



DEMOCRACY AND RULE OF LAW

CYCLE OF CONFERENCES IN VIEW OF THE MAY 2019 ELECTIONS
FOR THE EUROPEAN PARLIAMENT

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Introduction

In this ebook, *MEDEL – Magistrats Européens pour la Démocratie et les Libertés*, gathers most of the interventions and *PowerPoint* presentations given in its cycle of conferences “Democracy and Rule of Law”, held in March 2019, in view of the European Parliament elections to be held in May.

It is our intention with this publication to give a further contribution to the debate that Europe urgently needs to make about the four topics addressed in the conferences: immigration, austerity and social rights, populism and the independence of the Judiciary.

In this moment, we wish to deeply thank all the speakers in the conferences for their valuable contributions and their participation in the debate.

We also must extend a special word of appreciation to our member associations that co-organised the four conferences: *Magistratura Democratica* (Italy), *Neuerichter Vereinigung* (Germany), *Eteria Elinon Dikastikon Litourgon Gia ti Demokratia ke tis Elefteries* (Greece) and *Iustitia* (Poland).

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Speakers

Dionysia BITZOUNI – Supreme Court of Greece

Laura BOLDRINI – *LeU – Liberi e Uguali*

Tefkros Th. ECONOMOU – Supreme Court of Cyprus

Vittorio FANCHIOTTI – Università degli studi di Genova

Luigi FERRAJOLI – *Emeritus Professor of Philosophy of Law, Università di Roma Tre*

Monica FRASSONI – *European Green Party*

Massimo GIANNINI – Journalist, *La Repubblica* and *Radio Capital*

Tasos GIANNITSIS – University of Athens

Thomas GIEGERICH – University of Saarland; *Europa-Institut*, Saarbrücken, Germany

K. HATZIDAKIS – Former Minister and MP, *New Democracy*

Vangelis KATSIAVAS – *KKE* (Greek political party)

Andreas LOVERDOS – Former Minister, MP and Professor, *Kinal*

Riccardo MAGI – *Più Europa*

Krystian MARKIEWICZ – President of Iustitia, Polish Judges Association

Filipe MARQUES – President of MEDEL

Giorgos MAVROTAS – Professor and MP, *Potami*

Jürgen NEYER – European University Viadrina; Centre for Internet and Human Rights – CIHR

Theano PHOTIOU – Deputy Minister, *Syriza*

Michail PIKRAMENOS - President of the Greek Association; Vice-President of the Council of State; Ass. Professor at the Law Faculty of the University of Thessaloniki

David SASSOLI – *Gruppo Alleanza Progressista dei Socialisti e dei Democratici*

Elly SCHLEIN – *Gruppo Alleanza Progressista dei Socialisti e dei Democratici*

Margaritis SCHINOGRADIS – European Commission

Nando SIGONA – Birmingham University

Joaquim José Coelho de SOUSA RIBEIRO – Professor (retired) at the Law Faculty of the University of Coimbra; Former President of the Portuguese Constitutional Court

Georgios STAVROPOULOS – National Commission for Human Rights of Greece

Nikolaos VOUTSIS – President of the Hellenic Parliament

Program

MARCH 1ST, 2019 (FRIDAY), 3 P.M. – ROME, ITALY

(ROMA EVENTI - FONTANA DI TREVI - Piazza della Pilotta 4 – Roma, Italy)

(co-organised with *Magistratura Democratica*)

IMMIGRATION POLICY – FOR A EUROPE OF RIGHTS AND SOLIDARITY

Conference dedicated to MURAT ARSLAN

Nando SIGONA (Birmingham University), Filipe MARQUES (President of MEDEL); Massimo GIANNINI (*La Repubblica* and *Radio Capital*); Laura BOLDRINI (*LeU – Liberi e Uguali*); Monica FRASSONI (*European Green Party*); Riccardo MAGI (*Più Europa*); David SASSOLI (*Gruppo Alleanza Progressista dei Socialisti e dei Democratici*); Elly SCHLEIN (*Gruppo Alleanza Progressista dei Socialisti e dei Democratici*); Luigi FERRAJOLI (Università di Roma Tre)

MARCH 8TH, 2019 (FRIDAY), 7.30 P.M. – ERKNER (BERLIN), GERMANY

(Bildungszentrum Erkner e.V. Seestraße 39 15537 Erkner)

(co-organised with *Neue Richtervereinigung*)

LAW IN TIMES OF POPULISM - OPPORTUNITIES AND CHALLENGES: THE DIGITAL REVOLUTION AND EUROPEAN DEMOCRACY

Jürgen NEYER (European University Viadrina; Centre for Internet and Human Rights - CIHR)

MARCH 16TH, 2019 (SATURDAY) – ATHENS, GREECE

(Senate Room of the Hellenic Parliament, Parliament Building, Athens 105 57, Greece)

(co-organised with *Society of Greek Judges for Democracy and Liberties* / supported by the Hellenic Parliament)

AUSTERITY AND SOCIAL RIGHTS

Nikolaos VOUTSIS (President of the Hellenic Parliament); Michail PIKRAMENOS (Society of Greek Judges for Democracy and Liberties); Filipe MARQUES (President of MEDEL); Georgios STAVROPOULOS (National Commission for Human Rights of Greece); Joaquim Jose Coelho de SOUSA RIBEIRO (former President of the Portuguese Constitutional Court); Margaritis

