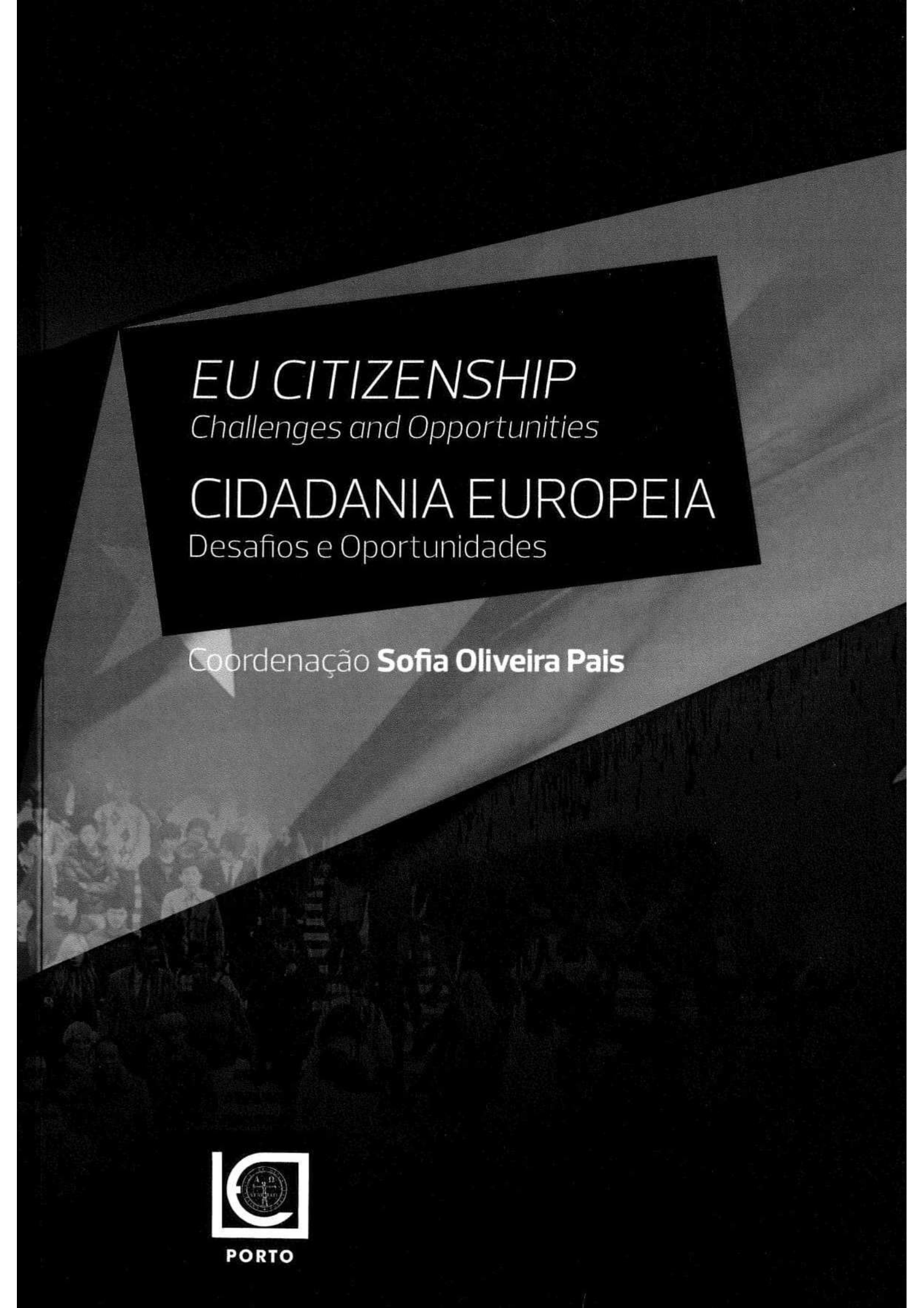

EU CITIZENSHIP
Challenges and Opportunities

CIDADANIA EUROPEIA
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PORTO

THE POLITICS OF AUSTERITY AND ITS LAW: CHALLENGES TO A EUROPEAN CITIZENSHIP

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§0. Introduction

Austerity is not a global phenomenon, although it has become a buzzword, and it seems to me that it challenges the agenda for the political sociology of law. In my view, this is mainly because despite of emerging as an economic model for combating the crisis, austerity is orchestrating a profound legislative reform involving different areas of law associated with the functioning of the economy, in particular social and labour rights. However, in the "babble of public debate" and the narrative based on the inevitability of the neoliberal model, the law is presumed to be politically and sociologically neutral and any discussion of its principles and basis are avoided. Thus austerity emerges as the source of a new positivism and legal formalisms. In this sense austerity challenges the European citizenship and the European social model. It is possible to argue that the European social *acquis* are experiencing a shrinking momentum.

Bearing this in mind, I have chosen to organise this article around three topics. In the first section, my purpose is to suggest that, in addition to the obvious economic and financial aspects of the austerity model, there is also a social model of reality that must be characterised sociologically. In the second, I will attempt to develop the idea that a certain concept of law is regarded as fundamental to a certain concept of society, meaning that the austerity society corresponds to a certain type of law and politics. Finally, in the third section I want to share with you what appear to me to be scenarios or possible ways of developing research and action programmes for sociology of law of austerity.

