilizada»[2]. Assim os impostos são o preço que todos, enquanto integrantes de uma dada comunidade organizada em estado, pagamos por termos a sociedade que temos.

Mas a exclusão de um estado patrimonial ou de um estado empresarial, não impõe como única solução um estado fiscal, pois sempre se pode perguntar se o estado não pode ser financiado por taxas e outros tributos de natureza comutativa, no que conduziria a um "estado taxador".

Uma ideia que chegou a entusiasmar alguns autores, não para a aplicar ao conjunto dos tributos e ao conjunto das despesas, mas a certos sectores da mais recente actuação do estado, como é o relativo à protecção do ambiente e, a seu modo, à regulação económica e social desenvolvida no quadro da mudança de uma «prestação pública» para uma «provisão pública» através da prestação privada dos serviços de

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[1] Sobre a ideia de estado fiscal, v. o nosso livro *O Dever Fundamental de Pagar Impostos. Contributo para a compreensão constitucional do estado fiscal contemporâneo*, 5.ª reimpr., Coimbra: Almedina, 1998, 2020, 191 e ss.

[2] Para uma visão do que têm sido os impostos ao longo da história, v. a obra de Charles Adams, *For Good and Evil. The Impact of Taxes on the Course of Civilization*, 2.ª ed., New York / Oxford: Madison Books / Lanham, 1999.

natureza económica. Todavia, o alcance de um tal tipo de estado é, a nosso ver, bastante limitado.

Limitado em geral porque o estado taxador encontra-se excluído, desde logo, de todo o conjunto de bens formado pelos *bens públicos*, cujos custos não podem ser repartidos pelos utentes, antes têm de ser suportados pelo conjunto dos contribuintes de impostos. E o mesmo vale relativamente aos bens que, embora os seus custos possam ser repartidos pelos correspondentes utentes, como os relativos à saúde, à educação, à habitação, à segurança social, ou seja, os relativos aos direitos sociais, o certo é que, por exigência constitucional, estes direitos devem ser assegurados a todos os cidadãos, sendo os mesmos, para quem os não possa assegura por si próprio, suportados pelos contribuintes[3].

O que vale, em larga medida, também no respeitante aos domínios da protecção do ambiental e da regulação económica e social. Pois, se em relação ao direito ambiental, o "princípio do poluidor-pagador" parece apoiar o estado taxador, a impossibilidade ou dificuldade em determinar o poluidor ou a medida dos custos da poluição a imputar aos poluidores, limitam em muito essa via. Algo que não deixa de estar presente também nas taxas ou outros tributos que suportam o financiamento da regulação económica e social[4].

2. O alcance: mercado e estado

Importa sublinhar o alcance que o financiamento do estado pela via dos impostos tem enquanto garantia fundamental de um dado equilíbrio entre o mercado e o estado, no quadro das comunidades estaduais modernas, cujo funcionamento assenta na sólida ideia de interdependência entre liberdade económica e liberdade política proporcionadas aos seus membros.

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[3] Que designamos, respectivamente, por "bens públicos por natureza" e "bens públicos por imposição constitucional" - v. o nosso livro *O Dever Fundamental de Pagar Impostos*, cit., p. 210 e ss., e artigo «A face oculta dos direitos fundamentais: os deveres e os custos dos direitos», em *Por uma Liberdade com Responsabilidade - Estudos sobre Direitos e Deveres Fundamentais*, Coimbra Editora, Coimbra, 2007, 163 e ss. (186 e ss.). V., também, Fernando Rocha Andrade, *Textos de Finanças Públicas*, Imprensa da Universidade de Coimbra, 2020, 40 e ss., que designa os segundos bens semipúblicos por razões distributivas.

[4] V. o nosso estudo «Da sustentabilidade do Estado fiscal», em José Casalta Nabais / Suzana Tavares da Silva, coord., *Sustentabilidade Fiscal em Tempos de Crise*, Coimbra: Almedina, 2011, 11-59.

Na verdade, a maneira como se financiam as comunidades nacionais implicada no estado fiscal é inteiramente consentânea com a ideia de primazia da liberdade das pessoas para, individual ou colectivamente, obterem os seus meios de sustento e de realização pessoal, cooperando com os demais membros da comunidade numa economia livre ou de mercado em ambiente de sã concorrência[5].

O que decorre da participação na produção de bens e serviços através da oferta dos correspondentes meios de produção ou organizando esta como empresários, obtendo, assim, as correspondentes remunerações ou contrapartidas próprias de uma economia assente em relações de troca de utilidades. Um quadro em que o estado se financia lançando mão de parte dos resultados positivos proporcionados pela economia, fazendo, assim, incidir os impostos sobre os resultados da distribuição primária dos rendimentos, riqueza e bem-estar operada pelo mercado em ambiente concorrencial.

Significa isto que o estado fiscal se financia de maneira heterónoma, ou seja, mediante o recurso a meios financeiros proporcionados pelo adequado funcionamento de uma economia livre. O que é bem diferente do estado patrimonial ou do estado empresarial que se financia fundamentalmente de uma maneira autónoma, ou seja, enquanto dono e gestor de toda a economia, e não enquanto regulador, ficando, por conseguinte, a seu cargo a distribuição verdadeiramente única dos rendimentos, riqueza e bem-estar. O que é diferente de uma distribuição em dois degraus constituída pela distribuição primária proporcionada pelo funcionamento do mercado e pela distribuição secundária ou redistribuição a cargo do estado, visando esta corrigir os resultados daquela. Pelo que, como é fácil de compreender, o papel desta dependerá muito da qualidade obtida por aquela, no quadro de um salutar equilíbrio entre o mercado e o estado que se revele virtuoso no sentido de o mercado responder adequadamente às falhas do estado e de este responder a tempo e horas às falhas de mercado[6].

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[5] O que mais não é do que uma outra maneira de afirmar a dignidade da pessoa humana como valor ou princípio matriz em torno do qual se posiciona toda a organização económica e política das comunidades estaduais.

[6] O que se revela cada vez mais difícil em virtude das falhas estruturais e simultâneas do mercado e do Estado, de que nos dá conta Vito Tanzi, *Termites of the State. Why Complexity leads to Inequality*, New York: Cambridge University Press, 2018, 191 e ss., e 305 e ss. V. o nosso livro *Problemas Nucleares de Direito Fiscal*, Coimbra: Almedina, 2020, 138 e ss.

II. A defesa judicial dos contribuintes

Num tal quadro de funcionamento do estado fiscal, a defesa e realização do estado de direito é missão de todos os poderes do estado. Por isso, também em sede da tributação a defesa dos direitos e liberdades dos contribuintes constitui tarefa de todos os actores tributários. Embora nos interesse aqui o papel dos tribunais, nacionais e europeus, é de aludir ao quadro mais amplo dos actores tributários.

3. O papel dos actores tributários

É claro que a defesa dos direitos e liberdades dos contribuintes passa pela acção adequada e articulada de todos os actores tributários – o legislador fiscal, os contribuintes, a administração tributária e os tribunais. O que se compreende, pois, a reduzir a realização dos direitos dos contribuintes à intervenção dos tribunais é manifestamente insuficiente desde logo porque reduz esta a situações de patologia jurídica.

Ora, são bem conhecidos os papéis dos actores tributários que se apresentam pela ordem, cronológica e lógica: *1)* o legislador fiscal, que cria ou institui em abstracto o imposto e regula necessariamente os seus elementos essenciais; *2)* o contribuinte que, como destinatário das normas que definem a incidência fiscal, pratica o facto tributário ou facto gerador do imposto, que não pode deixar de se reconduzir a manifestações da capacidade contributiva revelada na obtenção de um rendimento, na titularidade ou aquisição de bens de natureza patrimonial ou na aquisição onerosa de bens e serviços; 3) a administração tributária que dita o acto tributário ou acto de liquidação do imposto, através do qual se identifica o contribuinte ou devedor do imposto e determina, não raro através de diversas e complexas operações, o montante do imposto a pagar; e 4) (eventualmente) os tribunais quando a relação de imposto vier a ser atingida por alguma patologia contra a qual os atingidos venham a reagir para repor a legalidade.

Muito embora seja de assinalar que esta eventual intervenção dos tribunais se tenha tornou muito frequente, suportando uma verdadeira "indústria da litigação", dada a alteração profunda dos papéis dos outros actores situados a montante nas relações jurídicas tributárias. É que, dada a complexidades das situações tributárias, frequentemente internacionalizadas ou mesmo globalizadas, o legislador foi forçado a flexibilizar a legalidade fiscal, deixando inclusive alguns aspectos dos

elementos essenciais dos impostos para a administração tributária, que deles cuida através de orientações administrativas ou de actuações que não oferecem a garantia própria da tradicional intervenção do Parlamento através de lei.

Por seu lado, a tradicional tarefa da administração tributária de liquidar e arrecadar os impostos, foi, em larga medida, transferida para os contribuintes, sobretudo para as empresas, assente nas bem conhecidas técnicas tributárias de retenção na fonte e de pagamentos por conta de impostos. O que configura um sistema de "administração ou gestão privada" dos impostos, em que os contribuintes, com base num amplo exigente dever de colaboração, arcam com a liquidação e cobrança da generalidade dos impostos, suportando sem qualquer compensação diversos custos de administração e de cumprimento de impostos próprios e alheios[7].

Um quadro de actuação do legislador e da administração tributária que, naturalmente, reforça a litigação, aumentando em muito a probabilidade de a realização do estado de direito, no domínio dos impostos, passar necessariamente pela intervenção dos tribunais. Uma sobrecarga do poder judicial que, como é fácil de compreender, veio facilitar o apelo à resolução alternativa dos litígios, uma indiscutível e paradigmática expressão do actual fenómeno da "privatização da justiça". Uma realidade que, atendendo ao quadro da crescente morosidade da justiça, não podemos considerar grande avanço na real defesa dos direitos e liberdades dos contribuintes e na realização do estado de direito.

4. O papel dos tribunais nacionais e europeus

Mas deixemos esse quadro mais geral da realização dos direitos dos contribuintes e foquemo-nos em como os tribunais, nacionais e europeus, realizam o estado de direito no domínio dos impostos. Pois embora os resultados da defesa dos contribuintes pelos tribunais comportem limitações decorrentes da já referida "indústria da litigação", ainda assim é em sede judicial que os direitos dos destinatários do poder tributário do Estado encontram um respaldo mais consentâneo com a realização do estado de direito.

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[7] V. sobre a referida "privatização", *Direito Fiscal*, 11.ª ed., Coimbra: Almedina, 2019, 343 e ss.

Embora nas referências sumárias que vamos fazer não deixemos de assinalar alguns dos vectores que revelam as limitações ou dificuldades de resposta dos tribunais, nacionais e europeus. Assim, no respeitante aos tribunais nacionais, vamos aludir à defesa dos contribuintes pelo Tribunal Constitucional (TC), pelo Supremo Tribunal Administrativo (STA) e pela arbitragem tributária desenvolvida pelo Centro da Arbitragem Administrativa (CAAD). Por seu lado, no que concerne aos tribunais europeus, vamos ver como a defesa dos contribuintes pelo TJUE e pelo TEDH se revela, de algum modo, mais bem-sucedida do que a dos tribunais nacionais.

4.1. A defesa dos direitos dos contribuintes pelos tribunais nacionais

No que respeita aos tribunais nacionais, embora a generalidade das decisões propenda para a defesa dos contribuintes, podemos dizer que, em domínios muito significativos, a balança se inclina a favor do Fisco. O que vale para o Tribunal Constitucional, para o STA e para o CAAD.

Assim e relativamente ao TC, que controla constitucionalidade abstracta e, em última instância, a constitucionalidade concreta das normas jurídicas[8], embora tenhamos muitas decisões judiciais que defendem os contribuintes, todavia algumas das mais importantes foram favoráveis ao Fisco.

É certo que o TC declarou ou julgou inconstitucionais manifestações de verdadeiro fiscalismo como as traduzidas na excessiva garantia do crédito fiscal face aos credores comuns. O que se verificou com a declaração da inconstitucionalidade da impenhorabilidade total dos bens em execuções comuns de bens antes penhorados pela Administração Tributária[9]. E o mesmo sucedeu com a declaração de inconstitucionalidade, por violação do princípio da protecção da confiança legítima, da norma do artigo 751.º do Código Civil nos termos da qual o privilégio imobiliário geral, conferido à Fazenda Pública, preferia à hipoteca constituída antes da penhora realizada no processo de execução fiscal[10].

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[8] Segundo o conhecido modelo norte-americano de controlo difuso da *judicial review of legislation*.

[9] Acórdão n.º 451/95.

[10] Acórdãos 262/2002 e 263/2002. O artigo 751.º referia-se aos privilégios creditórios em geral, o qual, na sequência desses acórdãos, foi aletrado pelo Decreto-Lei n.º 38/2003, de 8 de Março, no sentido de se aplicar apenas aos privilégios creditórios especiais.

No sentido da defesa do estado de direito, o TC declarou inconstitucional orgânica da taxa de protecção civil que alguns municípios instituíram e outros se preparavam para aprovar, por não ser uma verdadeira taxa e, por conseguinte, os municípios não disporem de atribuições para tal[11]. O que levou os municípios, que a haviam instituído e cobrado, a devolvê-la. Embora seja difícil de entender que as tarefas de protecção civil possam ser dos municípios, já que constituem missão nacional. Inconstitucionalidade que, todavia, veio a ser ultrapassada com uma autorização legislativa concedia ao Governo[12], para estabelecer uma taxa de protecção civil nacional. Autorização que, se tivesse sido utilizada pelo Governo e, consequentemente, instituída a referida "taxa", mais não significaria do que a criação de mais um verdadeiro imposto com receita consignada.

Mas já em sede da proibição de impostos retroactivos, constante do artigo 103.º, n.º 3, da Constituição, o TC vem adoptndo um conceito tão restrito de retroactividade que leva a que considere inconstitucionais apenas os impostos relativamente aos quais se tenha verificado não apenas o facto gerador do imposto, mas também o próprio acto de liquidação. O que tem como consequência que a proibição da retroactividade dos impostos acabe por coincidir com o raio de acção do princípio constitucional mais geral da protecção da confiança legítima, tornando praticamente inútil a proibição de impostos retroactivos. Uma posição que tem permitido a que as leis do Orçamento do Estado contenham aumentos retroactivos de impostos, embora através de normas que, de maneira abusiva, são qualificadas como meras leis interpretativas[13].