SCHOINAS (European Commission); Tasos GIANNITSIS (University of Athens); Tefkros Th. ECONOMOU (Supreme Court of Cyprus); Dionysia BITZOUNI (Supreme Court of Greece); Representatives of the political parties: "SYRIZA", "NEA DIMOKRATIA", "KINIMA ALLAGIS", "KOMMOUNISTIKO KOMMA ELLADAS", "TO POTAMI", "ANEXARTITOI ELLINES"

MARCH 22ND, 2019 (FRIDAY), 3 P.M. – WARSAW, POLAND

(Warecka Street 4/6, Warsaw, Poland)

(co-organised with *Iustitia – Association of Polish Judges, Helsinki Foundation for Human Rights and Association 61*)

THE RULE OF LAW FROM A EUROPEAN PERSPECTIVE

Krystian MARKIEWICZ (President of Iustitia); Thomas GIEGERICH (University of Saarland; Europa-Institut, Saarbrücken, Germany); Vittorio FANCHIOTTI (Università degli studi di Genova); Filipe MARQUES (President of Medel); Polish candidates to the European Parliament

LET'S TALK ABOUT EUROPE!

In an article published in November 2013, Yves Bertoncini, director of *Notre Europe*, of the *Jacques Delors Institute*, predicted that the possible increase of populist movements in the May 2014 elections would have a small influence in the functioning of the European institutions: the biggest negative effects would be for the Member States and not for the Union and he could even see a positive side effect: the greater mobilisation of traditional parties.

Unfortunately, a single mandate was enough for this analysis to reveal itself as a mere *wishful thinking*: today we see a Brexit of details (and even date) still uncertain, the wear down of traditional political forces and the consequent arrival to power of populist parties and movements and the increasing attacks on basic institutions of the Rule of Law, such as the Judiciary, in several Member States.

It is for all this that the elections to the European Parliament that will take place in the next month of May assume more than ever a crucial importance for the future of the European project.

Notwithstanding this, most likely within two months we will be listening to speeches about the "distance between citizens and politicians" and of great concern for the high rates of abstention which, like in previous years, will most certainly be felt in the majority of the Member States. Now, if it is true that biggest part of the responsibility in this alienation of voters rests with policymakers – more concerned with discussing national issues than really European issues and incapable of presenting mobilizing projects and ideas – the civil society cannot set itself aside, as if nothing could be done to reverse this state of affairs.

In this perspective, *Medel – Magistrats Européens pour la Démocratie et Les Libertés*, a European NGO that aggregates 24 associations of judges and prosecutors from 16 European states, representing more than 15000 magistrates, will contribute to the debate on European themes, organizing in the next month of March a cycle of conferences on problems that mark the European agenda, doing it in the places where they have been most felt.

Thus, on 1st March, in Rome, we will discuss the *European Immigration Policy*, with the presence of Nando Sigona (Professor at the University of Birmingham), Massimo Giannini (journalist at *La Repubblica* and *Radio Capital*), Laura Boldrini (MP of *LeU – Liberi e Uguali*), Monica Frasoni (MEP of the *European Greens*), Riccardo Magi (MP of *Più Europa*), David Sassoli and Elly Schlein (members of the *Gruppo Alleanza Progressista dei Socialisti e dei Democratici*) and Luigi Ferrajoli (Professor at the University of Roma Tre).

On March 8th, in Erkner (Berlin), Professor Jürgen Neyer (from the *European University Viadrina* and the *Centre for Internet and Human Rights - CIHR*) will address issues related to *Law in Times of Populism – Opportunities and Challenges: the Digital Revolution and Democracy in Europe*.

On the following weekend, Saturday March 16th, in Athens, in the Senate room of the Greek Parliament and with the support of this institution, we will organise a large seminar on

Democracy and Rule of Law

Austerity and Social Rights, with the presence of speakers such as Nikolaos Voutsis (president of the Greek Parliament), Michail Pikramenos (President of the Association of Greek Judges), Georgios Stavropoulos (National Commission for Human Rights, Greece), Joaquim Sousa Ribeiro (former president of the Portuguese Constitutional Court), Margaritis Schinas (spokesperson of the European Commission), Tasos Giannitsis (University of Athens), Tefkros Th. Economou (Supreme Court of Cyprus) and Dionysia Bitzouni (Supreme Court of Greece). This seminar concludes with a debate between candidates of the various Greek political parties: Syriza, Nea Dimokratia, Kinima Allagis, Kommounistiko Komma Elladas, To Potami and Annexartitoi ellines.

Finally, on March 22nd, in Warsaw, in cooperation with the NGOs *Helsinki Foundation for Human Rights* and *Association 61*, we will discuss the *Rule of Law form a European Perspective*, with the presence of Krystian Markiewicz (President of Iustitia – Association of Judges Polish), Thomas Giegerich (University of Saarland and Europa-Institut, Saarbrücken) and Vittorio Fanchiotti (Università degli studi di Genova), followed here also by a debate with Polish candidates to the European Parliament.

With this contribution, MEDEL does nothing more than pursue one of the objectives that its founding members have established in 1985: the promotion of a common debate among magistrates from different countries, to support European integration, in view of creating a European Political Union.