§1. The austerity society as a model of social reality

Concerning the first question, it is tempting to pursue the path of authors who view the current situation as an extension of a crisis in capitalism, with the added nuance that the financial markets are taking over life in society (Streeck, 2013; Offe, 2013; Crouch, 2013). In this sense, it is assumed that each new crisis contains the sociological sources of a different kind of society, where we can find every post- and neo- society, or even the "spirit of capitalism" we have been studying.

In the current economic context, the concept of austerity defines a set of economic and social policy options which aim to contain or reverse expenditure through restrictions on state budgets, thereby altering the redistributive policy and spending associated with the economy and social reproduction. This is linked to a deeply economic rhetoric based on the idea that it is necessary to reform the state in order to "slim it down", curb the irresponsible behaviour of citizens and provide the financial markets, considered the means of financing the economy, with the confidence they need (Reis, 2012: 33). As a result, we are witnessing an increasing divide between the economy and the rest of society, through an amplification of the concerns voiced by Karl Polanyi and, at the same time, a reconfiguration of the foundations of redistributive policies and the role of law, which must reflect the economist logic underlying the reform of the welfare state, holding individuals accountable for excessive consumption and promoting confidence in the financial markets.

This economic blindness is well captured by Mark Blyth when he says that economists tend to see the issues of redistribution as the equivalent of Bill Gates walking into a bar: "once he enters, everyone in the bar is a millionaire because the average worth of everyone is pushed way up. This is at once statistically true, but empirically meaningless; in reality there are no millionaires in the bar, just one billionaire and a bunch of other folks who are each worth a few tens of thousands of dollars, or less. Austerity policies suffer from the same statistical and distributional delusion because the effects of austerity are felt differently across the income distribution. Those at the bottom of the income distribution lose more than those at the top for the simple reason that those at the top rely far less on government-produced services and can afford to

lose more because they have more wealth to start with. So, although it is true that *you cannot cure debt with more debt*, if those being asked to pay the debt either cannot afford to do so or perceive their payments as being unfair and disproportionate, then austerity policies simply will not work." (Blyth, 2013: 7-8).

Aware of the economic debates and different technical solutions proposed by economists and politicians, I believe that sociology and sociologists must question the social, institutional and legal consequences stemming from the way in which the economy dominates society. In this case, it is imperative to resume the political and legal principles that contribute to a fairer redistribution in favour of work, which has been sacrificed the most intensively to capital, by demanding respect for the dignity of real content (Touraine, 2010: 12-13).

This is why I would contrast a decent society with the austerity society, in order to draw suggestions from this for sociopolitical guidelines that I will return to in the final part of my presentation. Moreover, on an analytical level it is important to interpret sociologically whether this current period of austerity is, in fact, a new kind of society, and whether it is helping to erode the previous society, prevent the formation of a new type of society, or – and here the question is not only analytical – encourage the intervention and expressions of non-democratic authoritarian social actors who use exception as a form of political-legal social standard.

From a metatheoretical perspective, the questions emerging out of the social situation and the crisis can be posed in the following terms.

The first refers to the analysis of the processes involved in the production and reproduction of the social and political order. Although a great deal of research is dedicated to predicting and analysing social change, the question that always arises is how, despite all the changes, the social and political order is reproduced (cf. Beck, 2013: 39). The theoretical teleology in question determines that they focus on the normal functioning of political society by "looking at the present and the future [and asking] how order is reproduced" (Beck, 2013: 39-40). The second question, which is linked to the previous one, concerns how the normal and the pathological are defined in a stable, democratic reality. From a Durkheimian perspective this means that it is possible to

assess what is normal in a given society at a particular moment in time and, on this basis, define what is pathological. This in turn implies that these theories admit the existence of a (given or constructed) reality that essentially tends to be stable, and from this normative futures can be projected by identifying the means (processes and rights) by which the distribution of (tangible and intangible) assets must take place.

Consequently, these theoretical approaches freeze reality and tend to find it difficult to consider exceptional cases that disrupt normal routines and are liable to become "the new standard" in contemporary societies. In my view, the formulation of this problem invites us to reassess the standards for sociability and institutional organisation in society. In this sense, there is common ground in the work of Émile Durkheim and Giorgio Agamben, given that the austerity society is defined by many examples of trade-offs within social situations that were once considered pathological or exceptional and are now seen as normal. As Giorgio Agamben states, "The exception is a kind of exclusion. What is excluded from the general rule is an individual case. But the most proper characteristic of the exception is that what is excluded in it is not, on account of being excluded, absolutely without relation to the rule. On the contrary, what is excluded in the exception maintains itself in relation to the rule in the form of the rule's suspension. The rule applies to the exception in no longer applying, in withdrawing from it. The state of exception is thus not the chaos that precedes order but rather the situation that results from its suspension. In this sense, the exception is truly, according to its etymological root, taken outside (ex-capere), and not simply excluded" (Agamben, 1998: 27). The austerity model adds another element to this social argument concerning exception which should be emphasised, namely that the transitory nature of the social state of exception tends to become naturalised through a process of institutionalisation in the Parsonian sense. Guidelines for action, types of action, interactions and the institutionalisation of social standards end up creating a social system of norms, roles and status.