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[11] Acórdãos n.ºs 848/2017 e 367/2018, que declararam com força obrigatária geral a inconstitucionalidade, da taxa municipal de proteção civil, respectivamente, do município de Lisboa e do município de Vila Nova de Gaia.

[12] Constante do artigo 314.º da Lei do Orçamento do Estado para 2019 = Lei n.º 71/2018, de 31 de Dezembro.

[13] A que constitui excepção o acordão n.º 267/2017 que julgou inconstitucional, por violação do princípio da não retroactividade dos impostos, o artigo 133.º da Lei do Orçamento do Estado para 2016, na medida em que este preceito atribui natureza interpretativa ao aditado n.º 21 ao artigo 88.º do Código do Imposto sobre o Rendimento das Pessoas Colectivas. V. o nosso estudo «Notas a respeito das leis interpretativas e impostos retroactivos», em *Por um Estado Fiscal Suportável – Estudos de Direito Fiscal*, vol. V, Coimbra: Almedina, 2018, 307-331.

Também as diversas tributações acessórias de impostos, sobretudo do Imposto sobre o Rendimento das Pessoas Colectivas, em geral constituídas formalmente por adicionais ao correspondente imposto[14], o TC se tem pronunciado quase sempre a favor do Fisco. Uma realidade que tem crescido muito nos últimos anos, sendo que a maioria dessas tributações foram criadas com a expressa declaração do seu carácter excepcional e extraordinário para vigorarem durante um curto período de tempo. O que não tem acontecido porquanto quase todas essas tributações se transformaram em permanentes.

No respeitante aos tribunais tributários, com destaque para o STA, também se verifica algo parecido ao que ocorre com o TC. De facto, também o STA tem tido as duas vertentes em que julga a favor dos contribuintes ou a favor do Fisco, sendo que as linhas jurisprudenciais em benefício deste sejam da maior importância porque diz respeito a verdadeiros blocos de soluções que muito têm contribuído para o crescente aumento da tributação.

Mas comecemos pelas linhas jurisprudenciais a favor dos contribuintes e de outros sujeitos passivos da relação tributária. Neste sector, é de referir, de um lado, a jurisprudência relativa à interpretação do conceito aberto da indispensabilidade" dos gastos e perdas no apuramento do lucro tributável das empresas exigido até 2014, em que o STA foi aceitando como indispensáveis diversos gastos e perdas recusados pela Administração Tributária[15]. De outro lado, é de aludir à exigência que a jurisprudência estabeleceu no sentido de os administradores e gerentes das sociedades serem administradores também de facto para responderem pessoalmente pelas dívidas tributárias das sociedades de que são administradores ou gerentes[16].

Já em sentido contrário, dando razão ao Fisco, encontramos dois domínios em que as soluções do STA não colhem o nosso acordo. Um deles tem a ver com a recusa da admissibilidade do vício de nulidade dos actos tributários, isto é, dos actos de liquidação dos impostos, admitida apenas quando haja violação do caso julgado. O que nos parece

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[14] Que ostentam os mais diversos nomes, tais como adicionais, taxas de tributação autónoma, taxas, contribuições – v. o nosso livro *Problemas Nucleares de Direito Fiscal*, 189-192.

[15] Indispensabilidade que constava do artigo 23.º do Código do IRC que, com a alteração em vigor depois de 2014, deixou de ter aplicação.

[16] V. o nosso livro *Direito Fiscal*, 11.ª ed., Coimbra: Almedina, 2019, 270 e ss.

grave dado que, não havendo uma lista própria de actos tributários nulos, se aplica a estes a relativa aos actos administrativos em geral constante do artigo 161.º do Código de Procedimento Administrativo (CPA)[17].

Uma solução que cria uma discriminação na impugnação judicial da legalidade dos actos tributários nulos face à impugnação dos actos administrativos em geral, porquanto ao considerar aqueles apenas anuláveis limita a sua impugnação a um curto espaço de tempo bem mais curto do que o dos actos administrativos.

Outro domínio, em que as decisões do STA se inclinam a favor do Fisco, é o relativo ao controlo da legalidade dos tributos bilaterais – taxas e contribuições financeiras. De facto, depois de estas, como vimos, não serem testadas, em sede do controlo da constitucionalidade pelo TC quanto à sua verdadeira natureza, para saber se constituem verdadeiros tributos bilaterais ou se não passam de "impostos que não ousam dizer o nome"[18], seria de esperar que, ao menos em sede do controlo da legalidade, se procedesse aos correspondentes testes de legalidade.

Isto é que os tribunais fizessem o teste da bilateralidade dos tributos, da proporcionalidade *(balancing test)* entre a prestação pública e a correspondente taxa ou contribuição e da justificação económico-financeira desses tributos, como o impõe o regime geral das taxas[19]. O que, em geral, não tem sido feito, conduzindo a um resultado inaceitável. Significa isto que a correcção jurídica destes tributos têm um escasso escrutínio, uma vez que a justiça constitucional acaba por os não testar por os não considerar impostos e a justiça tributária não procede aos testes da bilateralidade, proporcionalidade e justificação económico-financeira exigidos aos tributos bilaterais.

Por fim, é de aludir à actuação da arbitragem tributária protagonizada pelo CAAD. Introduzida por exigência e no quadro do resgate que Portugal foi forçado a solicitar em 2011[20], a arbitragem tributária tem-se

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[17] V. sobre este problema o nosso estudo «A respeito da invalidade do acto tributário», *Revista de Legislação e de Jurisprudência* 148 (2018/2019) 84 e ss.

[18] Na expressão do bem conhecido juspublicista francês Marcel Waline.

[19] Que embora aprovado para as taxas das autarquias locais, deve ter-se por regime geral comum aos tributos bilaterais - v. o nosso livro *Problemas Nucleares de Direito Fiscal*, 44 e ss. (esp. p. 52 e s.).

[20] Que teve ver com a situação económico-financeira decorrente da bancarrota provocada pela política económica e financeira do XVIII Governo - do Primeiro-Ministro José Sócrates - e do consequente pedido de resgate internacional feito e nego-

mantido. De facto, o Governo Português assumiu perante a União Europeia a obrigação de «implementar a nova lei de arbitragem fiscal», tomando «as medidas necessárias para a implementar» a fim de «permitir uma resolução extrajudicial efectiva dos litígios em matéria fiscal»[21].

Podemos dizer que as decisões do CAAD, no domínio da justiça tributária, se apresentam como visível qualidade técnica e proporcionam a resolução relativamente célere dos litígios. O que tem contribuído para a dinamização da ordem jurídica tributária, traduzido na melhoria da legislação fiscal decorrente das decisões da arbitragem em alguns domínios de acentuada a litigação.

Todavia, como as decisões são susceptíveis de recurso para o STA quando estejam em contradição com outras do CAAD ou dos tribunais tributários superiores (STA e Tribunais Centrais Administrativos), e para o Tribunal Constitucional, quando julguem inconstitucionais ou se pronunciem sobre a constitucionalidade de normas legais, não pode o CAAD destoar das linhas jurisprudências construídas pelo STA e pelo TC que, com o referimos, não se apresentam muito favoráveis aos contribuintes em importantes domínios da tributação. Daí que o contributo da arbitragem tributária para a defesa do estado de direito acabe por se situar numa maior celeridade das decisões judiciais, de um lado, e no mais rápido ajustamento e consolidação da legislação fiscal em sectores de elevada litigação, de outro[22].

4.2. A defesa dos direitos dos contribuintes pelos tribunais europeus

Passando aos tribunais europeus, verificamos que as decisões destes se apresentam, em geral, mais inclinadas para a defesa dos contribuintes, embora se deparem com limites importantes decorrentes sobretudo da sua esfera de actuação. De facto, as suas decisões não se inclinam sempre para os contribuintes, se bem que seja visível o maior amparo que estes logram junto do TJUE e do TEDH.

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ciado por esse Governo, embora executado, nos estritos termos em que fora negociado, pelo XIX Governo – do Primeiro-Ministro Passos Coelho.

[21] Como consta do Memorando de Entendimento sobre as Condicionalidades da Política Económica celebrado entre o Estado Português, de um lado, e o Fundo Monetário Internacional, a Comissão Europeia e o Banco Central Europeu, de outro.

[22] V. sobre a arbitragem tributária os nossos estudos «Reflexões sobre a introdução da arbitragem tributária», em *Por um Estado Fiscal Suportável – Estudos de Direito Fiscal*, vol. IV, Coimbra: Almedina, 2015, 7-38, e «Sobre a privatização da justiça tributária», *Estudos em Homenagem ao Professor Sacha Calmon Navarro Coelho*, Belo Horizonte.

Assim e em relação ao TJUE, que é fundamentalmente um tribunal garante do estabelecimento e funcionamento do mercado interno, a defesa dos contribuintes é assegurada por via indirecta, ou seja, através da garantia do respeito das liberdades económicas fundamentais europeias[23]. O que o Tribunal proporciona, seja aplicando estas liberdades nos termos concretizados em regulamentos e directivas fiscais da harmonização fiscal positiva, que encontramos sobretudo em sede do IVA e outros impostos sobre o consumo e em alguns domínios da tributação das empresas, seja aplicando directamente as mencionadas liberdades para ajuizar da compatibilidade do direito fiscal nacional com o direito europeu.

Pois bem, o TJUE, na análise das excepções estabelecidas pelos Estados às referidas liberdades económicas, pondera as razões invocadas pelos Estados, convocando o princípio da proporcionalidade para as testar quanto à sua necessidade, adequação e proporcionalidade em sentido estrito[24]. Ou seja, procede ao *balancing test* entre as restrições às liberdades implicadas nas opções fiscais dos Estados e as justificações apresentadas por estes, desde que integrem o catálogo de justificações do TJUE.

O que levou este progressivamente a ter em conta as justificações relativas à garantia da coerência do sistema fiscal, à salvaguarda da repartição equilibrada do poder tributário entre os Estados, à prevenção do risco de fraude e evasão fiscal e à garantia da eficácia dos controlos fiscais. Em contrapartida, tem-se recusado considerar, entre outras, as justificações baseadas na perda ou redução da receita fiscal ou na compensação de uma medida restritiva das liberdades com a existência de outras vantagens fiscais ainda que não relacionadas com aquela medida[25].

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[23] As liberdades de estabelecimento, de circulação de pessoas, bens, serviços e capitais, bem como o direito à não discriminação em função da residência e os direitos que materializam a cidadania europeia.

[24] V., por todos, João Félix Pinto NOGUEIRA, *Direito Fiscal Europeu – O Paradigma da Proporcionalidade*, Coimbra Editora: Wolters Kluwer / 2010; e Philippe MARCHESSOU / Bruno TRESCHER, *Droit Fiscal International et Européen*, Bruxelles: Bruylant, 2018, 149-330. V., em geral, também, Miguel Poiares MADURO / Pasquale PISTONE, ed., *Human Rights and Taxation in Europe and the World*, IBFD, 2011; os estudos da obra de Florián GARCÍA BERRO, dir., *Derechos Fundamentales y Hacienda Pública. Perspectiva Europea*, Civitas – Thompson Reuthers, 2015.

[25] V. João Félix Pinto NOGUEIRA, *Direito Fiscal Europeu – O Paradigma da Proporcionalidade*, 239 e ss.; e Philippe MARCHESSOU / Bruno TRESCHER, *Droit Fiscal International et Européen*, 264.

O que nos revela um controlo pela via das liberdades económicas europeias mais amigo do estado de direito do que o desenvolvido pelos tribunais nacionais que controlam as medidas fiscais a partir dos limites constitucionais do poder tributário do Estado em nada semelhante àquele *balancing test*. É que o controlo que comportaria, de algum modo, limites materiais do tipo do oferecido pelo princípio da proporcionalidade, que é o princípio da capacidade contributiva como pressuposto da tributação e critério de medida da igualdade fiscal, ou não é utilizado ou é utilizado em muitos poucos casos[26].

Todavia, a recusa em absoluto da justificação da perda de receita fiscal sem qualquer ponderação, designadamente de cariz mais macro dos interesses em presença, revela, a nosso ver, algo de unilateral e arbitrário que parece não se compaginar com a comunidade de direito que é a União Europeia. Na verdade, a perda significativa de receitas fiscais, totalmente desconsiderada pelo TJUE, pode inclusive colocar o Estado em dificuldades de cumprimento das exigências do direito financeiro europeu relativas ao défice orçamental e à dívida pública. Pelo que seria desejável uma abertura à justificação da perda de receitas fiscais e ponderar esta tendo presente não só os interesses fiscais dos Estados versus as liberdades fundamentais, mas também o conflito ao nível do próprio direito europeu entre estas liberdades garantes do mercado interno e as exigências financeiras impostas pelo direito da União Europeia aos Estados[27].

No que respeita ao TEDH, a realização do estado de direito em sede da tributação é muito clara relativamente à verdadeira rede de obrigações tributárias acessórias que os contribuintes têm que cumprir e às diversificadas infracções tributárias a que se encontram sujeitos. Pois estas obrigações e infrações tributárias frequentemente se confrontam com os direitos protegidos pela Convenção. O que se tem verificado

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[26] No sentido de o princípio da proporcionalidade passar a ser o parâmetro material do controlo do poder tributário nacional, v. Giovanni MOSCHETTI, *Il Principio di Proporzionalità come "Giusta Misura" del Potere nel Diritto Tributario*, Wolters Kluwer / CEDAM, 2017. V. também o nosso livro *Problemas Nucleares de Direito Fiscal*, 32 e ss.