It's time to talk about Europe. Let's do it all – political parties, candidates and civil society.

IMMIGRATION POLICY – FOR A EUROPE OF RIGHTS AND SOLIDARITY

POLITICHE CONTRO I MIGRANTI IN VIOLAZIONE DEI DIRITTI UMANI

Luigi Ferrajoli

Il populismo al Governo ha un'intrinseca vocazione anticostituzionale che gli proviene dall'assunzione, come unica fonte di legittimazione del sistema politico, della volontà popolare indebitamente identificata con la volontà del ceto politico investito dal voto

Premessa

Voglio anzitutto esprimere il mio ringraziamento per l'invito a questo vostro Congresso. E voglio subito esprimere il mio apprezzamento per la bella relazione introduttiva della segretaria generale Mariarosaria Guglielmi.

Come antico esponente di Md – entrai in Md nel lontano 1967 e vi rimasi per tutti gli otto anni della mia vita di magistrato – ho partecipato a quasi tutti i ventidue congressi di Magistratura democratica. Ebbene, nella relazione di Mariarosaria ho sentito gli accenti della Md dei suoi anni migliori: la stessa passione civile, lo stesso entusiasmo politico, la stessa radicalità intellettuale, la stessa capacità di analisi critica e di progettazione politica che furono proprie dei tempi più gloriosi di questo straordinaria, preziosa associazione di magistrati che è Magistratura democratica.

Condivido interamente la riflessione di Mariarosaria sulle attuali derive populiste, antipolitiche e xenofobe del nostro sistema politico e sulla crisi da esse innestata della nostra democrazia costituzionale. Il populismo al Governo ha infatti un'intrinseca vocazione anticostituzionale, che gli proviene dall'assunzione, come unica fonte di legittimazione del sistema politico, della volontà popolare, indebitamente identificata, sulla base del risponso elettorale e senza mediazioni partitiche, con la volontà del ceto politico investito dal voto. Di qui la sua intolleranza per i limiti e i vincoli imposti alla politica dai diritti fondamentali e dai principi costituzionalmente stabiliti, per la separazione dei poteri e il controllo giudiziario e, per altro verso, per il confronto parlamentare e per le opposizioni politiche. Di qui la sua inevitabile e pericolosa vocazione a trasformare la democrazia parlamentare in un'autocrazia elettiva. Si tratta, va aggiunto, di una crisi della democrazia non soltanto in Italia, ma anche in molti altri Paesi europei, avendo l'Europa, come ha scritto Mariarosaria Guglielmi, «venduto l'anima» con le sue politiche di chiusura e negazione della dignità dei migranti e con le regressioni illiberali che stanno sviluppandosi in tanti suoi stati membri, dall'Ungheria alla Polonia, dalla Romania alla Bulgaria e alla Repubblica Ceca.

Ma ciò che più di tutto ho apprezzato della relazione Guglielmi è stata la riproposta di un tratto distintivo della vecchia identità di Md: «La scelta di campo a favore dei diritti e dei soggetti deboli» (p. 27), alternativa alla consonanza con le politiche dominanti e al rifugio rassicurante nel vecchio formalismo e tecnicismo. È una scelta che non contraddice affatto il costume di terzietà e di imparziale soggezione alla legge che deve contrassegnare la giurisdizione, giacché

essa altro non è che la scelta in favore della Costituzione, cioè del principio di uguaglianza e dei diritti fondamentali costituzionalmente stabiliti. La scelta per i diritti fondamentali costituzionalmente stabiliti equivale infatti alla scelta di campo a favore dei soggetti deboli che di quei diritti sono i titolari insoddisfatti e i cui diritti sono più gravemente violati: una scelta, perciò, delle loro istanze di uguaglianza e delle loro aspettative di garanzia, le quali sono perciò la fonte etico-politica di interpretazione e per così dire di inveramento dei valori costituzionali e fanno del giudice un garante dei diritti delle persone contro i poteri, proprio perciò da questi indipendente quale contro-potere, collegato alla sovranità popolare tramite la garanzia dei diritti costituzionalmente stabiliti come diritti di tutti.

1. La questione migranti

Ebbene, i soggetti deboli per antonomasia, titolari di diritti fondamentali violati e insoddisfatti, sono oggi soprattutto i migranti. Per questo stare dalla parte della Costituzione e dei diritti fondamentali in essa stabiliti vuol dire, come dice il bel sottotitolo del vostro Congresso, stare «dalla parte dei sommersi». Per questo l'opzione ideale per i diritti fondamentali che la Costituzione vi impone in quanto magistrati è oggi tutt'uno con la scelta a sostegno dei migranti. Per questo la questione migranti è oggi il banco di prova di tutti i valori stabiliti dalla nostra Costituzione come dalle Costituzioni di tutti i Paesi europei e dalla Carta dei diritti fondamentali dell'Unione: l'uguaglianza, la dignità delle persone, i diritti umani a cominciare dal diritto alla vita, la solidarietà, che sono tutti valori oggi pesantemente violati dalle politiche di questo Governo e da quelle dell'intera Europa.