This is the challenge we now face, following the 2008 crisis and the trail of exceptional change that has taken place. According to Ulrich Beck we are facing the "non-fulfilment of expectations and common

failures of the usual theoretical tools as well as the failure of politics" (Beck, 2013: 39), resulting in a questioning of the role of the social sciences in the current crisis. In this sense, the relevant formulas through which capitalism and democracy have been combined in what many call "democratic capitalism" are unstable, and have now been replaced by the affirmation of a financial capitalism capable of distancing itself from democratic principles.

In addition, what currently expresses the sociological specificity of the concept of austerity is the blurry nexus between the financial markets and individuals. So I support the idea that austerity is configured as the "pattern that connects" (Bateson, 1987: 17) systemic and mainly financial problems to questions involving individuals, families and organisations in the face of a policy of "civil request".

In that sense the sociological blurring between individuals and markets is supported by a cynical ethics that uses exceptional circumstances as a social response to the crisis, whilst displaying indifference to the harm resulting from increased inequality, impoverishment and social malaise. In the face of extreme power legitimised by the exceptional circumstances, this means that the markets, and in particular the financial system, continue to be fed, since their institutions and interests are considered "too big to fail, whilst people are too insignificant to count" (cf. ILO, 2011: 2-3).

Rather than ascribing equal status or importance to markets and people, what the experience of austerity offers us is, in effect, the subordination of people to markets, with the state acting as intermediary (cf. Schafer and Streeck, 2013). The austerity society as a model of social reality captures this dynamic characterised by the collective disruption of established institutional and individual standards which yield to the values of resignation, disappointment, guilt, distrust, doubt and fear. Austerity brings clarity to this idea which I call the "anthropomorphisation of the markets".

Therefore, the current meaning of austerity encompasses a political-legal model that is punitive to individuals and is guided by the belief that the excesses of the past must be repaired by sacrificing the present and future, whilst at the same time implementing a bold project for the erosion of social rights and the economic liberalisation of society. If

we look at the social facts occurring between September 2008 and the present day it can be seen that deregulation and the lack of control over the financial markets are identified as the source of the crisis and have highlighted the permanent tension between the political and economic spheres. State interventions to rescue financial institutions and their markets were initially accompanied by the possibility of the political affirming itself within democratic capitalism in a disciplinary sense in the sphere of economics. However, this is now viewed as old theory, given that the concern is now directed towards the efficient functioning of the financial markets. Moreover, the question of the regulation of the markets appears to have been replaced by their ontologization, under the terms of which their feelings, emotions, expectations and states of mind become the main concern in outlining political-legal reform in contemporary societies. This trend may perhaps be termed the "theory of the moral sentiments" of the financial markets.

§2. Politics and law in the social reality of austerity

In this second section my focus is the new configuration for society, politics and law. If we consider that to a type of society corresponds a type of law (Calavita, 2010), I therefore welcome the idea of the importance of sociologically analysing the consequences of the changing position of the state, law and justice in the current context of crisis and austerity.

I argue that the current context of crisis and austerity is profoundly conducive to the development of a sociology of law that is directed towards questioning the political and legal metareason that highlights the need to develop an approach to law that "results from the multiple configurations of interdependent relations and the interlinked strategies of actors, networks for public action and systems for action, in accordance with a decision-making scheme that results from the accumulation of negotiated regulations and power relations, in order to instil greater transversality, horizontality or circularity, rather than following a linear and hierarchical concept" (Commaille and Duran, 2009: 96).

Nowadays, this socio-legal analysis takes place in a trade-off context (and this is perhaps the most disturbing issue) between democracy as the aspiration for social justice, and democracy as a means of shrinking

citizenship and increasing poverty. In a sense, it is as if politics and law are instrumentally matched to separate the rule of law in the social state and I would like to stress this idea, since the advocates of austerity behave politically as if the rule of law and the welfare state were completely separate elements of the state. For all the different theories and interpretations of the links between the rule of law and the welfare state, this results in a strategic subversion of the principle of the indivisibility of the rule of law and the welfare state, forgetting that the "democratic state of law (or rule of law) is another name for the welfare state" (Miranda, 2011: 3).[1]

As part of my reflections, I would argue that the forms of politics and law that correspond to the austerity society are based on three key elements, namely: 1) questioning the theory of the separation of powers; 2) the principle of selectivity in the application of exceptional measures; 3) the content of the law of exception.

2.1 The theory of the separation of powers and the power of the unelected

My argument is that we are witnessing a form of production and application of power and law that is based on a cynical and strategic alliance of government and non-government actors for the purpose of institutionalising the austerity model. This means that we are facing a reconfiguration of the exercise of political power based on a combination of elected and unelected powers or, to give one example of this from the countries that have received bail-outs, the power of the elected government and the power of the unelected troika.

From the classic authors Locke and Montesquieu to the analyses of the sociology of politics and law, there has always been a tension between the normative dimensions of a pure theory of the separation of powers and concrete sociopolitical dynamics. It emerges, for example, in studies which capture this dynamic: the different alliances forged between political powers and social powers involving political parties; demonstrations of political pluralism (via pressure or interest groups); demonstrations of neo-corporativism; self-government;

1 Available at http://www.icjp.pt/sites/default/files/media/1116-2433.pdf.

self-regulation;[2] the judicialisation of politics and the politicisation of justice; the alternative use of law; judicial activism; judicial law; etc.

This means that the perspective for analysing the power of the unelected, since it is not new, is a development of this problematic (Vibert, 2007). For example, we can include in these demonstrations of the power of the unelected a wide range of expressions that include the markets, international financial organisations, central banks, regulatory bodies, ratings agencies, etc.[3] (Vibert, 2007: 1).