[27] Decorrentes do Pacto de Estabilidade e Crescimento e do Tratado Orçamental. V. os nossos estudos «Reflexões sobre a constituição económica, financeira e fiscal portuguesa», em *Por um Estado Fiscal Suportável – Estudos de Direito Fiscal*, vol. IV, Coimbra: Almedina, 2015, 157-185; e «Estabilidade financeira e o Tratado Orçamental», em *Por um Estado Fiscal Suportável – Estudos de Direito Fiscal*, vol. V, Coimbra: Almedina, 2018, 91-119.

frequentemente com o TEDH a convocar, designadamente, os direitos a um processo equitativo (artigo 6.º da CEDH), ao respeito pelo princípio *nom bis in idem* (artigo 4.º do Protocolo 7), ao respeito pela vida privada e familiar e inviolabilidade do domicílio (artigo 8.º da CEDH), a liberdade religiosa (artigo 9.º da CEDH), a liberdade de expressão (artigo 10.º da CEDH), etc[28].

O que, obviamente, não acontece com a tributação considerada em si mesma. É certo que o TEDH confronta o direito de propriedade com o poder tributário, partindo da ideia discutível de que a tributação em si mesma constitui uma ingerência no direito de propriedade garantido na primeira alínea do artigo 1.º do Protocolo n.º 1 anexo à CEDH. Todavia, acaba sempre por justificar a tributação com a excepção da segunda alínea do mesmo preceito relativa ao pagamento dos impostos. Uma solução que, ao ter por base a própria CEDH, não é verdadeiramente diferente da que considera a tributação, não uma ingerência no direito de propriedade, embora objecto de uma excepção, mas um limite imanente ao direitos fundamentais em geral e, portanto, também ao direito de propriedade, decorrente do facto de a tributação ter por suporte um dever fundamental – o dever fundamental de pagar impostos[29].

Significa isto que os Estados apenas se encontram limitados, no que respeita à tributação, a não estabelecer e recortar factos geradores de impostos que suportem obrigações tributárias que lesem especificamente, ou seja, quando imponham aos contribuintes uma "carga excessiva" ou constituam fundamentalmente "um atentado à sua situação financeira"[30]. Por isso, é muito raro considerar contrária à Convenção a tributação em si mesma. O que aconteceu, por exemplo, dado tratar-se de um tributação manifestamente excessiva, em três acórdãos de 2013 todos relativos à tributação da indemnização por cessação da relação de trabalho na Hungria[31].

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[28] V., respectivamente, os artigos 6.º da CEDH, 4.º do Protocolo 7, e 8.º, 9.º e 10.º da CEDH.

[29] V. o nosso estudo «Direitos fundamentais e tributação», *Boletim da Faculdade de Direito* 96/2 (2020) 667-695.

[30] V., desenvolvidamente, Philippe MARCHESSOU / Bruno TRESCHER, *Droit Fiscal International et Européen*, 329 e ss.

[31] Casos: NKM *c. Hungria*, n.º 66529/11, de 14 de Maio de 2013; *Gall c. Hungria*, n.º 49570/11, de 25 de Junho de 2013; e *R. Sz c. Hungria*, n.º 41838/11, de 2 de Julho de 2013 – v. Philippe MARCHESSOU / Bruno TRESCHER, *Droit Fiscal International et Européen*, 388 e ss.

Por conseguinte, a tributação em si mesma não é vista como constituindo restrições ou limites ao direito de propriedade, acomodando os impostos nos limites legais do poder tributário decorrentes da proibição de impostos com carácter confiscatório, resulte esta do princípio constitucional da tributação baseado no princípio da capacidade contributiva, como defendemos, ou de expressas disposições constitucionais, como acontece em alguns países[32].

III. Conclusão

A título de conclusão, vamos fazer uma pergunta cuja resposta nos revela a situação um pouco contraditória da realização judicial do estado de direito na tributação. E a pergunta é esta: estaremos perante uma protecção deficitária dos contribuintes a nível nacional e excessiva a nível europeu? Em certa medida, a resposta afigura-se positiva. Pois, relativamente aos tribunais nacionais, temos o limitado escrutínio levado a cabo pelo TC face à actuação do legislador fiscal, e pelo STA e pelo CAAD no que respeita à aplicação das leis fiscais pela administração tributária.

O que, relativamente ao TC, é particularmente visível no deficitário controlo constitucional dos impostos retroactivos, de um lado, e da ausência de um efetivo escrutínio constitucional sobre a inaceitável proliferação de impostos como o nome de taxas e contribuições, de outro lado. E isto para não falar na total ausência de consideração do princípio constitucional da capacidade contributiva para ajuizar, em termos materiais, do respeito da igualdade fiscal.

Uma realidade que é observável também no que respeita ao STA e ao CAAD, porquanto estes não só operam um controlo muito limitado da legalidade dos actos tributários nulos, como não realizam em geral o legalmente exigido controlo das taxas e contribuições financeiras. De facto, não encontramos nas decisões destes tribunais um adequado escrutínio à bilateralidade, proporcionalidade e justificação económico-financeira destes tributos aparentemente bilaterais.

Já no que respeita ao TJUE e ao TEDH, parece, pelo menos à primeira vista, uma proteção mais robusta dos direitos dos contribuintes.

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[32] V. a Constituição Espanhola (artigo 31.º, n.º 1) e a Constituição Brasileira (artigo 145.º, inciso IV), que proíbem impostos que tenham natureza confiscatória.

Embora isto apenas seja assim na medida em que a protecção de uns resultem em menor protecção de outros contribuintes, no quadro de direitos ou liberdades de realização rival como são os direitos e liberdades relativos ao pagamento de impostos que, ao não serem suportados por uns, serão necessariamente suportados pelos restantes. Se bem que estes não serão, de um lado, os mais ricos com grande capacidade de planeamento fiscal, nem, de outro, os que não integram a classe média por falta de capacidade contributiva, como são quase metade dos portugueses que não pagam o imposto sobre o rendimento pessoal por os seus rendimentos não ultrapassarem o mínimo de existência.

Aspeto este que é, todavia, mais visível relativamente ao TJUE do que face ao TEDH, porquanto aquele, ao decidir preferentemente em defesa das liberdades económicas fundamentais suportes do estabelecimento e funcionamento do mercado interno europeu, desconsidera quase totalmente, nos termos que referimos, a sustentabilidade financeira do Estado, empurrando este tendencialmente para o aumento da carga e esforço fiscais dos cidadãos que sobram para pagar impostos. Algo que resulta sobretudo da desconsideração total por parte do TJUE da perda significativa de receitas fiscais do Estado, ao excluir esta perda, em absoluto, das excepções admissíveis à limitação das liberdades económicas fundamentais.

Já relativamente ao TEDH a defesa que proporciona aos direitos fundamentais dos contribuintes, que não se reporta à tributação em si mesma, mas à diversificada rede de obrigações tributárias acessórias e sanções tributárias, o contributo para a realização do estado de direito apresenta-se mais equilibrado. Embora se deva acrescentar que, mesmo nesta sede, as decisões do TEDH podem ter efeitos menos simpáticos para a generalidade dos contribuintes. O que ocorrerá quando as suas decisões consistem na condenação do Estado a pagar indemnizações, sobretudo quando este, como acontece em Portugal, não faça uso do seu direito de regresso contra que deram causa a essa condenação[33]. Caso em que as decisões acabam por ter o real alcance de uma espécie de poder tributário apócrifo, uma vez que essas indemnizações terão de ser necessariamente satisfeitas com impostos, ou seja, pelos contribuintes, sendo que estes serão sempre e só os integrantes da já referida classe média.

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[33] Isto apesar de haver um dever funcional do Estado de exercer esse direito de regresso constante do n.º 4 do artigo 271.º da Constituição.

O que tem um significado algo idêntico ao das sanções impostas pelas organizações internacionais a regimes autoritários e totalitários, na medida em que não sejam especifica e tecnicamente aplicáveis apenas aos dirigentes desses regimes. Uma situação em que, no fim de contas, à crueldade praticada pelos dirigentes desses regimes sobre a generalidade dos seus concidadãos, acaba por se somar a constituída, de algum modo, pelas próprias sanções aprovadas pelas referidas organizações com as mais louváveis intenções.

THE ROLE OF EUROPEAN AND NATIONAL COURTS FOR UPHOLDING THE RULE OF LAW

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Koen Lenaerts*

Excellencies,
Ladies and gentlemen,

I am very grateful for the opportunity to participate in this conference and in particular to address you in the present session on "The role of European and national courts for upholding the rule of law".

As you are all aware, during recent years an increasing number of cases relating directly to the rule of law have arrived in the docket of the Court of Justice of the European Union.

Most of these cases have come to us by way of requests by national courts for a preliminary ruling on the interpretation of EU law.

These cases exemplify the way in which EU law is generally applied in practice, namely, for the most part, by the national courts, which are closest to the facts. Only where there is a doubt as to the meaning or validity of EU law does the Court of Justice come into play. In order to guarantee the uniform interpretation and application of the legal rules and the fundamental values we share, the Member States have vested in one single judicial body, the Court of Justice of the European Union, the task of interpreting EU law and of ruling on its validity.

This mechanism is based not on hierarchy but on mutual assistance: it is a system of dynamic judicial cooperation where different,

* President of the Court of Justice of the European Union. All opinions expressed herein are personal to the author.

yet complementary tasks are allocated between the Court of Justice and national courts on the basis of mutual respect and mutual trust.

As it happens, the first of the recent rule of law cases was submitted to the Court of Justice by a Portuguese court, namely the *Supremo Tribunal Administrativo*. Members of another Portuguese court, the *Tribunal de contas*, were contesting temporary salary reductions that had been implemented as part of general cuts in public spending. The plaintiffs argued that those salary reductions threatened their judicial independence.

In its landmark judgment *Associação Sindical dos Juízes Portugueses* of 2018,[1] the Court of justice recalled that the European Union is a union based on the rule of law.

It held that every Member State must ensure that any of its courts which may be called upon to apply EU law are independent, in order to be able to provide effective judicial protection in the field of EU law.

The Court of justice explained the concept of independence as follows: it presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously. *Externally*, its members must be protected against interventions or pressure which might influence their decisions. *Internally*, courts are to be impartial, meaning that they must not favour any of the parties before them.

As interpreted by the Court of Justice, the rule of law within the EU does not prescribe a single, particular constitutional model. It allows room for diversity, provided that the basic tenets of any democratic society are respected. That view is shared by the European Court of Human Rights.

That is why, one year after the judgment *Associação Sindical dos Juízes Portugueses* was delivered, in the A.K. judgment[2] concerning the independence of the Disciplinary Chamber of the Polish Supreme Court, the Court of Justice referred extensively to the case law of the European Court of Human Rights in which that court highlighted that what is at stake with judicial independence is the confidence

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[1] Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117.

[2] Judgment of 19 November 2019, A.K. (Independence of the Disciplinary Chamber of the Supreme Court), Joined Cases C 585/18, C 624/18 and C 625/18, EU:C:2019:982.

which the courts in a democratic society must inspire. That confidence may be undermined not only by constitutional or legislative changes that are at odds with judicial independence but also by the context that led to those changes. That is why both courts favour a contextual approach, according to which judicial independence is protected both *in law* and *in fact*.

In *Repubblika*[3], a case concerning judicial independence in Malta, the Court of Justice also followed this contextual approach. It examined whether there are objective circumstances capable of giving rise to legitimate doubts in the minds of the citizens as to the imperviousness of the courts concerned to external factors and their neutrality with respect to the interests before them.

These cases provide classic example of the judicial cooperation between national courts and the Court of Justice that takes place by means of the preliminary ruling mechanism.

It also shows how this mechanism helps to guarantee common minimum standards of judicial protection through independent courts and thus to uphold the rule of law.

For without judicial independence, the rule of law is meaningless in practice.

Judicial independence is also the basis of mutual trust, without which the European Union as a union of law and an area without internal borders could not exist.

Given the importance of the preliminary ruling mechanism in this context, the Court of Justice emphasised, in its *Miasto Łowicz*[4] judgment of last year, that national judges are free to refer questions to the Court of Justice.

The preliminary ruling mechanism is, of course, not the only procedural route available for guaranteeing respect for EU law and for the rule of law more generally.

The EU Treaties have empowered the Commission, as the Guardian of those treaties, to oversee the proper application of EU law and to bring infringement proceedings before the Court of Justice against a Member State that it considers to be in breach of it.

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[3] Judgment of 20 April 2021, Repubblika, C-896/19, EU:C:2021:311, point 57.

[4] Judgment of 26 March 2020, Miasto Łowicz (Régime disciplinaire concernant les magistrats), C-558/18, EU:C:2020:234.

In addition to the cases I have already mentioned, the Court of Justice has been seized by the Commission in matters concerning respect for the rule of law.

Indeed, infringement proceedings are ultimately the appropriate means for ensuring the correct implementation of judgments delivered by the Court of Justice in preliminary ruling procedures, *where necessary*, as those judgments form part of EU law.

To conclude, I would like to mention once again the European Court of Human Rights which also strongly engages in upholding the rule of law.

Given the threefold protection that exists in the European Union, through national courts, the Court of Justice and the European Court of Human Rights, I am confident that the rule of law will continue to be protected within the European legal space.

I am very much looking forward to our discussion and thank you for your attention.

RULE OF LAW AND HUMAN RIGHTS: RECALLING THE CONNECTION[1]

Direitos Humanos e Rule of Law: relembrando a ligação

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Paula Veiga*

Good morning, Excellencies, Dear Colleagues, Ladies and Gentlemen.

It is both a privilege and an immense pleasure for me to be here at the Convento de São Francisco, today, to celebrate with you the Portuguese Presidency of the European Union in Coimbra.

I would like to share with you some thoughts on the connection between the Rule of Law and the respect for Human Rights (understood as individual, collective and minority Rights).

The third millennium will be a defining period for the future of Human Rights worldwide. In the second millennium, concepts of Human Rights emerged, evolved and expanded. Since World War II, developments have occurred at an escalating pace. This second millennium has brought dramatic progress towards recognition and enforcement of Human Rights, as well as the institutionalization of the Rule of Law in the international arena.

Let us see how it happened, remembering some fundamental moments.

World War II convinced those who had been sceptics during the period of the League of Nations that a global institutional structure

* University of Coimbra, Faculty of Law.