Dico subito che questo Governo e, in particolare, il Ministro dell'interno Salvini non hanno affatto inaugurato, ma hanno solo proseguito le politiche e le pratiche contro gli immigrati del precedente Ministro Minniti e quelle degli altri Governi europei. Ci sono però quattro gravissime differenze qualitative nell'operato di questo Governo rispetto a quello dei Governi passati, tutte connesse all'approccio populistico alla questione dell'immigrazione e tutte corrispondenti ad altrettante perversioni del tradizionale populismo penale.

1.1 La prima differenza è il carattere criminogeno assunto oggi in Italia dalle leggi e dalle politiche governative in tema di sicurezza. Mi limito a ricordare due misure il cui effetto sarà quello di accrescere la devianza, la marginalità sociale e l'insicurezza.

La prima è il decreto cosiddetto “sicurezza” voluto dal Ministro Salvini, che oltre alle solite misure punitive ha ridotto le forme di integrazione e soppresso di fatto il permesso di soggiorno per motivi umanitari. Ne sta seguendo l'espulsione dal sistema di protezione per richiedenti asilo e rifugiati (Sprar) e dai centri di accoglienza straordinaria (Cas) di decine di migliaia di migranti, gettati sulla strada come irregolari e destinati ad alimentare l'emarginazione sociale e la delinquenza a beneficio ulteriore della politica della paura. Si tratta di una misura disumana e crudele, stupidamente persecutoria, con la quale migliaia di persone perfettamente integrate nella società italiana vengono strappate dal loro mondo e trasformate in persone illegali e virtualmente devianti: giacché sempre le persone escluse dalla società civile sono esposte e disposte ad essere incluse nelle società incivili o illegali o peggio nelle organizzazioni criminali.

La seconda misura criminogena è la proposta di legge sull'estensione dei presupposti della legittima difesa. Nel testo approvato al Senato viene di fatto soppresso il requisito della proporzionalità tra difesa e offesa, semplicemente con l'aggiunta che tale requisito ricorre "sempre", senza possibile valutazione da parte del giudice, in caso di violazione di domicilio, e quindi anche nel caso di chi in casa propria spari per difendere i propri beni. Non è solo una riforma carica di valenza simbolica dato che antepone, come ha detto Mariarosaria Guglielmi, l'inviolabilità del domicilio e dei beni all'inviolabilità della vita umana. È anche una misura che provocherà l'aumento degli omicidi, oltre che dei suicidi e degli infortuni dovuti all'uso di armi da fuoco. Basti pensare al numero attuale degli omicidi in Italia, dove nessuno va in giro armato, e al loro numero in America, dove tutti possono comprare armi: meno di 400 omicidi in un anno in Italia, 66.000 in Brasile, circa 30.000 negli Stati Uniti e in Messico dove tutti si armano per paura. Non è azzardato prevedere che l'uso delle armi promosso da Salvini porterà anche da noi il numero degli omicidi e dei suicidi ai livelli americani.

1.2 La seconda differenza delle politiche di questo Governo in tema di migranti rispetto alle politiche del passato è ancor più inquietante. Consiste nel fatto che il consenso popolare viene perseguito, dagli odierni populismi, non soltanto nei confronti di misure punitive, ma anche nei confronti di politiche e di pratiche che apertamente violano i diritti umani delle persone e talora consistono in veri e propri reati: come la preordinata omissione di soccorso, la chiusura dei porti (misura informale equivalente di fatto a un provvedimento discriminatorio, perché adottato unicamente nei confronti delle navi recanti a bordo migranti), la costrizione dapprima dell'Aquarius e della Diciotti e poi della Sea-Watch a vagare in mare con i loro carichi sofferenti di centinaia di persone, il trattenimento in ostaggio e perciò la privazione della libertà dei migranti a bordo di queste navi. Qui il populismo penale consiste nella ricerca del consenso non già facendo leva sulla paura per la criminalità di strada e inasprendo le pene, bensì ostentando politiche esse stesse illecite, consistenti in violazioni massicce dei diritti umani. Va aggiunto che il Ministro Salvini ha non solo commesso, ma ha anche rivendicato il reato di sequestro di persona contestatogli dalla Procura di Agrigento e per il quale è stata chiesta l'autorizzazione a procedere, nonché tutte le altre disinvolte violazioni di norme di diritto interno e di diritto internazionale: dalle norme del codice penale sull'omissione di soccorso al Testo Unico sull'immigrazione del 25 luglio 1998 che vieta il respingimento indiscriminato di quanti intendono chiedere asilo, nonché di minori stranieri non accompagnati e di donne in stato di gravidanza o nei sei mesi successivi al parto, dalla Convenzione di Amburgo sulla ricerca e il salvataggio marittimi del 27 aprile 1979, che impone di operare i salvataggi «nel modo più efficace possibile» portando i naufraghi in un «porto sicuro», cioè nel porto più vicino, fino al principio elementare del diritto del mare, oltre che delle tradizioni marinare di tutti i Paesi civili, secondo cui chi rischia la vita in mare deve essere comunque salvato.