None of these demonstrations of power is new from the perspective of political science and political sociology, as seen in analyses that aim to capture evidence of "political and economic influence" (Dahl, 1985: 23-46) or the regulatory powers of various sectors and economic and social areas. However, what is now new about this power of the unelected is that they have become elements of political authority, political power and legitimising and legalising procedures. It is common knowledge that the memorandums signed by the troika (the IMF, EC and ECB) and the governments of Ireland, Greece and Portugal determine the implementation of procedures for the reform of legislation, public policies and the reform of the state and the economy, without which financial loans will not be granted.

In addition, there is also another dimension linked to these political interventions in the affairs of national states by the unelected, which results from the alliance between the political agendas of the unelected and government political agendas for reform, specifically when these take on neoliberal political contours. The case of Portugal shows the confused way in which it becomes difficult to determine the source of political-legal measures in the public arena. The underlying issue is that, in either case, a process of legitimation and creation of legality

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2 Other concepts that should be borne in mind are lobbying, influence, corruption, the power of the media or fourth power and the conspiracy theories and crypto powers described by Norberto Bobbio (1988: 109-140). Also, as a critique of the theory of the separation of powers, see the discussion by Carl Schmitt on the incompatibility between liberalism and democracy, in Cohen and Arato (1990: 201 onwards).

3 The phenomenon of ratings agencies as an expression of the power of the unelected is very significant. They are known to challenge the power of key states such as the United States, or blocs, such as the European Union, and have played a decisive role in the current crisis, although this is not analysed in this study.

is being implemented on the basis of this vague and perverse alliance between the elected and the unelected.

This conspiratorial logic results in reforms guided by the principle of uncertainty and indeterminacy. Since it is close to the origins of this uncertainty and its own conduct is a source of uncertainty for others, the governing power is therefore free to determine the rule of exception for sovereignty and the law.

2.2 Political selectivity and the law of exception

Theorisation of the state of exception is associated with an extensive body of literature linked to the work of Carl Schmitt. For my part, I only wish to pick up on the idea presented in the first section of this paper in which I argued that the model for the social reality of austerity is heavily influenced by sociological predicates concerning exception as the standard for social and institutional organisation. However, what I would like to stress now is that social exception has translated into political-legal exception.

The contraposition between the basis of the state of exception as opposed to the democratic rule of law emerges in two ways. One has its origins in intense debates in the public arena involving academics, particularly legal specialists associated with constitutional law, politics, trade unions, etc., who invoke the idea of the state of exception as a crucial element in understanding whether democracy, within the framework of austerity politics, has been suspended or not, or the type of relations to be established with the political and jurisdictional sphere.[4] The second emerges from academic reflections and studies whose aim is to reflect on the socio-legal significance of the state of exception in the present-day context of democratic societies marked by austerity.

On a European level the question is not new, given that situations of exception tend to be framed by the need for formal democratic

4 By way of example, I would recall the debate that took place in the Coimbra regional section of the Portuguese Bar Association in which Vieira de Andrade, Professor of State Law at the University of Coimbra, defended the principle of the reserve of the possible and the clear separation of politics and jurisdictional control over measures applied by the Portuguese government, while Jorge Novais, Professor of Constitution Law at the Universidade Nova de Lisboa, firmly defended protection of the nucleus of fundamental rights affected by the same measures.

and jurisdictional control, as Maxime St-Hilaire notes (2011: 78). This observation should, however, be accompanied by demonstrations of concern over the austerity measures and exceptionalism that form the basis of studies developed within the Council of Europe.

What has been studied less – and this is the question I want to emphasise here – is the linking of the principle of exception to the principle of the selectivity of state actions. This theoretical and analytical connection is useful, since the evidence of austerity policies reveals the unequal distribution of restrictions and sacrifices amongst individuals and social groups, thus threatening the principle of the rule of law.

I therefore want to stress the link between the application of emergency measures and the selectivity of state guidelines. This exercise is, at this moment, relevant in terms of revealing the contradictory heuristic relations between different social groups and interests. In addition to the visible appearance of legal structures, political decision-making processes and political behaviour, there is other evidence that shows the state as interpreting rationalities that reveal the selectivity of its actions.

This subject has been carefully analysed by António Hespanha, who identified two types of state intervention in situations involving acquired rights and rights guaranteed by the state: the first corresponds to the assurance that certain rights will be maintained and the second involves the general impoverishment of other rights.

Another important focus of his argument is the selective use of the legal principle of trust, which is applied unevenly according to whether it concerns property rights and rights stemming from contracts between individuals, or rights related to state benefits. One of the elements which the author criticises is the apparent distinction between the state's obligations according to the type of rights in question. In his words, "within state services, those due under contract have often been treated with deference and are therefore shielded from changes motivated by the public interest, corrections to structural defects in contracts (such as any disparity in benefits i.e. one-sided contracts) or restrictions due to the crisis".

This is what has complicated the renegotiation or termination of public-private partnership contracts generally regarded as harmful

(or highly damaging) to the public interest [...] In contrast, other state benefits – notably those arising out of state social policies or even government salaries – lie outside this guarantee and are subject to instability" (Hespanha, 2012). I would argue that this can be extended to the way in which pension schemes, unemployment benefit and other social benefits are interpreted.