[1] This Article corresponds to a short development of some aspects addressed by the author at the High Level Conference *Rule of Law in Europe in 18 May,* held in 17-18 May 2021, at the Convento de São Francisco, in Coimbra, Portugal.

must be reconsidered. The post-war era produced the effort to advance with the Rule of Law and to recognize and enforce Human Rights. The United Nations was founded. Three years later, in 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights - a cornerstone of modern thinking regarding Human Rights that melded concepts of civil and political Rights born out of national legal orders. In short, the history of the 20th Century could well be explained by looking at the role played by the Rule of Law and the aspirations of Freedom and Democracy.

1. One crucial moment is the emergence of Regional Human Rights courts

The first regional Human Rights courts were established in the latter half of the 20th Century. In 1950, the European Court of Human Rights was formed. Similarly, in 1969 the American Convention on Human Rights was adopted in Costa Rica, which provided for the creation of the Inter-American Court of Human Rights. This court was officially installed in San José, Costa Rica, in 1979. A similar regional Human Rights Court for Africa has been recently established, in the 21st Century.

These regional Human Rights courts have the great merit of bringing to light Human Rights abuses, and asserting jurisdiction over those responsible. The practical outcome is that, nowadays, any government of a member state of these systems has to explain itself if it fails to take sufficient account of Human Rights.

2. But, what this as to do with the Rule of Law?

Making the connection between Rule of Law and Human Rights, or recalling that connection, implies overturning a merely positivist theory of Law and recognising that the Rule of Law may have some substantive consequences within societies sufficiently attuned to certain values. In fact, one thing is the form and procedure adopted by the State in exercising legal power (the formal Rule of Law concept); another is the content with which the State exercises its legal power (the material Rule of Law concept).

Although the Rule of Law is an important legal principle, its content is still debated. Central to those debates is precisely the question of whether, in order to achieve its aim of guiding institutional action and taming political power, the Rule of Law should have formal and procedural attributes only, or also substantive ones.

As you all know, the principle of the Rule of Law has been an old maxim for the main purpose that authorities and people in positions of power exercise their potential within a framework of well-established norms and not in an arbitrary manner. (Let me call this the classical notion of the Rule of Law.)

At this most basic notion, this concept of the Rule of Law refers to a system in which law is able to impose meaningful restraints on the state and individual members. It directly relates to the notions of *a government of laws*, the *supremacy of the law* and *equality of all before the law*. This narrow concept stresses the formal or instrumental aspects of Rule of Law[2]. In this sense, laws must be *general, public, prospective, clear, consistent, capable of being followed, stable* and *enforced.*

3. In the third millennium, what does the Rule of Law actually mean in the international legal order, besides the meanings it has in internal systems?

Although the concept of the Rule of Law appears in major political texts and international treaties, it had not been defined in any of those texts. Indeed, the exact details of the Rule of Law, be it in a material dimension, be it in a formal one, are not always clear.

One reason is that – given the predominantly domestic legal origin – different states, regions, cultures and legal systems prefer different notions over others, turning the Rule of Law into an essentially contested concept[3]-[4]. The domestic legal origin explains why 'Rule of Law' was, from the start, different from 'Rechtstaat' and from 'État de

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[2] See, for all, Joseph Raz, 'The Rule of Law and Its Virtue', in *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press, 1979.

[3] In this constitutional (therefore, internal) approach, *rule of law* is one of the fundamental principles of the *Constitution* and of a *constitutional State* (see Article 2 of the 1976 Portuguese Constitution).

[4] Rüdiger Breuer, 'Konkretisierungen des Rechtstaats-und des Demokratiegebots', in *Festgabe 50 Jahre Bundesverwaltungsgericht*, 2003, 223–253.

droit'[5]. Another reason for this multiple meaning is that this principle is not exclusively a legal concept, but also a legal-political one.

A broad notion of this concept maintains that the Rule of Law, in addition to the attributes of a narrow notion (the so-called classical notion), also promotes certain substantive values which, among others, include Justice, Human Rights and Democracy. This broad notion can also apply to the international arena[6]. Of course it is a difficult, almost an impossible task, to agree on a common definition of the international Rule of Law in the form of 'one size fits all'[7]-[8]. Of course there will always be questions raised about the type of Human Rights that should be included in such a notion and how the Rule of Law can be distinguished from other concepts such as Justice. Of course, others may suggest that Human Rights are independent from Law.

But the international legal order in the 21st Century reveals the paradoxical increase of all things constitutional, such as constitutionalisation or quasi-constitutional settings and practices. The resulting changes in international affairs raise deeper questions about the normative underpinning of international relations concerning justice, fairness and legitimacy. This phenomenon of constitutionalisation on a global scale has been observed, namely in the environment of supranational or international organisations. It reflects the need to put innovative regulatory or principled practices into place. In the European context, the most successful example of constitutionalisation is, as we all are aware, the European Union. But this process is always a two-way one: national constitutionalism[9] influences the international

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[5] In this sense, see J. J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, 7.ª ed., Coimbra: Almedina, 2003, 92-97.

[6] A notion of the international approach of Rule of Law can be seen at Elena Katsell, 'The rule of law and the role of human rights in contemporary international law', in Rob Dickinson *et al.,* ed., *The rule of law and the role of human rights in contemporary international law*, Cambridge University Press, 2012, 131-152.

[7] This does not mean an author's support for natural law theories of Human Rights (the so-called transcendental theories). It means, instead, the acceptance of the trend of the ethic of accommodation of difference.

[8] In Europe, during recent years, the main issue concerning the universalism of Human Rights (and, therefore, that ethic of accommodation of difference) within the European Court of Human Rights has been the religious one.

[9] Since the Enlightenment period and the American and French Revolutions, this constitutional system has been based on the rule of law and the preservation of individual and public liberties.

legal order and international law induces national legal orders[10]. By this methodological approach it is possible to link the Rule of Law and Human Rights. However, it is important to stress that this bond can, in any case, be part of the problem or part of the solution…

The Rule of law can be instrumental in promoting the values of Peace, Justice, Freedom and Human Dignity for individuals. In other words, the pursuit of Justice for societies is framed in the construction, and reinforcement of the Rule of Law. In this sense, it is a system based on ethical aspirations and common values. This system, that we call Law, has an instrument in the international domain. That instrument is, to be precise, international human rights law and we shall use it.

We are aware that the connection is not easy, or was not easy at the beginning, as the Universal Declaration of Human Rights mentions the Rule of Law only in passing in the Preamble, suggesting in typically cryptic fashion that 'Human Rights should be protected by the Rule of Law'. Perhaps, as the late United Nations diplomat Vieira de Mello suggested '[t]he responsibility to protect human rights, held by both states and the international community, is increasingly seen as a central aspect of the rule of law' and '[w]e will spread the culture of human Rights'[11].

Again, this third millennium traces a new trend in the field of linking Human Rights and Rule of Law. In a global context, namely in the 2000 Millennium Declaration, States agreed to spare no efforts to strengthen the Rule of Law and respect for all internationally recognized Human Rights[12]. And five years later, in the 2005 World Summit Outcome, States also recognized the Rule of Law and Human

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[10] On global constitutionalism, see, our Paula Veiga, *Direito constitucional e direito internacional no contexto do constitucionalismo global: um roteiro pedagógico*, Lisboa: Petrony, 2020. In English, see, Christine Schwöbel, *Global Constitutionalism in International Legal Perspective,* Brill / Nijhoff, 2011; Ekaterina Yahyaoui Krivenko, *Rethinking Human Rights and Global Constitutionalism: From Inclusion to Belonging, Cambridge University Press,* 2017; and Anne Peters, 'The Merits of Global Constitutionalism', *Indiana Journal of Global Legal Studies* 12/2 (2009) 397-411.

[11] Sergio Vieira de Mello, Address at the Closing Meeting of the Fifty-Ninth Session of the Commission on Human Rights (Apr. 25, 2003), available at <http://www.usp.br/svm/textos/t-dh-07.php>, accessed 2021/05/24.

[12] Document available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Millennium.aspx>, accessed 2021/05/03.

Rights as belonging to the universal and indivisible core values and principles of the United Nations[13]. At the same time, the Human Rights Council has actively advanced the Rule of Law, namely by a series of resolutions that directly relate to both concepts (Human Rights and the Rule of Law).

On the European level, the rule of law is safeguarded by multiple institutions on various levels, notably by those of the European Union. In this European context, according to Article 3 of the Statute of the Council of Europe, every member state must accept the threefold principle *Rule of Law, Human Rights and Democracy*. The Rule of Law is – or at least should be – a pillar of any national legal order in these member states. A reference to the Rule of Law is also made in the Preamble of the European Convention of Human Rights, a text that was drawn up under the auspices of the Council of Europe, the first of the European organizations seeking to build a new European order from the rubble of the Second World War (even prior to the European Communities). The achievements of the Convention, in both establishing jurisprudence on Human Rights and promoting Human Rights and Democracy across Europe, are immense. It has greatly strengthened the Rule of Law in the Region, and can even be said to have contributed significantly to the continued peace and stability of the Continent. Of course we must as well stress that the Rule of Law is also a constituting value in the European Union's institutional *ethos,* applicable both to the institutions and to the member states.

In another hand, the European Commission for Democracy through Law – the so-called Venice Commission – recognised and explained, in 2011, in a research report, that the British concept 'Rule of Law', the German concept 'Rechtsstaat', and the French concept 'État de droit' have different origins[14]. However, as the Venice Commission also noted, the underlying standards for Rule of Law are the same. These entail: *(i)* legality; *(ii)* legal certainty; *(iii)* prohibition of arbitrariness; *(iv)* access to justice; *(v)* non-discrimination and equality before the law; and *(vi)* last, but not the least, respect for Human

[13] Document available at <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf>, accessed 2021/05/03.

[14] Document available at <https://rm.coe.int/0900001680700a61>, accessed 2021/05/03.

Rights.

These standards coincide to a large extent with what the European Court of Human Rights has underlined in its case-law over the last few decades. Here, Rule of Law is even considered to be part of the *spirit* of the Convention. This judicial organ used the concept *Rule of Law* for the first time in *Golder v. United Kingdom* in February 1975, basing its interpretation of article 6 (§1) of the Convention (right to a fair trial) on the reference to the Rule of Law in the Convention's Preamble. In this decision, the Court emphasised that this principle should not be seen as merely a 'more or less rhetorical reference', devoid of relevance for those interpreting the Convention[15]. Since then, the Rule of Law has become a guiding principle for Strasbourg. In this context, the Court has offered further clarifications on a number of key themes which underpin the Rule of Law, including: *(i)* the separation of powers; *(ii)* the role of the judiciary; *(iii)* impunity; *(iv)* a court established by law; *(v)* sufficiently accessible and foreseeable law.

In short, it can be said that, in the third millennium, the core principles of a substantive meaning of the Rule of Law serve, in the multilevel constitutionalism framework, the aim of *good governance* based in Human Rights. Actually, if there is a lesson to be learned from the Second World War it is that using only the law, in a formal sense, as justification for a state's policies is incredibly dangerous…

4. Some fundamental conclusions

The framework adopted in this Article implies the recognition of multilevel constitutionalism, that methodological effort to conceptualise the changes in international law and its normativity, even if it is only

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[15] The actual issue was whether a convicted prisoner had the right, under Article 6 (1) of the Convention, to take legal proceedings to clear his name. The United Kingdom authorities had effectively refused him permission to sue. Article 6 (§1) of the Convention provides: 'in the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Does the provision of Article 6 (§1) of ECHR guarantee only certain procedural rights once a court is seized of a case? Or does it also guarantee a right of access to a court? The Strasbourg Court, to answer these questions, relied on, among other things, the notion of the Rule of Law, which, as we already noted, is referred to in the Preamble to the Convention.

an academic approach. As we have already noticed, by this approach, principles of international law, such as human rights, non-discrimination, equal conditions of competition, and, in the European context, the four economic freedoms in the EU, operate much as constitutional principles. This approach is also likely to achieve the consensus that will be needed to resolve global issues in the years ahead. This challenges, namely those related to Human Rights, include: *(i)* the allocation of natural resources; *(ii)* the equitable distribution of wealth among citizens of countries; *(iii)* the role of religion in government and politics; *(iv)* the prevention of discrimination; and *(v)* insuring tolerance.

Rule of Law is, then, understood as the vehicle for the promotion and protection of the normative framework given by Human Rights, because it requires that legal processes, institutions and substantive norms are consistent with those Rights.

In this approach, Human Rights and Rule of Law have to go hand in hand, so that Human Rights are not merely words on paper. In fact, rights are empty words in the absence of a legal and political order in which they can be realized. And, in our conception, the Rule of Law is not just about laws and government.

One final word is due to Covid-19. The pandemic is creating a host of new legal challenges, where Human Rights and Rule of Law are also expected to work hand in hand, in order to avoid a *plurality of forms of discrimination and stigma related to Covid-19, specially targeting the 'other', as we say in a multiculturalist approach of Human Rights.* In fact, the pandemic has shown us the pressure on civil liberties, such as threats to freedom of opinion, discussion, press freedom for journalists covering the news and scientists who had different opinions on the results of their research or studies. These pressure arose and increased during the pandemic and, predictably, to justify unjust procedures due to the 'emergency'.

Thank you very much for your attention.

PRIVACY ISSUES IN TIMES OF CORONA

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Paulo Pinto de Albuquerque · Nele Schuldt

Introduction

Exceptional circumstances on a global scale call for exceptional measures on part of the individual states. This has certainly been the case during the COVID-19 pandemic, the effects of which have been felt for over two years now. As COVID-19 threatens the life and the physical integrity of individuals, positive obligations are triggered for Contracting States. As a consequence, governments react and have placed restrictions on daily life which have impeded and continue to impede the enjoyment of rights and freedoms under the Convention. The measures to which states have resorted to, their compliance with international human rights norms, especially the right to private and family life, will be the focal point of this contribution.