Ebbene, questo cumulo di illegalità, ostentatamente disumano, sta provocando una catastrofe della quale l'Italia e l'Europa dovranno un giorno vergognarsi e saranno, dalla storia, chiamate a rispondere. Negli anni 2014-2016 centinaia di migliaia di persone furono salvate dalle navi della Marina militare italiana e della Guardia costiera, dalle navi delle ong, le quali da sole hanno salvato ben 46.796 persone nel solo 2016, e dai mercantili di passaggio. Ma ora, a causa della preordinata omissione di soccorso decisa dal Governo con la chiusura dei porti, la strage continua in dimensioni ben maggiori. Poiché la Marina militare italiana viene tenuta a distanza, le navi delle ong sono state allontanate e i mercantili girano al largo per non perdere giorni di viaggio a causa dell'impossibilità di trasferire a terra i migranti salvati, altre migliaia di

naufraghi resteranno senza soccorsi e moriranno affogati, ovviamente lontano dai nostri occhi e dalle nostre coscienze. Secondo l'Alto commissariato delle nazioni unite per i rifugiati (Unhcr), nel 2018 ben 2.275 persone sono affogate nel Mediterraneo e il tasso di mortalità, lungo la rotta Libia-Europa, che nel 2017 è stato di un decesso ogni 38 arrivi, è stato nel 2018 di un decesso ogni 14 arrivi. Inoltre l'85% dei migranti tratti in salvo nell'area di mare libica sono stati consegnati alla Libia dove sono stati incarcerati nelle ben note condizioni spaventose. A causa dell'omissione di soccorso, lo scorso 18 gennaio sono affogati ben 117 migranti dei 120 naufraghi al largo della Libia. Si è trattato di una strage, di cui questo Governo porta la responsabilità, dato che esso non solo non si è direttamente attivato, ma con la chiusura dei porti e l'allontanamento delle navi della nostra Marina e delle navi delle ong ha di fatto impedito che altri prestassero soccorso a questi disperati.

Sono queste gigantesche omissioni di soccorso e, soprattutto, la loro aperta rivendicazione e ostentazione i tratti principali per i quali questo Governo cosiddetto «del cambiamento» passerà tristemente alla storia e che valgono a oscurare, per la loro drammatica immoralità e illegittimità, tutte le altre politiche governative. Non si tratta solo di politiche che alimentano il veleno razzista dell'intolleranza e del disprezzo per i diversi quale veicolo di facile consenso. L'esibizione dell'illegalità e della disumanità equivale a deprimere la moralità corrente e ad alterare, nel senso comune, le basi del nostro Stato di diritto: non più la soggezione alla legge e alla Costituzione, ma il consenso elettorale quale fonte di legittimazione di qualunque arbitrio, persino se delittuoso.

1.3 Vengo così alla terza differenza delle politiche di questo Governo contro i migranti rispetto a quelle messe in atto dai Minniti e dai Macron e che assimila semmai il Ministro Salvini al presidente americano Trump. Essa consiste nel fatto che la violazione dei diritti umani, mentre era occultata da Minniti, viene ora sbandierata come fonte di consenso. Di qui il veleno distruttivo immesso nella società italiana del quale ci ha parlato Laura Boldrini. Il Ministro Salvini non si limita a interpretare la xenofobia, ma la alimenta e la amplifica, producendo due effetti distruttivi sui presupposti della democrazia.

Il primo effetto è l'abbassamento dello spirito pubblico e del senso morale nella cultura di massa. Quando l'indifferenza per le sofferenze e per i morti, la disumanità e l'immoralità di formule come «prima gli italiani» o «la pacchia è finita» a sostegno dell'omissione di soccorso sono praticate, esibite e ostentate dalle istituzioni, esse non solo sono legittimate, ma sono anche assecondate e alimentate. Diventano contagiose e si normalizzano. Sollecitano l'odio per i diversi. Non capiremmo, altrimenti, il consenso di massa di cui godettero il nazismo e il fascismo. Queste politiche crudeli stanno avvelenando e incattivendo la società, in Italia e in Europa. Stanno seminando la paura e l'ostilità per i soggetti più deboli. Stanno logorando i legami sociali. Stanno screditando, con la diffamazione di quanti salvano vite umane, la pratica elementare del soccorso di chi è in pericolo di vita. Stanno fascistizzando il senso comune. Stanno svalutando i normali sentimenti di umanità e solidarietà che formano il presupposto elementare della democrazia.

Stanno, infine, costruendo le basi ideologiche del razzismo; il quale, come scrisse lucidamente Michel Foucault, non è la causa ma l'effetto delle oppressioni e delle violazioni dei diritti umani: la «condizione», egli scrisse, che consente l'«accettabilità della messa a morte» di una parte dell'umanità. In tanto, infatti, possiamo accettare che ogni anno decine di migliaia di

disperati vengano respinti o peggio affoghi nel tentativo di approdare nei nostri Paesi, e che milioni di persone muoiano per fame e malattie non curate, in quanto questa accettazione sia sorretta dal razzismo. Non a caso il razzismo è un fenomeno moderno, sviluppatisi dopo la conquista del “nuovo” mondo, allorquando i rapporti con gli “altri” furono instaurati come rapporti di dominio e occorreva perciò giustificarli disumanizzando le vittime perché diverse e inferiori. Che è lo stesso riflesso circolare che in passato ha generato l’immagine sessista della donna e quella classista del proletario come inferiori, perché solo così se ne poteva giustificare l’oppressione, lo sfruttamento e la mancanza di diritti. Ricchezza, dominio e privilegio non si accontentano di prevaricare. Pretendono anche una qualche legittimazione sostanziale.