2.3 Austerity and the law of exception

The third issue refers to the problem of the creation and application of law and how this is challenged by replacing the democratic principle of law by another principle, based on supposedly natural, technical and exceptional standards (cf. Hespanha, 2007: 83) that are considered the most appropriate in a context of crisis.

The law that emerges from this follows the current standards of financial capitalism as a powerful model for regulating relations that are not only economic but human. The law of exception now appears inevitable and cannot be challenged by popular sovereignty or the principle of the democratic creation of law (cf. Hespanha, 2007: 84-86).

In the austerity model the law of exception, in common with the concept of "liquid law" – as can be seen in the socio-legal reflections developed by Zygmunt Bauman[5] – distances itself from the predicates of predictability, security and trust and is transformed into an instrument of domination in the new configuration of power. Exceptionality in this law is part of the austerity process, supported by an instrumental cost-benefit rationality that liquefies and weakens the obstacles put in place by the law that had previously prevailed (cf. Priban, 2007: 1).

We are facing a process of re-standardising social reality which aims to make legal norms more flexible, removing their rigidity by subverting the principle of legal security. As an illustration of this, it can be seen that in the legal system of exception general legal principles such as the non-retroactivity of laws are threatened by the introduction of legislation which affects social legislation in general (pension, wages, etc.).

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5 Concerning this, it is important to consult the book *Liquid Society and its law* (2007) compiled by Jiri Priban which contains contributions from various authors working in the sociology of law.

I would also like to mention two characteristics of the law of exception and one emerging consequence for the functioning of the law (cf. Arnaut and Farinas, 1996; Faria, 2010). The first refers to the relationship between time and law. When François Ost, in 2000, wrote the introduction to the texts resulting from the seminar *A aceleração do tempo jurídico*, austerity was not yet on the socio-legal research agenda. However, the acceleration of legal time and the accelerated pace with which legislation is adopted, transformed and altered, is a sign of the urgency of the temporality of exception, nowadays imposed as the norm (Ost, 2000).[6] If acceleration presupposes the speeding up of political and legislative change, what should we make of a law and a precipitate, opportune, instantaneous normativity which claims urgency as the justification for its rapid emergence? How should we view a law that is devoid of democratic consideration and incapable of ensuring legal security? How can a fair balance be maintained between political-normative stability and social change?

The starting point for outlining the inquiry is austerity as the historical catalyst for the neoliberal project. The opposition between fear and hope, two affective states defined temporally by uncertainty regarding the future, are reference points for the intensification of the experience of the present time, as Hanna Arendt emphasises, breaking with historical time as alterity in relation to the present and converting the past into a homogeneous extension of the present (cf. Genard, 2000: 110). As can be seen, this is not just a matter of responding to the analytical issue of the relationship between the individual and social structures (or, in other words, between subjective and objective, micro and macro, or action and structure), but also, above all, of assessing the political and citizenship implications emerging out of austerity (Ferreira, 2005: 116).

The second characteristic is fuelled by the general principle of precaution, applied in this case to the pressing needs of austerity and exception. I will take as an example the reforms to labour law. The principle of precaution in association with the politics of austerity emerges as

6 Time has featured in the sociological analysis of its theorisation. Considering the question of time from a socio-legal perspective, it is also relevant to cite the work of António Casimiro Ferreira and João Pedroso *Os Tempos da justiça: ensaios sobre a duração e a morosidade processual* (1997) and *O Trabalho procura Justiça* (2005: 260-270), by António Casimiro Ferreira.

mystification (appealing to the principle of "social fear"),[7] by concealing the fact that the causal nexus between flexibility and security is uncertain and the preventive reform measures adopted may create risks of their own (cf. Sunstein, 2005). This issue is particularly important since the relationship between efficiency and equity has indistinct outlines in terms of labour and analysis of the subject has proved inconclusive (Louçã and Caldas, 2009: 327- 353). From scientific uncertainty, scenarios and suppositions are created which justify bypassing the principles of proportionality, non-discrimination and consistency with similar previous measures.[8] This draws attention to the fact that a sense of collective insecurity and panic may be aroused by a non-existent relationship, therefore defined as a non-existent risk which is deeply feared.[9] By way of example, preventing the "social evil" of rigid labour legislation becomes a socially acceptable risk, despite the likelihood that its influence on lowering unemployment, job creation, increased productivity and economic growth is questionable. In addition, there is a lack of debate on the impact of neoliberal flexibility measures on social cohesion and integration.[10] This "purchase of regulatory security" (Sunstein cit. in Aragão, 2008: 45) operates as a technical ideology, justifying the imposition of exceptional labour legislation.[11]

This phenomenon is particularly evident in the sphere of labour, where the law of exception has made a paradigmatic break with the

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7 In the opposite sense, see Alexandra Aragão (2008: 14).

8 See Communication from the Commission of the European Communities on the precautionary principle (2000).

9 Following the analysis of Alexandra Aragão, who explores the question of the social perception of risk (2008: 45-50).

10 See the *Green Paper on Labour Relations* (2006: 185-198), *Rights at work in times of crisis: Trends at the country level in terms of compliance with international labour standards* (2011), *Global Employment Trends 2012: preventing a deep job crisis* (2012), *Recovering from the crisis: A global Jobs Pact* (2009), *The financial and economic crisis: a decent work response* (2009a) and *Trade Unions and Global Crisis – Labour's Visions, Strategies and Responses* (2011a).