I. Declaring a public emergency threatening the livelihood of a nation

1. The political choice to derogate from the Convention

A number of states, like France,[1] Armenia,[2] Georgia,[3] Latvia,[4] Romania[5] and the Czech Republic[6] resorted to public emergency

[1] Benoit Van Overstraeten / Christian Lowe, 'France declares public health state of emergency over Covid-19' (*Reuters*, 14th October 2020), <https://www.reuters.com/article/us-health-coronavirus-france-emergency-idUSKBN26Z2PQ>, accessed 12th November 2020.

[2] Republic of Armenia Government Decision No. 298-N On Declaring State of Emergency in the Republic of Armenia, 2020 <https://www.arlis.am/DocumentView.aspx?docid=145261>; *the State of Emergency was extended from March 16th, 2020 to September 11th, 2020,* see: Reuters Staff, 'Armenia extends state of emergency over

resorted to public emergency measures, an indicator which points to the state's intention to derogate from certain regular obligations under international, as well as domestic law. Depending on the international standards by which a state is bound, a formal procedure may be required to enter into a state of public emergency. Pursuant to Article 4 of the International Covenant on Civil and Political Rights (ICCPR), a state must notify the Secretary-General of the United Nations, whereas a Contracting State to the European Convention on Human Rights (ECHR) must inform the other Contracting States of its intention to derogate from the Convention.[7] The precise time of notification is unclear in the ECHR system. In the current crisis, Contracting States notified the Council of Europe at various points in time. Previous case law indicates, however, that the notification should not be unduly delayed.[8] The notification should provide an overview of the measures taken, as well as the reasons and purpose for the indicated measures.

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coronavirus until Sept. 11' (*Reuters*, 12th August 2020), <https://www.reuters.com/article/uk-health-coronavirus-armenia-idukkcn25810n>, accessed 13th August 2020.

[3] Communication contained in the Note Verbale No. 24/1 from the Permanent Representation of Georgia, dated 1 January 2021, registered by the Secretariat General on 1 January 2021 (*Council of Europe Portal*, 1st January 2021), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dvDNSYjk&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=GEO&_coeconventions_WAR_coeconventionsportlet_codeNature=10>, accessed 11th March 2021.

[4] REPUBLIC OF LATVIA, Cabinet Order No. 655 [2020], <https://likumi.lv/ta/en/en/id/318517>, accessed 7th February 2021.

[5] The President of Romania, Decree on the extension of the state of emergency in the territory of Romania [2020], Official Journal of Romania, Part I, No. 311/14.04.2020, <https://rm.coe.int/16809e375e>, accessed 20th April 2020.

[6] GOVERNMENT OF THE CZECH REPUBLIC, 'Measures adopted by the Czech Government against the coronavirus' (23rd March 2021), <https://www.vlada.cz/en/media-centrum/aktualne/measures-adopted-by-the-czech-government-against-coronavirus-180545/>, accessed 19th April 2021.

[7] The requirement of notification has already been mentioned in 1956, namely that "any information transmitted to the Secretary-General by a Contracting Party in pursuance of Article 15, paragraph 3, of the Convention must be communicated by him as soon as possible to the other Contracting Parties and to the European Commission of Human Rights." *See* COUNCIL OF EUROPE COMMITTEE OF MINISTERS, Resolution (56) 16 [1956]. Available at <https://rm.coe.int/16805e35bf>, accessed 8th January 2021.

[8] *Greece v the United* Kingdom [1958], App. No. 299/57, § 158.

Once measures have ceased to operate, the Member State shall inform the Secretary of the Council of Europe.

To this date, the following Member States have submitted notifications to the Secretary General of the Council of Europe to rely on Article 15 of the Convention: Latvia,[9] Armenia,[10] North Macedonia,[11] Georgia,[12] Estonia,[13] the Republic of Moldova,[14] Romania,[15] Albania,[16]

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[9] *See* the declaration of the Latvian Government related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 16 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 10 June 2020 (see the notification of the same day).

[10] *See* the Armenian Government's declaration related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 19 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 16 September 2020 (see the notification of the same day).

[11] *See* the declaration of the Government of North Macedonia related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 1 April 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 30 June 2020 (see the notification of the same day).

[12] *See* the declaration of the Georgian Government related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 23 March 2020.

[13] *See* the declaration of the Estonian Government related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 20 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 18 May 2020 (see the notification of the same day)

[14] *See* the declaration of the Government of the Republic of Moldova related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 19 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 20 May 2020 (see the notification of the same day).

[15] *See* the Romanian Government's declaration related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 17 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 15 May 2020 (see the notification of the same day).

[16] *See* the declaration of the Albanian Government related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 31 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 25 June 2020 (see the notification of the same day).

San Marino[17] and Serbia[18]. The derogating states declared a number of rights of the Convention to be limited or restricted: Article 5,[19] Article 6,[20] Article 8[21], Article 11,[22] Article 1 of Protocol 1,[23] Article 2 of Protocol 1[24] and Article 2 of Protocol 4.[25] Some states chose not to specify which rights would be limited as a result of the declared state of emergency.[26]

A public emergency constitutes "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."[27] A state is largely left to its own devices if and when to declare a public emergency, which consequently may necessitate the derogation of certain principles. [28] The Strasbourg Court would generally afford a wide margin of appreciation, owing to the fact that domestic authorities are best placed to determine the implementation of

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[17] *See* the declaration of the Government of San Marino related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 10 April 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 8 July 2020 (see the notification of the same day).

[18] *See* the declaration of the Serbian Government related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 6 April 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 13 October 2020 (see the notification of the same day).

[19] Article 5 restrictions were explicitly mentioned by Estonia and Georgia.

[20] Article 6 restrictions were explicitly mentioned by Estonia.

[21] Article 8 restrictions were explicitly mentioned by Albania, Estonia, Georgia, Latvia and North Macedonia.

[22] Article 11 restrictions were explicitly mentioned by Albania, Estonia, Georgia, Latvia, Moldova and North Macedonia.

[23] Article 1 Protocol 1 restrictions were explicitly mentioned by Albania, Estonia and Georgia.

[24] Article 2 Protocol 1 restrictions were explicitly mentioned by Albania, Estonia, Georgia, Latvia, Moldova and North Macedonia.

[25] Article 2 Protocol 4 restrictions were explicitly mentioned by Estonia, Georgia, Latvia, Moldova and North Macedonia.

[26] Armenia, Romania, San Marino and Serbia did not specify which rights would be restricted as a result of the state of emergency.

[27] *Lawless v Ireland* (no. 3) [1961], App. No. 332/57 (A/3), § 28.

[28] *See Ireland v the United Kingdom* [1978], App. No. 5310/71, § 207: "It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation]" to identify a public emergency.

special measures to combat a national emergency. Case law has shown, however, that states do not enjoy an unlimited discretion, with the Strasbourg Court functioning as a supervisory body.[29]

2. The obligations of derogating states in a public emergency

The derogating state must adhere to a number of standards, the purpose of which is to scrutinize, to varying degrees, the state's actions. In other words – a state cannot implement unfettered emergency actions and policies without some kind of review. Accordingly, any emergency measures must be clearly linked to the threat,[30] necessary, and aimed at combatting an actual, clear, present or imminent danger,[31] and it cannot be implemented as a preventative measure.[32] Moreover, any measure must be strictly proportionate to the exigencies of the situation.[33]

Under international law a number of rights are classified as non-derogable, even in times of emergency.[34] General international law absolutely prohibits torture and inhuman and degrading treatment, as well as the arbitrary deprivation of life. Under the ICCPR, the right to

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[29] *See,* for example, *Hasan Altan v Turkey* [2018], App. no. *13237/17*, § 91; *Şahin Alpay v Turkey* [2018], App. No. 16538/17, § 75; *Brannigan and McBride v the United Kingdom* [1993], App. No. 14553/89, § 43).

[30] Jan-Peter Loof, 'Crisis Situations, Counter Terrorism and Derogation from the European Convention of Human Rights – A Threat Analysis', in Antoine Buyse, ed., *Margins of Conflict. The* ECHR *and Transitions to and from Armed Conflict*, Intersentia, 2010, 53.

[31] The Siracusa Principles on the Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights clarify what is meant by 'necessary': "The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger." UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4.

[32] *See* the Lawless Case, cited above, § 28; 'The Greek Case': Report of the Commission [1970] App. Nos. 3321/67, 3322/67, 3323/67, 3344/67*,* §117.

[33] *ee, for example*, *A and others v the United Kingdom* [2009], App. No. 3455/05, §185, where, respectively, interrogation measures of detainees, as well as distinctions between national and non-nationals with regards to detention powers, were found to be disproportionate, despite the existence of a public emergency.

[34] *See*, for example, *Aksoy v Turkey* [1996], App. No. 21987/93, §76*;* and *Nuray Sen v Turkey,* [2004], App. No. 25354/94*,* §169.

freedom of religion is non-derogable. The COVID-19 pandemic, however, has led to restrictions in a range of areas: Whereas a predominant number of states have limited freedom of movement and assembly – albeit to varying degrees-, other rights such as the right to a fair trial, the right to liberty and security of person, the right to property, the right to education and the right to respect for private and family life have also been affected. The latter right to privacy is potentially severely limited as a result of government imposed restrictions. These include restricting the number of persons an individual or 'household nucleus' is permitted to visit, restrictions on reasons for leaving the home, (essential vs. non-essential travel), curfews, as well as, in some cases, the distance a person may move outside their home.

3. The political choice not to derogate and its implications

Some Council of Europe Contracting States explicitly made use of the possibility to derogate from the right to respect for private and family life (Article 8) by using the provisions supplied under Article 15 of the Convention. Most states relied and continue to rely on the restrictions as set out under Article 8(2) ECHR. A clear distinction must be made here: A state which has not derogated under Article 15 must continue to observe its obligations pursuant to Article 8, while relying on the restrictions as set out in Article 8(2). A restriction must always be provided for by law, pursue a legitimate aim and be considered strictly necessary and proportionate. For example, the Court found that a state overstepped its power by ordering compulsory isolation for an excessive period of time, as was the case concerning health rights in *Enhorn v Sweden*.[35] Here, the Court emphasized the necessity to carefully balance competing rights and favour options with less severe impacts on the concerned individual. If less severe measures are available, those ought to be taken prior to imposing more severe measures. Le Bris analyses that any assessment of the measures will focus predominantly on the *effects* of the relevant measures, as opposed to

[35] In *Enhorn v Sweden* [2005], Ap. No. 56529/00, §42, the Court emphasises that a state needs to demonstrate that "less severe measures have been considered and found to be insufficient" before an infected person can be detained. Consequently, such extreme measures can only be viewed as the "last resort in order to prevent the spreading of the disease".

scrutinizing a Contracting State's decision to declare a state of emergency.[36]

A state which has triggered Article 15 of the Convention under extraordinary circumstances and has stated the possibility of a derogation from a specific Convention Article, such as Article 8, can go further than merely restricting the right. To be clear, the discretion accorded to the Contracting States under Article 15 is wider than under article 8(2), yet both are subjected to the proportionality test. The distinction between Article 15 and Article 8(2), therefore, is one of degree, not one of nature. In any case, neither of the two scenarios can lead to a complete suspension of a right under the Convention. The essence of any Convention right or freedom must be respected and can neither be interfered with under the derogation clause of Article 15 of the Convention nor under any limitation clause, such as those provided for in Articles 8-11.

In addition, Article 17 of the Convention clearly indicates the existence of an absolute limit to any State interference with Convention rights or freedoms, since the Contracting States may not engage in any activity or perform any act aimed at their destruction or at their limitation beyond the clauses of limitation foreseen in the Convention. The logic underpinning Article 17 of the Convention is that each Convention right or freedom has some core elements that guarantee to the individual right-holder a sphere that must always remain free from any state interference. Therefore, the examination of the essence of the right and the proportionality test must be clearly distinguished.

II. CoE Contracting States' Responses to the COVID-19 pandemic with respect to the right to privacy

1. COVID Apps and other restrictions imposed by CoE States

The processing of personal data may be a necessary measure in times of a pandemic.[37] On a global scale, location data has been

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[36] Catherine Le Bris, «Du juste équilibre : les limitations aux droits de l'homme en période de crise sanitaire (Première partie)», *Revue des droits de l'Homme*, Actualités Droits-Libertés, (2 novembre 2020), para. 13.

Koufaki and Adedy v Greece [2013], App. Nos. 57665/12 and 57657/12, §37.

[37] Marcello Ienca / Effy Vayena, 'On the responsible use of digital data to tackle the COVID-19 pandemic' *Nat. Med.* 26 (2020) 463.

tracked by companies such as Google in an effort to understand movements of individuals during the pandemic.[38] Frontrunners of the use of digital technology to counteract the COVID-19 pandemic are the People's Republic of China (PRC), Hong Kong, South Korea and Israel, where governments have sought to use location data to analyse how and at what rate the pandemic is spreading. Apps have been developed in an effort to digitalize contact tracing, and maps indicate so-called hotspot zones of Coronavirus outbreaks. In some states, being diagnosed with a Covid-19 infection requires the downloading of an app which tracks the movement of individuals and sends out warnings if the quarantined person leaves their home.[39] Both the processing of personal data, as well as the mandatory use of an app raises human rights issues.[40] In assessing effectiveness to secure individuals' rights to private life, it should also be noted that any use of pseudonymised data, by nature, carries a risk of re-identification.[41] Even fully anonymised data is never safe from being re-identified, and so capable of exposing extremely sensitive personal data of individuals.[42] The taking of temperatures, as well as the monitoring of people's travel history and quarantine orders similarly impact individuals' privacy rights. Medical privacy has also been significantly diminished since the emergence of COVID-19. CoE Member States have similarly moved forward in an

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[38] *See* Community Mobility Reports, <https://www.google.com/covid19/mobility/>, accessed 20th April 2021.

[39] *See* <https://www.duvarenglish.com/coronavirus/2020/04/08/turkey-to-track-coronavirus-patients-via-mobile-phone-application-to-enforce-quarantines>, accessed 2nd February 2021.

[40] Mathew RYDER *et al.,* 'COVID-19 & Tech responses: Legal opinion', 10, <https://www.matrixlaw.co.uk/wp-content/uploads/2020/05/Covid-19-tech-responses--opinion-30-April-2020.pdf>, accessed 30th April 2021.