1.4 C’è poi una quarta differenza rispetto al passato e un altro effetto, non meno grave, di queste politiche antiimmigrati. Consiste nel mutamento da esse prodotto delle soggettività politiche e sociali: non più le vecchie soggettività di classe, basate sull’uguaglianza e su lotte comuni per comuni diritti che negli anni Settanta avevano prodotto la sola stagione del riformismo italiano – dallo Statuto dei diritti dei lavoratori al nuovo diritto di famiglia, dal divorzio alla legalizzazione dell’aborto e alla riforma sanitaria –, bensì soggettività politiche di tipo identitario – «italiani contro migranti», «prima gli italiani», «noi contro gli stranieri» – basate sull’identificazione delle identità diverse come nemiche e sul capovolgimento delle lotte sociali: non più di chi sta in basso contro chi sta in alto, ma di chi sta in basso contro chi sta ancora più in basso, dei poveri contro i poverissimi e soprattutto dei cittadini contro i migranti, trasformati in nemici contro cui scaricare la rabbia e la disperazione generate dalla crescita delle disuguaglianze e della povertà.

Le politiche contro i migranti si coniugano così con le politiche antisociali che in questi anni hanno accresciuto la disoccupazione e il precariato nei rapporti di lavoro, provocando la disaggregazione delle vecchie forme di soggettività politica collettiva basate sull’uguaglianza nei diritti e sulla solidarietà tra uguali. Espressioni come “movimento operaio” e “classe operaia”, “coscienza di classe” e “solidarietà di classe”, che per oltre un secolo sono state centrali nel lessico della sinistra, suppongono infatti l’uguaglianza dei lavoratori nelle condizioni di vita e nella titolarità dei diritti e la stabilità dei rapporti di lavoro e delle relazioni tra lavoratori. Oggi, a causa dei rapporti precari e mutevoli, perfino nelle grandi fabbriche i lavoratori neppure si conoscono tra loro. Quelle espressioni sono quindi andate fuori uso essendo venuta meno, con la precarietà e la moltiplicazione dei tipi di rapporto di lavoro, l’uguaglianza nei diritti, sicché i lavoratori, anziché solidarizzare in lotte comuni, sono costretti a entrare in competizione tra loro.

Questo mutamento di struttura della società, prodottosi in questi anni in Italia come in gran parte delle democrazie occidentali, è stato provocato da molti fattori. Ma io credo che il principale fattore sia rappresentato dalle politiche contro il lavoro: la precarizzazione dei rapporti di lavoro, la loro arbitraria differenziazione in decine di rapporti atipici, la distruzione dell’uguaglianza nei diritti e con essa della solidarietà di classe su cui si basavano la soggettività politica dei lavoratori e la forza delle lotte sociali. Politiche liberiste contro il lavoro da un lato e politiche populiste contro i migranti dall’altro hanno così dato vita a due processi, l’uno di scomposizione e l’altro di ricomposizione sociale: la disaggregazione delle tradizionali soggettività di classe basate sull’uguaglianza e la solidarietà, e la riaggregazione in chiave reazionaria di nuove soggettività identitarie basate sull’intolleranza per i differenti, primi tra tutti quei differenti per antonomasia che sono i migranti.

Si è trattato di due azioni congiunte e complementari messe in atto dalle due destre – le destre razziste e le destre liberiste, di fatto alleate – che hanno prodotto un ribaltamento della direzione della vecchia lotta di classe: non più gli operai contro i padroni e i poveri contro i ricchi in nome dell'uguaglianza e contro le disuguaglianze, ma i soggetti deboli contro i debolissimi e soprattutto i cittadini contro i migranti. Si è così rivelato il nesso tra la crisi delle garanzie del lavoro e la perdita del radicamento sociale della sinistra, tra il crollo dell'uguaglianza tra i lavoratori e il declino della loro rappresentanza politica, tra il mutamento della struttura dei soggetti collettivi, la crisi delle basi sociali del pluralismo politico e la svolta reazionaria prodottasi, non solo in Italia, in quest'ultimo trentennio. Del resto l'alleanza perversa tra sovranismi razzisti e liberismo si manifesta anche sotto un altro aspetto: i sovranisti, con la loro rivendicazione di un'illusoria sovranità nazionale, sono oggi i maggiori avversari che si oppongono alla costruzione di una sfera pubblica europea, e in prospettiva globale, in grado di imporre limiti e regole ai poteri selvaggi dei mercati.

2. Tre anticorpi culturali all'attuale deriva della democrazia

Domandiamoci a questo punto: cosa è possibile fare contro una simile deriva? Cosa possiamo fare noi – giuristi, magistrati – contro questa mutazione della società e del nostro sistema politico? Io penso che quanto meno possiamo, e perciò dobbiamo, introdurre, nel dibattito pubblico, taluni efficaci antidoti o anticorpi democratici.