11 The Communication from the Commission on the precautionary principle (2000) states that "Scientific uncertainty results usually from five characteristics of the scientific method: the variable chosen, the measurements made, the samples drawn, the models used and the causal relationship employed. Scientific uncertainty may also arise from a controversy on existing data or lack of some relevant data. Uncertainty may relate to qualitative or quantitative elements of the analysis." (2000: 15).

assumptions of labour law, eliminating conflict as a dynamic component of labour relations and the protection of workers as a condition of liberty. The functions of labour law are also questioned, specifically (Ferreira, 2012) the economic-instrumental function which is always dependent on the fragile balance between the commodification of labour and the restrictions imposed by the status conferred on workers under labour law. This falters in the face of the changes to working and rest times, whilst the function of organising power relations within the sphere of labour, presented as the dispensability of workers and the narrowing of collective bargaining, makes organising the "voluntary submission" of the worker to the authority of the employer a despotic exercise of power, with no counterpower.

There is one consequence to these two characteristics of the law of exception which appears to me to be highly significant, namely the combination of the time of exception and the activation of the principle of precaution, both competing for greater flexibility and, above all, for the legalisation of social practices that were formerly questionable from a legal point of view. This results in reducing the discrepancy between *law in books* and *law in action*, in the sense that it reduces the ineffectiveness of rights associated with the non-application or selective application of the law on the part of the state.

I would like to single out this aspect, since it is linked to a very substantial research tradition within the sociology of law, specifically through the work of J. Carbonier and E. Blankenburg concerning the effectiveness and implementation of legal regulations. On the basis of the argument developed here, the question of the effectiveness or ineffectiveness of law has become associated with the processes of producing austerity law, which is directed towards the principles of the temporality of exception and precaution.

From a sociological point of view, this is an issue of great relevance to the sphere of labour. Legalising the one-sided contract, to the extent that *de facto* power and illegal extracontractual practices become positive law, is one of the objectives of the advocates of austerity, even though it involves denying the anthropological and sociological functions of labour law (Supiot, 2006: 9-10). In the name of austerity realism, there is no hesitation in "killing off the legal person

in the man" (Arendt, 1978: 381-383), expelling any considerations of justice from the law. The Schmittian resonances[12] of the argument are not inappropriate to the sphere of labour, given the ongoing implementation of measures designed by the troika[13] and accepted by bailed-out governments. It may be considered that at present legislative reforms aim to enshrine within labour law something that is essentially exterior to it and that is nothing less than the elimination of its political and legal identity, in exchange for external financing. Labour law therefore becomes a product of the market, used as a security for external aid.

§3. *Towards a political sociology of the law of austerity*

In this third and final section, I intend to explore what appear to me to be scenarios or possible paths for constructing research and action programmes for a sociology of the law of austerity or a political sociology of austerity law. Following the work of Jacques Commailles, I intend to bear in mind that the law reveals metamorphoses of the political and that law and politics combine in different ways. Together, they constitute the entry point for the debate on the austerity society.

Firstly, they emerge from reflections based on a critical sociology of law that is disposed to confront the problems emerging from the link between the normative and cognitive dimensions of social reality. Secondly, the sociology of law, as it is widely known, uses the investigative tools and instruments required to carry out scientific research. In this particular case, the theorisation and research strategy I will be using reflects the guidelines on middle range theory established by Roberto Merton.

3.1 Politics, law and the limits of social justice

If you are reading these words, at some time in your life you will have used a ruler to draw more or less precise lines and measure, more or less accurately. It may seem strange to invoke this image, yet the lines I have in mind are those which separate the various functions of the

12 See Giorgio Agamben, *Estado de Excepção* (2010).

13 Available at http://www.imf.org/external/np/loi/2011/prt/por/051711p.pd.

state, its policies and the role of law. They are the lines that divide ideologies, theoretical paradigms and concepts, but also political projects and concrete policies. It is for this reason that the tensions underlying the theoretical debates and the correlation between political forces and current interests in society show that what is at stake is defining where to draw the line between what should and should not constitute political-legal intervention under the austerity model. In the light of what has been previously stated, the defining lines for the political-legal model of austerity are captured in two traditional debates originating in philosophy and political theory. The first emerges from the opposition between forms of state welfarism and formulas for the minimal state. Given that in *realpolitik* theory the existence of the state was never totally questioned (except in anarchist thinking), this debate pitted libertarians and neoliberals, for whom the state should limit itself to responding to matters of law and order, against others such as liberal egalitarians, social-democrats and various advocates of the Third Way, who accepted the need for state intervention in social matters. This paradigmatic tension held sway until 2008, when states intervened to secure the financial system at the cost of weakening their social functions. This constitutes the current debate on "the state of the state" in which, to ensure peace and meet the expectations of the financial markets, measures are adopted to transfer the income of citizens to the accumulated wealth of financial capitalism. The second debate is closely related to the first and refers to the subject of social justice. Here as well, the austerity model affects the terms of reference of the problematic. Briefly, taking *A Theory of Justice* by John Rawls as a reference point, the question has been one of knowing how, within unequal societies, a distributive criterion can be established through which the least privileged members of society can enjoy more equal access to primary social benefits: liberty, opportunities, income and wealth and the basis for self-respect. Austerity, however, draws a double "veil of illusion" over questions of social justice and equity. The first is based on its social experimentalism, the continuing decline in living conditions and the quality of democracy created by the policies and law of austerity, revealing the existence of a theory of social inequality which tests the limits of an unequal distribution of assets that is prejudicial to

the least privileged. The second is related to a false egalitarianism supported by a supposed consensus created on the basis of the collective responsibility of all members of society, regardless of their position in the social structure. It is presented as a collective identity/"we", to use the words of George Gurvitch, in which all are equally responsible.[14] The "we", as a collective interest and in the shape of a combined force, raises the dilemma of how to combine individual sacrifice and social justice, leading to the revival of a classic problem in political theory: in the face of a crisis that affects all, it becomes necessary to resort to measures that violate the fundamental rights of some.