[41] *See* GDPR, Recital 26: "Personal data which have undergone pseudonymization, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person." *See* also Michelle FINCK / Frank PALLAS, 'They who must not be identified- distinguishing personal from non-personal data under the GDPR', *International Data Privacy Law* 10/1 (2020) 16: "Pursuant to Recital 26 GDPR, the relevant criterion to assess whether data is pseudonymous or anonymous is identifiability."

[42] Luc ROCHER / Julien M. HENDRICKX / Yves-Alexandre DE MONTJOYE, 'Estimating the success of re-identification of incomplete datasets using generative models' *Nature Communications* 10 (3069), (2019) 1 <https://www.nature.com/articles/s41467-019-10933-3>, accessed 20th June 2020.

attempt to make use of digital technology to slow down the spread of the virus. Calls for a privacy-protecting approach towards digital contact tracing, by observing consent, having an independent oversight body, restrictive data acquisition processes and informed decision-making on part of the traced individuals have been made in this regard.[43]

In the following section, some responses from Contracting States to the Council of Europe concerning measures of surveillance and privacy infringements will be highlighted. The future task for the Strasbourg Court will be to distinguish between legitimate restrictions and illegitimate infringements on the human rights of individuals in the context of COVID-19 responses.

Countries such as Armenia passed amendments providing the authorities with the legal basis to survey cell phone data for tracking the coronavirus, including accessing confidential medical information.[44] Telecommunications companies were requested to share their customers' phone numbers, location, time and date of calls and text messages, through which Armenian authorities intend to identify potential carriers of the COVID-19 virus, as well as monitor those who are infected.[45] The call records are to be destroyed by law once the state of emergency ends. Other safeguards, however, such as delineating boundaries for the collection of phone records, identifying the precise purpose of data collection, as well as stating which persons have access to the data, are absent.[46] The Human Rights Defender of the Republic of Armenia, Arman Tatoyan warned of some of the risks attached to the aforementioned legislative changes: "The State of Emergency restrict[s] certain constitutional rights and contain[s] derogations from Armenia's

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[43] Yoshua Bengio, 'The need for privacy with public digital contact tracing during the COVID-19 pandemic', *Lancet Digit Health* 2/7 (2020) e342, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7266569/>, accessed 1st February 2021.

[44] *See* Seda Ghukasyan, 'Armenia: Parliament Passes Bills to Access Mobile Phone Data to Identify Covid-19 "Contact Circles"' (31st May 2020), <https://hetq.am/en/article/115353>, accessed 15th April 2021.

[45] Lilit Arakelyan, 'Armenia: Can Mass Surveillance Halt Covid-19?', *Institute for War and & Peace Reporting* (16th April 2020), <https://iwpr.net/global-voices/armenia-can-mass-surveillance-halt-covid-19>, accessed 20th September 2020, §10.

[46] Human Rights Watch, 'Armenia: Law Restricts Privacy Amid COVID-19 Fight', (3rd April 2020), <https://www.hrw.org/news/2020/04/03/armenia-law-restricts-privacy-amid-covid-19-fight>, accessed 16th September 2020.

obligations under the European Convention on Human Rights. This refers to the rights such as protection of personal data, respect for private and family life, freedom and privacy of correspondence."[47]

The privacy of individuals has also been impacted by Poland's implemented measures. The app *kwarantanna domowa*, published under the auspices of the Ministry of Digital Affairs,[48] monitors the mandatory 14-day quarantine period[49] for individuals who either had contact with a person infected with the COVID-19 virus, or who had returned from abroad. Throughout the day, the individual in quarantine must respond to text messages asking to provide photographic proof of the individual's whereabouts.[50] If the person does not respond, the police will be notified to carry out a check-up. Along with the photograph taken with the phone, the app submits a geolocation tag to the police, indicating where the photo was taken. According to *Privacy International*, "the system checks both the person (using facial recognition) and the location, essentially replicating what would otherwise be a visit from a police officer."[51] It is unknown whether this app uses a centralised server or a decentralised server.

Russia's response also included rather strict measures, such as the use of facial recognition technology, capable of identifying persons acting contrary to quarantine orders. In March 2020 alone, 178,000 facial recognition cameras were situated in Moscow.[52] The OECD voiced

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[47] Human Rights Defender of the Republic of Armenia, 'Legal position of the Human Rights Defender on draft laws restricting the privacy of correspondence and other rights', (31st March 2020), <https://www.ombuds.am/en_us/site/ViewNews/1137>, accessed 15th June 2020.

[48] Polish Government, 'Koronawirus: informacje i zalecenia', <https://www.gov.pl/web/koronawirus/kwarantanna-domowa, accessed 23rd January 2021.

[49] The 14-day quarantine was mandated under the decision made on 13th March 2020, *see* <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000434>, accessed 24th September 2020. In April 2021, home quarantine only lasts for 10 days if no symptoms have occurred, *see* <https://www.gov.pl/web/coronavirus/temporary-limitations>, last accessed 24th April 2021.

[50] TakeTask, 'Crisis management', <https://taketask.com/solutions/crisis-management/>, accessed 25th April 2021.

[51] Privacy International, 'Poland: App helps police monitor home quarantine' (19th March 2020), <https://privacyinternational.org/examples/3473/poland-app-helps-police-monitor-home-quarantine>, accessed 3rd July 2020.

[52] Alexander MARROW, 'Russia's lockdown surveillance measures need regulating, rights group say', (24th April 2020, Reuters), <https://www.reuters.com/article/health-coronavirus-russia-facial-recogni-idINKCN2260CF>, accessed 25th June 2020.

its concern for individuals' infringements on a number of rights relating to the "right of access to their personal data, the right to erasure, and the right to be informed as to the purposes of processing and who that data is shared with."[53] Russia has also resorted to tracking people's phones and geolocation data to track "citizens who are in contact with patients with new coronavirus infection on the basis of information from cellular operators about the geolocation of a cell phone of a particular person, which would allow citizens to be notified (over the phone) if they have been in contact with a person suffering from the novel coronavirus, sending relevant messages to inform them of the need for self-isolation."[54]

Belgium similarly makes use of personal telecoms data. According to the government, the mobile phone data is aggregated and anonymized and "telecoms operators only supply anonymized and aggregated data to Sciensano, which then sends the requested analyses to the government."[55] Interestingly, the government justifies this use for its proven benefits in handling the Ebola epidemic in West Africa in 2013-2015. As has been concluded by a number of researchers, the use of call detail record data, which collected millions of individual's cell phone data failed to lead to detect the Ebola outbreaks and thus failed in its purpose.[56] If applications are lodged in this regards, calling for unjustified measures infringing the rights to private life of individuals, the Courts will carefully have to assess whether measures that have proven futile in past pandemics could fall under the exemption categories of Article 8(2) of the Convention.

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[53] OECD, 'Tracking and tracing COVID: Protecting privacy and data while using apps and biometrics', (23rd April 2020), <http://www.oecd.org/coronavirus/policy-responses/tracking-and-tracing-covid-protecting-privacy-and-data-while-using-apps-and-biometrics-8f394636/>, accessed 16th June 2020.

[54] Communications Ministry, cited by Gleb STOLYAROV / Polina NIKOLSKAYA / Olesya ASTAKHOVA, 'Russia to use mobile phones to track people at risk of coronavirus', <https://www.reuters.com/article/us-health-coronavirus-russia-iduskbn21aimt>, accessed 23rd June 2020.

[55] Government of Belgium, 'Coronavirus COVID-19', <https://www.info-coronavirus.be/en/faq/>, accessed 12th April 2021.

[56] *See,* amongst others, Susan L. ERIKSON, 'Cell phone ≠ Self and Other Problems with Big Data Detection and Containment during Epidemics', *Med Anthropol Q* 32/3 (2018). For a discussion on the use of mobile phone data collection in crisis situations, *see* Amy MAXMEN, 'Can tracking people through phone-call data improve lives?', *Nature* (29th May 2019), <https://www.nature.com/articles/d41586-019-01679-5>, accessed 1st June 2020.

In the United Kingdom, privacy concerns have been raised for a number of the imposed measures. A Bloomberg report details the government's plan to request mobile network operators to share customer roaming data for the purpose of repatriating citizens stranded abroad.[57] The Government previously requested phone location data in order to survey the imposed lockdown measures.[58] On 4 May 2020, the NHS started trialling a contact tracing app on the Isle of Wight. According to Mathew Gould, CEO of the government department responsible for developing the app, the anonymization of data may indeed appear to be "pseudonymized"[59], indicating the possibility of re-identification of individuals and its use for further research post-pandemic. He also states that there exists no "definitive list of exactly who would have access to the data."[60] Lynskey and Veale criticised the NHSX app for its potential of mission creep, and the possibility of re-identification of analysis of individuals' contacts and location history through pseudonymous data.[61] They also voiced concern about the accuracy of the NHSX's app, as the app does not appear to "allow iPhones to recognise each other when they are locked and in an individual's bag or pocket

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[57] Thomas SEAL, 'U.K. Asks Phone Carriers for Data to Help Fly Brits Abroad Home', *Bloomberg Technology* (1st April 2020), <https://www.bloomberg.com/news/articles/2020-04-01/u-k-asks-phone-carriers-for-data-to-help-fly-brits-abroad-home>, accessed 30th June 2020; *see* also Jack LOUGHRAN, 'UK to use mobile data to track people's whereabouts during coronavirus crisis', *Engineering and Technology* (20th March 2020), <https://eandt.theiet.org/content/articles/2020/03/uk-to-harvest-mobile-data-to-track-people-s-whereabouts-during-coronavirus-crisis/>, accessed 30th June 2020.

[58] Marky SWENEY / Alex HERN, 'Phone location data could be used to help UK coronavirus effort (the Guardian, 19th March 2020), <https://www.theguardian.com/world/2020/mar/19/plan-phone-location-data-assist-uk-coronavirus-effort>, accessed 30th June 2020.

[59] <https://www.theregister.com/2020/05/04/uk_covid_app_human_rights_parliament/>, last visited 30th June 2020.

[60] Laurie CLARKE, 'Uncertainty over who could access NHSX contact tracing app data as pilot goes live', NS *Tech* (4th May 2020), <https://tech.newstatesman.com/coronavirus/uncertainty-over-who-could-access-nhsx-contact-tracing-app-data-as-pilot-goes-live>, accessed 30th June 2020.

[61] Orla LYNSKEY / Michael VEALE, 'Supplementary Written Evidence by Dr. Orla Lynskey, Department of Law, London School of Economics, and Dr Michael Veale, Faculty of Laws, University College London (COV0093)', UK Parliament, pg. 5, <https://committees.parliament.uk/writtenevidence/4090/html/>, accessed 30th June 2020.

during an encounter unless someone with an Android phone is nearby …". If, as a consequence, users were to be mandated to keep their phones unlocked at all times to allow for the proper functioning of the app, there would exist an acute risk of stolen phones providing sensitive data to unknown third parties.[62]

France became the first country to request Google and to loosen their privacy protections in order for their digital contact tracing apps to function better. Previously, almost 300 privacy experts issued a joint statement urging governments to adopt a privacy-preserving decentralised server as opposed to a centralised method.[63] From 23rd March 2020, individuals in France were also requested to carry an 'Attestation de deplacement derogatoire', demonstrating a valid reason for being outside one's home – such as grocery shopping, travelling to work, obtaining necessary healthcare, essential family matters, etc.[64] Drones equipped with cameras were utilised to enforce the lockdown until a complaint at the Conseil d'Etat led to a ruling, in which it was stated that drone use "constitutes a serious and manifestly unlawful infringement of privacy rights."[65]

Less restrictive privacy measures were adopted by the Italian and the Swedish government. Italy became a frontrunner in the European area to launch a voluntary, decentralised contact tracing app, following the framework developed by Apple and Google, whereby Bluetooth is

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[62] Orla Lynskey / Michael Veale, 'Supplementary Written Evidence', 5.

[63] Joint Statement on Contact Tracing: Date 19th April 2020, pg. 2, <https://drive.google.com/file/d/1OQg2dxPu-x-RZzETlpV3lFa259Nrpk1J/view> accessed 1st July 2020.

[64] For the current measures, *see* France, Ministry of the Interior, 'Attestations de Deplacement', (22nd April 2021), <https://www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Attestations-de-deplacement>, accessed 24th April 2021. *See* also, for earlier versions, France, Ministry of the Interior, 'Provision of a digital movement certificate', (14th April 2020), <www.interieur.gouv.fr/fr/Actualites/Communiques/Mise-a-disposition-d-un-dispositif-numerique-d-attestation-de-deplacement>, accessed 20th June 2020.

[65] La Conseil d'Etat, Nos. 440442, 440445 (18th May 2020), <https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-18-mai-2020-surveillance-par-drones>, accessed 18th May 2020. *See also* Helene Fouquet / Gaspard Sebag, 'French Covid-19 Drones Grounded after Privacy Complaints', *Bloomberg* (18th May 2020), <https://www.bloomberg.com/news/articles/2020-05-18/paris-police-drones-banned-from-spying-on-virus-violators>, accessed 1st July 2020.

utilised to swap codes between cell phones. Once a person tests positive for the COVID-19 virus, the doctor uploads the result and people whose cell phones detected close contact with the infected person receive a notification.[66] The data stored on the individual's device is encrypted and must be deleted when no longer in use, or by the end of the year.[67]

In contrast to the above-mentioned states, Sweden decided entirely against the use of a contact-tracing app as a supplementary tool to fight the COVID-19 pandemic, for reasons of privacy concerns.[68]

2. Novel challenges: Health Certificates and COVID-19 Passports

Another relatively novel aspect that may risk the enjoyment of the right to private life emerged in the form of vaccination passports. The majority of CoE Member States now require a health certificate or vaccination passport for various activities, including international travel, the visiting of public and private areas such as the food and entertainment industry.[69] Some sectors, such as the health industry, even require mandatory vaccination against the COVID-19 virus.[70] At the EU level

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[66] Angelo AMANTE / Elvira POLLINA, 'Italians embrace coronavirus tracing app as privacy fears ease' (Reuters, 11th June 2020), <https://www.reuters.com/article/us-health-coronavirus-italy-apps/italians-embrace-coronavirus-tracing-app-as-privacy-fears-ease-iduskbn23i2m5> accessed 30th June 2020.