2.1 Il primo antidoto contro la corruzione del senso comune e del senso morale prodotta dall'ostentazione dell'immoralità e della disumanità delle politiche antimigranti consiste nel chiamare queste politiche con il loro nome: si tratta di violazioni massicce dei diritti umani stabiliti costituzionalmente e, in molti casi, di veri e propri reati. È questa l'importanza civile, prima che giuridica, delle denunce e delle iniziative giudiziarie contro queste politiche al di là dei loro esiti processuali: la creazione della percezione sociale della loro illegalità, oltre che della loro immoralità, in grado di arginarne l'accettazione acritica o peggio l'aperto sostegno.

E qui vorrei sottolineare e sollecitare la percezione pubblica dell'estrema gravità della negazione parlamentare dell'autorizzazione a procedere contro Salvini. Si è trattato di un voto parlamentare non già comparabile, come ha detto Massimo Giannini, al famoso voto del Parlamento che anni fa avallò la tesi di Berlusconi sulla minorenne Ruby quale nipote di Mubarak, ma di una decisione assai più grave. Con quel voto su Ruby nipote di Mubarak, come in tutti i casi in cui è stata supposta l'esistenza di un qualche *fumus persecutionis*, fu infatti negata l'esistenza dei reati contestati: il vizio, in questo modo, ha reso omaggio alla virtù. In questo caso, al contrario, il reato è stato apertamente rivendicato non soltanto da Salvini, che quando ricevette la sua contestazione dichiarò che l'avrebbe incorniciata e appesa al muro come una medaglia, ma dall'intero Governo che l'ha difeso in nome di un preminente interesse pubblico. Con quel voto a favore del Ministro Salvini questa maggioranza ha così deliberato che è nel «preminente interesse pubblico» la violazione dei diritti umani e dei doveri di solidarietà stabiliti dalla nostra Costituzione. Ha affermato, in breve, l'insindacabilità della politica, così negando la sostanza del costituzionalismo e dello Stato costituzionale di diritto e archiviando il sistema dei limiti e dei vincoli imposti dalla Costituzione al potere politico. E a questo proposito dobbiamo riconoscere che l'articolo 9 della legge costituzionale del 16 gennaio 1989 – che ha previsto una simile negazione dell'autorizzazione a procedere sulla base della «valutazione insindacabile» della maggioranza, del cui sostegno i ministri

godono per definizione, «che l'inquisito abbia agito per la tutela di un interesse dello Stato costituzionalmente rilevante ovvero per il perseguimento di un preminente interesse pubblico» – equivale a una mina collocata sotto l'assetto costituzionale della nostra democrazia: una mina esplosa con quel voto del 19 febbraio scorso.

2.2 Il secondo anticorpo contro la deriva in atto è la vergogna, della quale ci ha parlato stamattina Gianrico Carofiglio e che dobbiamo provocare con un appello alla coscienza civile di tutti. Di quanto sta accadendo dovranno, un giorno, vergognarsi non soltanto gli attuali governanti, ma anche quanti li hanno votati e li sostengono con il loro consenso. Costoro non potranno dire: non sapevamo. Nell'età dell'informazione sappiamo tutto. Siamo a conoscenza delle migliaia di morti provocati dalle nostre politiche. Sappiamo perfettamente che in Libia i migranti vengono torturati, stuprati, schiavizzati, uccisi. Conosciamo esattamente le forme di sfruttamento fino alla riduzione in schiavitù cui sono sottoposti, in Italia, molti migranti. Per questo difendere i diritti dei migranti significa anzitutto difendere noi stessi. Per questo affermare la dignità dei migranti come persone equivale ad affermare e a difendere la nostra dignità. Per questo rifiutare la parola d'ordine «prima gli italiani» equivale a rifiutare il razzismo che ad essa sta dietro e difendere, contro il razzismo, l'identità democratica del nostro Paese.

È questa vergogna, io credo, che deve portarci ad auspicare che i terribili effetti della chiusura delle frontiere dei Paesi ricchi – le penose odissee di quanti fuggono dalla miseria, dalle guerre o dalle persecuzioni, le migliaia di persone che muoiono ogni anno nel tentativo di raggiungere le nostre coste, le decine migliaia di disperati che si affollano ai nostri confini contro barriere e fili spinati – saranno un giorno condannati come gli orrori dei nostri tempi che imporranno al costituzionalismo del futuro un nuovo *mai più*: l'affermazione e la garanzia della libertà di circolazione sul pianeta di tutti gli esseri umani, lo *ius migrandi* appunto come autentico diritto ad avere diritti, condizione elementare dell'indivisibilità e dell'effettività di tutti gli altri diritti della persona oggi sanciti nelle tante carte dei diritti facenti parte del nostro diritto internazionale ma sistematicamente violate. Si stabilirebbe così il presupposto elementare di un costituzionalismo globale. Si chiuderebbe il mezzo millennio del falso universalismo dei diritti umani inaugurato con la proclamazione del diritto di emigrare ad uso esclusivo delle politiche di conquista dell'Occidente. Si rifonderebbe la dignità di tutti gli esseri umani – dei migranti, ma anche di noi stessi – in quanto ugualmente persone e si avrebbe un aumento della qualità della vita di tutti.