The concerns I have listed form part of a research path for a political sociology of austerity law. Given this context, law increasingly becomes a system for distributing scarce resources and therefore the legal guardian of a model of social (in)justice. Establishing limits for state intervention associated with distributive mechanisms confers enormous centrality on law and the way in which it combines with austerity politics. Naturally, the divide between the political and the legal is set aside, replaced by the previously defined outlines for a political sociology of law.

3.2 Blame as an element of legal awareness

The second scenario or path refers to the responsibility of citizens as consumers and as democratic citizens who, through their "consumer greed", to use the words so dear to Jacques Rancière (2005), have helped create the situation we are now facing. High levels of debt and easy access to credit allowed citizens to undertake commitments which, in the event of any default, became one more fuse that ignited the crisis.

In this "regime of truth" concerning shared situations in the present day it is even possible to trace a principle of "responsibilities attributed to worker-consumers" which legitimises the demands for them to contribute in order to find ways out of the crisis. As Bob Jessop stated in

14 Following George Gurvitch, the use of the plural "we" describes a whole that cannot be reduced to the plurality of its members, a union that cannot be decomposed. The "we", according to Gurvitch, does not attribute specific characteristics to the identity of its members and therefore constitutes a social framework as a concrete whole. It thus assumes the existence of reciprocal participation through unity in plurality and plurality in unity (cf. Gurvitch, 1977: 245).

2009,[15] one of the explanations is that consumers who took out mortgages without the slightest intention of paying for them, overused their credit cards and engaged in rampant consumerism as if there would be no need to "settle accounts" one day, helped cause the financial crisis. They therefore have to shoulder part of the blame for the impact of the crisis and incorporate this into their own personal condition.[16]

It is from this perspective that a socio-legal approach to blame associated with the austerity society can be tested. The question can be formulated in the following terms: under economic and social conditions considered normal, conflicts and litigation associated with consumerism and loans are resolved through the legal framework of civil law and consumer law. The question is that now, in a context of exception and austerity, the pressure on worker-consumers is based on a diffuse collective awareness marked by blame. Moreover, and again taking up the analogy with Durkheimian thought, a kind of symbolic-legal trade-off can be seen, under the terms of which private civil liability is transformed into a rhetoric of "criminalisation" of the freedom of individuals expressed through their subjective rights, with their irresponsible behaviour now sanctioned and condemned. The symbolic-legal dynamic of the "collective awareness of guilt" creates an ambiguous socio-legal space in which individuals, in addition to renegotiating mortgages and loans and making increased efforts to meet their commitments, are also constrained by wage cuts, fiscal reforms of dubious equity and a regression in labour and social rights. In fact, the *homo juridicus* of austerity is the "indebted man",[17] gradually stripped of the

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15 http://blog.theasa.org/?p=228.

16 Featuring frequently in speeches by politicians, in public debates and commentaries by opinion makers, references to the problem of family and individual debt, associated with the blame mechanisms that justify the sacrifices, include political changes and changes in law enshrined in the austerity reform agenda. The subject is not new to philosophical and political thought, and the works of Friedrich Nietzsche and Walter Benjamin must inevitably be cited, as well as the more recent work of Zygmunt Bauman in which the issue of debt and blame emerge as a form of discipline for social control, thus challenging the position formerly occupied by employment bonds.

17 From a neoliberal perspective, the concept of individual freedom is inseparable from the emergence of "indebted man" and the social relations established between creditors and debtors (cf. Lazzarato, 2012).

social rights with which he might aspire to a minimum level of socio-economic security.

3.3 Fear and legitimacy

The third research path is related to the legitimisation procedures adopted in the austerity society. As I aimed to emphasise in the two opening sections of this text, a clear affinity can be identified between Zygmunt Bauman's notion of liquid modernity and the notion of the austerity society. However, the specific features of the latter contain a theme dear to Bauman, namely social fear. Zygmunt Bauman establishes an argument for legitimacy that is defined by the establishment of boundaries raised in the transition from the solidity of solid modernity and the fluidity of liquid modernity. One of the themes developed by the author is the question of the fears of modern life, which he frequently associates with the dissolution of the solidarity of solid modernity and processes of exclusion and distancing from difference in the other and the unknown, illustrated by a fear of the return of the "dangerous classes",[18] the unemployed, immigrants, delinquents, the working poor and the poor, demonised by everyone who believes they can define themselves as decent and who feel that others may not be like them.

The political-legal consequences of this analytical thread on the theme of fear are projected in the politics of fear as one of the most important characteristics of the liquid society which lies at the roots of a new form of legitimation responsible for the erosion of civil liberties and human rights (Priban, 2007: 9). As Jiri Priban aptly notes, the creation of the state of emergency is facilitated by an increase in fears concerning personal security and the need to contain urban decay.