[67] *See* Immuni app, <https://www.immuni.italia.it/>, accessed 12th November2020. *See* also Kris HOLT, "Italy's Immuni' COVID-19 contact tracing app uses Google, Apple tech', *iCrowdNewswire* (2nd June 2020), <https://icrowdnewswire.com/2020/06/02/italys-immuni-covid-19-contact-tracing-app-uses-google-apple-tech/>, accessed 30th June 2020.

[68] *See* European Commission, 'Mobile contact tracing apps in EU Member States', <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/travel-during-coronavirus-pandemic/mobile-contact-tracing-apps-eu-member-states_en>, accessed 12th April 2021; *See* also Patricia JONASON, 'Covid-19 pandemic and data protection issues in Sweden', *Data Protection Issues related to COvid-19 Comparative Perspectives* (20th July 2020), <https://blogdroiteuropeen.com/2020/07/20/covid-19-pandemic-and-data-protection-issues-in-sweden-by-patricia-jonason/>, accessed 20th August 2021.

[69] Ana BEDUSCHI, 'Covid-19 health status certificates: Key considerations for data privacy and human rights', ECIL *Working Paper* 2021/1, pg. 1.

[70] See, for example, <https://www.reuters.com/world/europe/france-make-covid-19-vaccination-mandatory-health-workers-macron-2021-07-12/>; Greece orders COVID-19 vaccinations as infections rise | Reuters; <https://www.gov.uk/government/publications/vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance/coronavirus-covid-19-vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance>.

(and joined by other CoE Member States, such as Albania, Turkey and Ukraine) travellers will need a COVID-19 Vaccine Passport/Certificate, detailing whether the person has a vaccination passport, a test certificate or a recovery certificate.[71]

Digital vaccination passports require the provision of private information, such as an individual's name, date of birth, date of issuance of the vaccination, and the vaccination type. According to Article 9 of the GDPR, an individual's vaccination status is considered sensitive data, the collection and further use of which must be justified. Collecting sensitive data "for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health" constitutes one such legitimate exemption. According to McAuley, Hyde and Chen, however, a legitimate justification would need to entail the production of evidence, proving that those "vaccinated indeed pose a lower threat to public health."[72] At this point in time, the evidence as to the effectiveness of a lower risk of spread through vaccinations remains "unclear."[73]

An individual without a vaccination passport may experience varying degrees of restrictions in their "work, insurance, hospitality and leisure, and other parts of life, based on an individual's health or risk of COVID-19 infection or transmission."[74] Another risk associated with vaccination/health certificates is the creation of a 'digital divide', whereby persons without a digital version of their health status are exposed to additional access hurdles. To mitigate unnecessary infringements on the right to private life and freedom from discrimination as a result of such 'digital divide', Hine et al recommend readily available physical IDs or paper versions of health certificates.[75]

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[71] All Details on EU COVID-19 Vaccine Passport Revealed: Here's What You Need to Know - <SchengenVisaInfo.com>.

[72] D. McAuley / R. Hyde / J. Chen, 'Response to the Ada Lovelace Institute Call for Public Evidence: Vaccine Passports and COVID Status Apps', 2.

[73] D. McAuley / R. Hyde / J. Chen, 'Response to the Ada Lovelace Institute Call', 3.

[74] International monitor: vaccine passports and COVID status apps | Ada Lovelace Institute.

[75] Emmie Hine *et al.,* 'Saving human lives and rights: recommendations for protecting human rights when adopting COVID-19 Vaccine Passports', (July 12, 2021) 6, available at SSRN: <https://ssrn.com/abstract=3885252>.

III. Privacy obligations of Council of Europe states faced with a pandemic

The use of highly sensitive data seems a necessary evil to combat the COVID-19 pandemic, yet certain data protection and privacy principles must be observed. In the current health crisis, domestic authorities rely on sensitive health data of its citizens to plan and coordinate the state's course of action. Safeguards must ensure that any measure remains "transparent, necessary and proportionate, and when they exist, data protection and privacy laws should have clear exceptions that apply to public health crises. (..)"[76] The purpose of part III is to set out obligations for CoE Member States faced with this pandemic.

In its case law, the Strasbourg Court has already acknowledged the 'existence of an exceptional crisis without precedent'[77] (albeit referring to a financial crisis). In *Enhorn v Sweden*, it also demonstrated its willingness to find a Convention violation in case of excessively long compulsory isolation. Here, the Court emphasized the necessity to carefully balance competing rights and favour options with less severe impacts on the concerned individual.[78]

Before the COVID-19 pandemic, the Strasbourg Court has dealt with quarantine as a result of infectious diseases (influenza) only once. In *Kuimov v Russia*[79], it assessed the imposition of an influenza quarantine at a foster home, which temporarily restricted a father from visiting his child. In the meantime, connection between the family was established by means of phone contact and through visible contact, relying on a glass window. The Court did not find a violation of Article 8 of the Convention, highlighting the 'legitimate aim of protecting the

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[76] Access Now, Recommendations on Privacy and Data Protection in the Fight Against Covid-19, (March 2020) 4.

[77] *Koufaki and Adedy v Greece* [2013], App. Nos. 57665/12 and 57657/12, §37.

[78] The careful balancing of 'public health needs and safety with human rights' was also emphasized by Oluwatoyin A. SORINMADE, 'Highlighting some of the challenges COVID-19 has posed to the European Convention on Human Rights', *BJPsych Bulletin* 44/4 (2020) 177. The need for a balancing act between 'public and private interests' with respect to implementing a 'potentially human rights infringing approach by a state's authorities' was also highlighted by Sascha-Dominik (Dov) BACHMANN, 'State Responsibility for the (Public) Right to Health and Security in Times of COVID Pandemic – A European Perspective', *Indon. J. Int'l & Comp. L.* 7 (2020) 407.

[79] *Kuimov v Russia* [2009], App. No. 32147/04.

child's health and rights', carried out through a quarantine that lasted for a limited period of time (about seven weeks).

More recently, the Court faced applications in the context of the COVID-19 pandemic. In *Terheş v Romania*[80], the applicant contested restrictions which were imposed during a state of emergency. According to the order issued by the Romanian Minister of the Interior, people were advised not to leave the house between 6 o'clock in the morning and 1 o'clock in the afternoon and were prohibited from doing so throughout the night. The government provided an exhaustive list of exemptions concerning this rule and requested that people carry a document attesting the valid reason for leaving their home. The applicant complained that these measures amounted to 'administrative detention'. The Court noted the general, not individual preventive nature of the measure, which had basis in law. In the eyes of the Court, the list of exemptions provided sufficient flexibility so that the degree of intensity of the restrictions could not be equated to a situation of house arrest. The general lockdown, therefore, could not be deemed to constitute a deprivation of liberty as defined under the Convention. It must be highlighted that Romania also notified the CoE of its intention to derogate under Article 15 of the Convention, and specifically from its obligations under Article 2 of Protocol No. 4 prior to the implementation of the ordinance. Since the applicant did not express how these lockdown measures affected him personally, and did not specifically complain under Article 2 of Protocol No. 4, the Court did not discuss the validity of the derogation. On the basis of this unfortunate reasoning, the Court declared the application inadmissible.

The decision in *Le Mailloux v France*[81] concerning the insufficient measures taken by France to combat the spread of the COVID-19 virus similarly led to a declaration of inadmissibility. Here, the applicant invoked Articles 2, 3, 8 and 10 of the Convention on account of the State's failure to comply with its positive obligations to protect the life and physical integrity of persons within its jurisdiction. The Court, however, found that the applicant failed to demonstrate how the actions or inactions of the State affected him personally. It remains to be

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[80] *Terhes v Romania* [2021], App. No. 49933/20.

[81] Le Mailloux v France [2021], App. No. 18108/20.

seen in future COVID-19-related cases how the Court handles applications concerning, *inter alia*, Article 8 of the Convention.

Most recently, the case of *Vavřička and others v the Czech Republic*[82] has shown that interferences with the right to private life in the context of compulsory vaccinations can be justified on account of the pressing social need to protect individual and public health against certain well-known diseases.[83] The Court reiterated the wide margin of appreciation afforded to states in instances where the government's measures remain proportionate to the legitimate aims pursued. Moreover, the Court acknowledged a wide European consensus on the benefits of vaccines. The *Vavřička* judgment is timely, as a growing number of European Member States consider both directly mandatory vaccination schemes against COVID-19 (for health care workers, for example)[84], as well as indirectly mandatory vaccination schemes (through beneficial treatment of vaccinated people).[85]

It is to be expected that the Court will recognise the immense benefits of reaching herd immunity, and that a mandatory vaccination scheme may eventually be deemed a proportionate measure under Article 8 of the Convention, so long as it is 'necessary in a democratic society' and based on sound scientific evidence.[86] A more contentious question concerns the growing discussion around vaccination

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[82] *Vavřička* and others v the Czech Republic [2021], App. No. 47621/13 and others.

[83] The Grand Chamber emphasised that "vaccination protects both those who receive it and also those who cannot be vaccinated for medical reasons and are therefore reliant on herd immunity for protection against serious contagious diseases."

[84] Italy has been the first member state to resort to mandatory coronavirus vaccinations for all healthcare workers, *see* Marta PATERLINI, 'Covid-19: Italy makes vaccination mandatory for healthcare workers', BMJ (2021) 373, n905.

[85] For an insightful discussion on the ethics of mandatory vaccinations in light of the ongoing pandemic, see, *inter alia*, Julian SAVULESCU, 'Good reasons to vaccinate: mandatory or payment for risk?', *Journal of Medical Ethics* 47/2 (2021), <https://jme.bmj.com/content/47/2/78>, accessed 30th April 2021; Christopher DYE / Melinda C. MILLS, 'Covid-19 vaccination passports', *Science* 371/6535 (2021) 118, acknowledging some companies "no jab, no job" policies.

[86] Written Evidence from Dr Lisa Forsberg, Dr Isra Black, Dr Thomas Douglas, Dr Jonathan Pugh (COV0220), 'Compulsory vaccination for COVID-19 and human rights law' (2020), availale at <https://committees.parliament.uk/writtenevidence/9253/pdf/>, accessed 12th February 2021.

passports and their privileges attached to it.[87] Discrimination worries have been voiced,[88] as well as concerns for data protection.[89] Depending on the scheme that is chosen for such passports, a European health database raises immensely critical questions about the infringement of the right to private life. Solutions such as blockchain technology should be considered in this regard. Blockchain offers a decentralised, transparent and anonymous approach to data management, making data "shared yet impermeable, immutable and tamper-proof."[90] More generally, the Court must pay close attention to structural inequalities in data access and exposure, which could result in a disproportionate interference of the right to privacy for particularly disadvantaged communities and groups.[91] Moreover, promoting the use of digital contact tracing tools may widen the inequality gap between members of the population, limiting access and effectively infringing on the right to private and family life for those who do not have access to a smart phone capable of supporting the necessary digital technology.[92] A "consent-based, opt-in approach" towards the use of digital

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[87] Kelvin K. F. Tsoi *et al.,* 'The way forward after COVID -19 vaccination: vaccine passports with blockchain to protect personal privacy', BMJ *Innov* (2021) 337-341.

[88] *See*, *inter alia*, Mark A. Hall / J. D. Studdert / David M. Studdert, 'Vaccine Passport' Certification – Policy and Ethical Considerations', *The New England Journal of Medicine* (2021), <https://www.nejm.org/doi/full/10.1056/NEJMp2104289>, accessed 15th April 2021; *See also* an American perspective on Digital Health Passes and its potential infringements to discriminate on lower income countries whose vaccination rates may not have reached the required level for people to be able to travel freely: Lawrence O. Gostin et al., 'Digital Health Passes in the Age of COVID-19: 'Are "Vaccine Passports" Lawful and Ethical?', *The Journal of the American Medical Association* (2021) e1.

[89] Council of Europe, Information, 'Protection of human rights and the "vaccine pass', *Documents* SG/*Inf* 11 (2021) 3.

[90] *See* Kelvin K. F. Tsoi *et al.,* 'The way forward after COVID -19 vaccination', 339.

[91] *See*, for example Stephen Cave *et al.,* 'Using AI ethically to tackle covid-19', BMJ 372/364 (2021) 1-2; Linnet Taylor, 'The price of certainty: How the politics of pandemic data demand an ethics of care', *Big Data & Society* 7/2 (2020) 5; *see* also Audrey Lebret, 'COVID-19 pandemic and derogation to human rights', *Journal of Law and the Biosciences* 7/1 (2020) 1, emphasizing that states ought to pay particular attention to vulnerable populations and the potential of placing a disproportionate burden on them with regards to the infliction of restrictive measures. I would argue that this disproportionate burden should also be avoided in the context of rights enshrined under Article 8 of the Convention.

[92] Sharifah Sekalala *et al.,* 'Health and human rights are inextricably linked in the COVID-19 response', BMJ *Global Health* 5 (2020) 3.

technology aiding in the combat against COVID-19 appears to be most appropriate,[93] with adequate safeguards for those who are unable or unwilling to engage with the digital solutions offered by states.

Conclusion

The times of COVID-19 are trying times. Whilst governments struggle to contain one of the biggest health threats of our times, citizens are faced with a trade-off in which public health concerns trump basic human rights- such as the right to private and family life. Consequences are far reaching, and will be felt far beyond the times of actively fighting the pandemic. A key consideration should be the contextualisation of the use of data: Whereas infringements on the rights to privacy may be necessary, if done in a proportionate manner, a misuse of data in different contexts, namely to advance political power, must strictly be avoided.[94] The dangers of mission creep, mass surveillance, and discrimination are omnipresent in society and may only be exacerbated by states' responses to the current health crisis. It is vital, for the sake of the rule of law, the upholding of human rights, and the legitimacy of governance, to tread carefully and to comply with international and regional human rights provisions. Above all, a totalitarian state may tackle the health crisis, but with it, it may also extinguish the essence of what makes humans humane: Essential in this is the right to private and family life.