It is precisely in relation to this latter point that I would argue that there are nuances to the relationship between fear, exception and legitimation in the context of the austerity society. The first of these rejects the legitimation of exception based on fear and difference in the other in favour of a legitimacy based on the collective fate of a people dependent on the "emotions of the financial markets". This is the

18 Castel, Robert (2003).

combined "collective we" which I referred to in the previous point, which organises the attitudes and expectations that form the basis of a legitimacy created out of predictions of catastrophic scenarios associated with the risks emerging from the financial markets that can only be reduced by imposing austerity measures and reducing the welfare state. Fear, in the context of austerity, is an integral part of a political contractualism which forms the basis of a paradoxical regime of causality. This is the point I wish to emphasise, given that fear in the austerity society is affirmed as a mechanism for translating structural problems, public debt and financial bailouts into individual designs. It therefore constitutes a mechanism for legitimation, converting the narrative of austerity into the dominant political-social model and ensuring total priority is given to the moral values of austerity neoliberalism. The needs of families and individuals makes them willing to accept certain living and working conditions, however precarious they may be, provided that they can subsist on them. A critical sociology of law directed towards the themes of austerity, fear and legitimacy cannot avoid revisiting the subject of the "rule of law" and the "universal nature of law", confronting this with the different aspects of the law of austerity for different social groups. Fear is only apparently democratic, as the repository of communal, inter-class expectations. The social reality that permeates the politics and law of austerity ultimately reveals the intensive processes of social differentiation between groups and individuals associated with the application of this form of normativity.

3.4 Austerity and non-recognition of rights

The concept of recognition is linked to the work of Axel Honneth, already the subject of analysis by the sociology of law in a recent edition of the journal *Droit et société*. Its critical theory has led to a normative approach to social reality which acknowledges in itself the potential for progress (Guibentif, 2011: 295). This is shared by the emancipatory approach of much socio-legal research, namely in *Critical Legal Studies*, *Movement Critique du Droit* and the work developed by other colleagues (cf. Guibentif, 2003: 178). It is an important issue, since it links sociological models of social reality with sociological studies of

the law which challenge the limits of official legal systems (*idem*) connected with the alternative use of law, emancipatory legal pluralism, approaches sometimes connected with subjects such as the mobilisation of rights, the effectiveness of rights, access to the law and to justice and legal awareness. However, how can we reformulate the previous argument in the light of the austerity society, when this is defined by stagnation and a regression in social issues and rights? Recognise what and how, when the social actors are no longer motivated by social and economic interests or extending their rights and only defend existing rights as a form of resistance to the regressive movement that seeks to suppress them in the name of neoliberal-inspired market objectives?

Moreover, if we agree with Alain Touraine (2010: 127) on the "end of the social", where do we place politics and the law, given that the divide between the economic system which no one is able to effectively control and life in society threatens the principles of liberty and justice more than any relations based in force?

Two lines of investigation may be pursued in a political sociology of law. One is the analysis of the mobilisation and recognition of existing rights, namely social and labour rights, identifying the forms of struggle that aim to prevent "non-recognition" and the abolition of these rights. The *indignados* movement, the use of the courts by trade unions, public actions and recourse to the courts by professional organisations representing magistrates and public prosecutors, the work of European legal specialist networks, demonstrations in defence of the welfare state and labour law and even proceedings lodged against the ratings agencies are all evidence of the existence of a network constructed from the "bottom up", configuring a pattern for the mobilisation and use of the law against the politics of austerity.

The other revives the Durkheimian tradition of taking the law as a sociological indicator of social solidarity, investigating the way in which the law of exception under austerity has been established as a standard for social life that contributes towards decoupling and abolishing basic principles of social law, leading to the emergence of a society in which the income of citizens is transferred to the financial markets.

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After 20 years of relevant achievements in Union Citizenship it is time to reflect about its future role, in particular with the recent and profound European crisis. Should EU citizenship be considered a complement to the economic integration project or is it a mere supplementary solution to remedy gaps in the free movement of persons? Which rights should be included in that EU citizenship status? What is the relevance of the new dimensions of European citizenship, such as diplomatic and consular protection through the European External Action Service, the transnational judicial protection of fundamental rights, or the protection of EU citizens' rights, as consumers? The core issues of this book are the role of Member States and European Institutions in clarifying these doubts, as well as to analyse the multiple and complex dimensions of European citizenship.

Passados mais de 20 anos sobre as grandes conquistas da Cidadania da União, discute-se que papel esta deve desempenhar num futuro próximo, tendo em conta as amplas inquietações suscitadas pela recente e profunda crise europeia. Deve a cidadania europeia ser vista como um complemento ao projeto de integração europeia ou ser considerada uma estrutura meramente suplementar, capaz de colmatar eventuais lacunas na livre circulação de pessoas? Que tipos de direitos podem ser incluídos nesse estatuto fundamental? Qual o relevo das novas facetas da cidadania europeia, como a proteção diplomática e consular através do Serviço Europeu para a Ação Externa, a proteção jurisdicional transnacional dos direitos fundamentais, ou a defesa dos direitos dos cidadãos da União, enquanto consumidores? Saber qual o papel dos Estados-Membros e das Instituições Europeias no esclarecimento destas dúvidas, bem como analisar a densificação das múltiplas e complexas facetas da cidadania europeia, são as questões centrais deste livro.

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