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[93] Yoshua Bengio *et al.,* 'The need for privacy with public digital contact tracing during the pandemic' *The Lancet* 2/7 (2020) e342.

[94] Andrej Zwitter / Oskar J. Gstrein, 'Big data, privacy and COVID-19 – learning from humanitarian expertise in data protection', *Journal of International Humanitarian Action* 5/4 (2020) 5.

THE RULE OF LAW, COURTS AND TRUST IN THE FIELD OF JUDICIAL COOPERATION

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Pedro Caeiro*

1. Courts play an unparalleled role in the upholding of the rule of law in its substantive dimension (protection of fundamental rights). The following considerations purport to address the question: how does trust relate to that function? Is it an obstacle or a driver?

2. Trust is a disposition that allows for individuals and social entities to decide in situations of risk and uncertainty, when they do not know or cannot control all the factors that might be relevant for taking such a decision. In other words, trust is a surrogate for knowledge and control.

In the realm of judicial cooperation, it has a dialogical structure (trustor/trustee) and leads the former to devalue the risk of adverse consequences based on the expectation that the latter will act in a way that averts them. Judicial cooperation can carry a negative outcome for the requested State/trustor: if the requesting State/trustee violates the fundamental rights of the individual concerned, the former will have taken part in such breach. Trust and distrust help the requested State to screen and fend off unacceptable risks.

3. In its notorious Opinion 2/2013,[1] the Court of Justice of the European Union (CJEU) devised a "principle of mutual trust" as a fundamental principle of EU law, which would generate a duty to presume

* Associate professor, integrated researcher, Univ Coimbra, UCILeR, Faculty of Law.

[1] CJEU, Opinion of the Court (Full Court) of 18.12.2014, ECLI:EU:C:2014:2454.

that all the other Member States of the European Union (EU) comply with fundamental rights[2] – and, by extension, with the rule of law.

With respect, I am not convinced that trust can be the content of a legal principle, because it simply cannot be prescribed. A *duty to trust* is a contradiction in itself since trust is a subjective disposition, even when applied to social entities. You can force someone to marry you – but not to love you. Moreover, trust only makes sense when there is risk exposure and uncertainty, which makes distrust also a viable and legitimate alternative. A duty to trust is a duty to presume that risk does not exist, which suppresses the need for risk assessment and, consequently, dispenses with trust.

Thus, the "principle of mutual trust" is an inaccurate name for a quite different and more technical mechanism: the establishment of a *presumption of compliance* with the rule of law, by which the courts shall abide in judicial cooperation proceedings. The content of this duty is not to trust, but rather to presume that the counterpart respects the rule of law, which in turn facilitates the recognition of their decisions. Otherwise, the alleged principle of mutual trust would paradoxically result in a radical exclusion of both trust and distrust from the cooperation procedure. And yet, as we will see, trust can still play a role within a system of presumed compliance.

4. In a purely domestic setting, a court will not refrain from handing down a prison sentence just because there is a well-founded suspicion that the person convicted can be subject to abuse or ill-treatment in the prison facilities of that country, either for general or specific reasons. There is no place for trust or distrust in the decision process because courts and prisons are part of the *same polity*. At the internal level, possible violations of human rights by, e.g., the authorities in charge of the prison system, do not carry the responsibility of the sentencing courts before third parties, such as the individual or the ECHR – it is the *State*, as a whole, that will be held accountable. The presumption established by the case-law of the CJEU and the suppression of risk assessment impact the dialogical structure inherent in *transnational* judicial cooperation and approximate its rule to domestic proceedings. In fact, this approximation is consistent with the project of a single judicial area,

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[2] *Ibid.*, para. 191 f.

where national courts are part of the *same cooperation system* when they apply EU law – and hence are seen as *issuing* and *executing* authorities.

5. Nevertheless, suppressing risk assessment does not suppress the risk itself. Nor does the concept of a "single judicial area" change the individual responsibility of the single Member States vis-à-vis third parties for the breach of the obligations arising from the ECHR. As a consequence, adverse results of cooperation – namely, the violation of human rights by the issuing state – may still occur and carry the liability also of the executing State. In *Pirozzi*[3] and *Castaño*,[4] the European Court of Human Rights (ECtHR) has made clear that, notwithstanding the doctrine of equivalent protection adopted in *Bosphorus*[5], it will not refrain from adjudicating on possible violations of the Convention involving the application of EU law.

6. Therefore, the major shift of direction brought by the CJEU in *Aranyosi / Caldararu*[6] and its sequels (namely LM[7] and *L and P*[8]), where the Court has acknowledged that the general presumption of compliance with the rule of law can be rebutted in a particular case, deserves to be praised for many reasons. Above all, it allows for more effective protection of fundamental rights. It also reframes the responsibility of national courts for the enforcement of the rule of law while executing foreign warrants and decisions. Moreover, it rehabilitates the proper meaning of trust in cases where cooperation depends on the provision of guarantees by the requesting State (according to the judgments ML[9] and *Dorobantu*[10]). Finally, with its reinstatement as a valuable asset in cooperation proceedings, trust becomes a powerful driver for the

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[3] ECtHR, Judgment, App. no. 21055/11, *Pirozzi v. Belgium*, 17.04.2018.

[4] ECtHR, Judgment, App. no. 8351/17, *Romeo Castaño v. Belgium*, 09.07.2019.

[5] ECtHR, Judgment, App. no. 45036/98, *Bosphorus Hava Yollari Turízm ve Ticaret Anonim Şírketí v. Ireland*, 30.06.2005, esp. paras. 156 f. and 165.

[6] CJEU, Judgment, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi / Căldăraru*, 05.04.2016, ECLI:EU:C:2016:198.

[7] CJEU, Judgment, Case C-216/18 PPU, LM, 25.07.2018, ECLI:EU:C:2018:586.

[8] CJEU, Judgment, Joined Cases C-354/20 PPU and C-412/20 PPU, L / P, 17.12.2020, ECLI:EU:C:2020:1033.

[9] CJEU, Judgment, Case C-220/18 PPU, ML / *Generalstaatsanwaltschaft Bremen*, 25.07.2018, ECLI:EU:C:2018:589.

[10] CJEU, Judgment, Case C-128/18, *Dorobantu*, 15.10.2019, ECLI:EU:C:2019:857.

reform of systemic malpractice by national authorities, who will otherwise face the risk of refusal of cooperation from the authorities of fellow Member States.

It should be stressed that this positive change in the stance of the CJEU was not due to any amendment of the existing legislation, but rather to the persistence of national courts, whose referrals on the protection of fundamental rights in cooperation proceedings have eventually resonated in the jurisprudence of Luxembourg.

7. In the rather unusual *Gavanozov* II case, the Opinion delivered by AG Bobek[11] went along the same lines: the judicial authorities of a Member State whose laws do not comply with minimum standards in a particular aspect should not be able to *issue* requests for cooperation related to that aspect. Otherwise, they will be acting unlawfully and against mutual trust.

In my view, deficiencies in the law do not really contend with trust, because they can be *known* and *assessed* by the other Member States. Having said that, there are no reasons not to extend the AG's conclusion to situations where the risk for fundamental rights lies in the *practice* of the issuing Member State – and therefore require trust. For instance: if the prison conditions in a given Member State are in breach of minimum standards, the respective judicial authorities should refrain from issuing an EAW until they are in a position to guarantee to their counterparts that the risk has been removed. In this way, the need to be trusted will foster the rule of law in a twofold manner: it will prevent the breach of fundamental rights in the case in question and it will encourage the national authorities of the requesting Member State to implement the required changes to the prison system.

8. This approach brings about a significant change of perspective: EU Member States will finally be moving from "the respect for the rule of law is not an issue because we trust each other" to "we must respect the rule of law to be trusted by the others".

To conclude, if I may adapt William E. Deming's well-known quote: in God we trust – all others provide evidence when appropriate.

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[11] Case C-852/19, Opinion of Advocate General Bobek delivered on 29 April 2021, ECLI:EU:C:2021:346.

THE ROLE OF EUROPEAN AND NATIONAL COURTS IN UPHOLDING THE RULE OF LAW

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Robert Spano*

It is my great pleasure to participate in this High-Level Conference and also an immense privilege to be here with you in person in Coimbra. After numerous online video messages, nothing can quite compare to the experience of taking part in a real life conference. I would like to thank the organisers and the moderator of this session, Paulo Pinto de Albuquerque, for bringing us together. I would also like to greet today's distinguished panellists. I very much look forward to our discussions.

We are all aware of the context in which this conference takes place, with recent examples of challenges to the rule of law and judicial independence; what the Secretary General of the Council of Europe calls "democratic backsliding".[1] This is evidenced by litigation before the Court of Justice of the European Union and the Strasbourg Court.

Accordingly, I will define the question to be answered as follows: what role can international courts play in upholding this core principle within the current political climate?

It is actually a very interesting question and I will answer by making four points.

My first point is that the European Court of Human Rights upholds the principle of the rule of law through the various substantive guarantees which the Court has inferred from this notion. These include

* President of the European Court of Human Rights.

[1] "State of Democracy, Human rights and the Rule of Law: a democratic renewal for Europe", Report by the Secretary General of the Council of Europe, 2021.

the principle of legality or foreseeability, the principle of legal certainty, the principle of equality of individuals before the law, the principle of control of the executive whenever a public freedom is at stake, the principle of the possibility of a remedy before a court and the right to a fair trial. Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State.

Since the Convention system is founded on the principle of subsidiarity, these substantive guarantees are to be applied by domestic judges who make up, what I have called our "European community of judges", who apply Convention principles at the domestic level.

My second point is that the European Court of Human Rights upholds the rule of law through the development of its rich jurisprudence on judicial independence.

The complaints brought before the Strasbourg Court are often based on the right to a fair trial by an 'independent and impartial tribunal established by law' under Article 6 § 1 of the Convention, but also on Article 5 (the right to liberty), Article 8 (the right to private life) and Article 10 (freedom of expression). Case by case, judgment by judgment, the Court has built up a substantial arsenal of case-law on crucial aspects of judicial independence: the detention of judges; judicial appointment processes; disciplinary processes; dismissals and demotions.

As we all know, an efficient, impartial and independent judiciary is the cornerstone of a functioning system of democratic checks and balances. Judges are the means by which powerful interests are restrained. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before the law.

The judiciary is therefore an essential component of democratic societies and a key institution that needs to be protected.

Judges must be independent from other organs of the state; this is crucial in any democracy. As the Court has stated, "the notion of separation of powers between the executive and the judiciary has assumed growing importance in the case-law of the Court".[2]

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[2] *See* Stafford v. the United Kingdom [GC], no. 46295/99, § 78, ECHR 2002-IV.

My third point underlines the quality and importance of judicial dialogue between the Strasbourg and Luxembourg Courts on rule of law issues. The Court of Justice of the European Union has in recent years rendered important rulings in the field of judicial independence under the Treaty on European Union (TEU) and the EU Charter of Fundamental Rights. The jurisprudential core of many of these rulings relies upon Strasbourg case-law and Strasbourg case-law itself relies upon the findings of the Luxembourg Court. The recent case of *Guðmundur Andri Ástráðsson v. Iceland* [GC] is a case in point, and in particular the Grand Chamber's reliance on the principle of irremovability as set out in *Commission v Poland*.

In my view there is a clear symmetry of values between the two systems. This is the case despite the procedural differences between the cases brought to each European Court. Rule of law issues are raised before the Luxembourg Court by way of references for preliminary rulings and infringement proceedings. Before the Strasbourg Court, the individual applicants are the directly affected parties to domestic proceedings. Yet, the two systems are evidently complimentary and mutually reinforcing.

My fourth point focuses on the implementation of judgments of the Court and how this contributes in a very concrete way to upholding the rule of law.

In a State governed by the rule of law, final and binding judgments of courts must be executed without exception. The same applies to judgments of the European Court of Human Rights by which a State is bound under international law.

As regards executing the Court's own rule of law judgments, I would to mention the case of *Oleksandr Volkov v. Ukraine*. Considering the special circumstances identified in the judgment, the Court made specific indications under Article 46 of the European Convention for its implementation regarding both individual and general measures.

In February 2015, the Supreme Court of Ukraine reinstated the applicant Judge to his post. Regarding general measures these were adopted to ensure the structural independence of the judiciary in Ukraine, *inter alia,* by excluding political bodies (the President and the Parliament) from the process of the appointment and dismissal of judges. To this end Constitutional changes were adopted by the

authorities in 2016. However, the Committee of Ministers continues to supervise the execution of this case, adopted by the Court in 2013, and others in the same group, as certain outstanding issues as regards structural independence of the judiciary remain, mostly related to giving effect to constitutional amendments in practice.

This case demonstrates on the one hand the effect that a judgment may have on the individual applicant concerned but also the complexity of implementing rule of law reforms at the domestic level, through notably important constitutional reform. Judgments of the European Court of Human Rights point out deficiencies at the national level, however remedying these deficiencies takes political will as well as financial and other resources.

This brings me to *my conclusion.*

The European Court of Human Rights plays a crucial role in upholding key rule of law principles through its developed and developing jurisprudence. This will be reinforced in the future, as our new case-processing strategy aims at targeting "impact" cases, which often raise rule of law issues.

The principle of subsidiarity means that these principles are then applied at the level of domestic courts, demonstrating the full extent of the reach of Strasbourg case-law.

Yet, we should not rely *solely* on the courts to solve the rule of law challenges we are witnessing. The judiciary cannot strengthen the rule of law alone.[3]

In my opinion, a true human rights culture cannot be sustained in the long run by the top-down imposition of legal norms that do no resonate in contemporary societies. Human rights must exist in the hearts and minds of peoples and their representatives in communal life. A pervasive rule of law and human rights culture must exist not just within the judiciary, but also in parliaments and with civil society, as well as with citizens.

It is through joint and joined up action that we uphold the rule of law.

Thank you.

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[3] "State of Democracy, Human rights and the Rule of Law: a democratic renewal for Europe", Report by the Secretary General of the Council of Europe, 2021.

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