2.3 È precisamente questo il terzo e forse il più importante anticorpo. Esso consiste nella cattiva coscienza che dobbiamo creare intorno all'enorme contraddizione tra le attuali politiche contro l'immigrazione e tutti i valori costituzionali. Consiste perciò nella scelta che la questione dei migranti impone alla coscienza civile di tutti: se i diritti umani e la dignità delle persone vadano presi sul serio o se si ridurranno, a causa delle loro massicce violazioni, in una vuota e insopportabile retorica. Dei diritti umani, infatti, fa parte anche il diritto di emigrare. Questo diritto è stabilito dalla nostra Costituzione, che lo enuncia nell'articolo 35, comma 2, e nel diritto internazionale, che lo afferma negli articoli 13, comma 2, e 14 della Dichiarazione universale dei diritti umani e nell'articolo 12, comma 2, del Patto internazionale sui diritti civili e politici del 1966. Non solo. Esso è il più antico dei diritti fondamentali, essendo stato formulato fin dal secolo XVI da Francisco De Vitoria a sostegno della conquista del "Nuovo mondo", quando erano gli europei a emigrare per colonizzare e depredare il resto del pianeta,

e poi da John Locke, che lo pose alla base del diritto alla sopravvivenza: il quale, egli scrisse, diversamente dal diritto alla vita contro la violenza omicida non richiede garanzie, essendo assicurato dal lavoro, sempre accessibile a tutti purché lo si voglia quanto meno emigrando nelle «terre incolte» dell'America dove c'è «terra sufficiente a bastare al doppio dei suoi abitanti».

Ebbene, prendere sul serio i diritti umani stabiliti in tutte queste carte vuol dire, di nuovo, chiamare con il suo nome – diritto fondamentale – anche questo diritto, e quindi assicurare la libertà di circolazione delle persone al pari della libertà di circolazione delle merci. Vuol dire abbattere le frontiere. Non è un'ipotesi utopistica o estremistica, ma al contrario un imperativo realistico di ragione. I flussi migratori sono fenomeni strutturali e irreversibili, frutto della globalizzazione selvaggia promossa dall'attuale capitalismo, che né le leggi, né i muri, né le polizie di frontiera saranno mai in grado di fermare ma solo di drammatizzare e clandestinizzare. Inoltre, come ha mostrato Thomas Pogge in un libro di dieci anni fa su *La povertà e i diritti umani*, «la povertà nel mondo è molto più grande, ma anche molto più piccola di quanto pensiamo... La sua eliminazione richiederebbe poco più dell'1% del prodotto globale»: precisamente l'1,13% del Pil mondiale, circa 500 miliardi di dollari l'anno, meno del bilancio annuale della difesa dei soli Stati Uniti. È certo, d'altro canto, che l'Occidente non affronterà mai seriamente i problemi che sono all'origine delle migrazioni di massa – la miseria, la fame, le devastazioni ambientali – se non li sentirà come propri, e non li sentirà mai come propri se la pressione degli esclusi alle sue frontiere non diventerà irresistibile.

Naturalmente so bene che nessun uomo politico potrebbe oggi sostenere una simile tesi. Non potrebbe farlo a causa di due aporie, l'una relativa allo spazio e l'altra al tempo, che vincolano la politica e la democrazia: gli spazi angusti dei territori rappresentati e i tempi brevi delle scadenze elettorali e dei sondaggi ai quali sono ancorati il consenso e la rappresentanza politica. Ma questo non è una ragione sufficiente – ed è anzi una ragione di più – perché la cultura giuridica dica le cose che la politica non riesce a dire. Sostenere e mostrare che il diritto di emigrare è un diritto vigente, che in quanto tale richiede di essere garantito significa nient'altro che prendere il diritto positivo sul serio, rilevarne la normatività e criticare come un'indebita lacuna la mancata produzione delle sue garanzie e delle connesse funzioni e istituzioni di garanzia. Se la politica non è capace di dire tutto questo, se non ha il coraggio, perché vittima della demagogia, di riconoscere che il diritto di emigrare è stato sempre ed è tuttora un diritto di tutti, allora è la cultura giuridica e politica che deve dirlo, sul piano scientifico ancor prima che su quello politico. È questo ruolo critico e progettuale che il costituzionalismo rigido, disegnando con i diritti e gli altri principi costituzionali il “dover essere giuridico” del diritto positivo, ha imposto alla scienza del diritto e ovviamente alla politica: un dover essere – i principi costituzionali presi sul serio – dalla cui attuazione peraltro, come continuano ad ammonirci realisticamente i preamboli alla Carta dell'Onu e alla Dichiarazione universale dei diritti umani, dipende il futuro della convivenza pacifica e, dobbiamo oggi aggiungere, dell'abitabilità del pianeta.

Una politica realista, oltre che informata all'uguaglianza e alla garanzia della dignità e dei diritti fondamentali di tutti, dovrebbe insomma avere il coraggio di assumere il fenomeno migratorio come l'autentico *fatto costituente* di un futuro ordinamento internazionale basato sull'effettiva uguaglianza di tutti gli esseri umani, il diritto di emigrare come il *potere costituente* di questo nuovo ordine globale e il popolo meticcio ed oppresso dei migranti, con

le sue infinite differenze culturali, religiose e linguistiche, come il *popolo costituente* dell'umanità futura quale unico popolo globale, anch'esso meticcio perché formato dall'incontro e dalla contaminazione di più nazionalità e di più culture, senza più differenze privilegiate né differenze discriminate, senza più cittadini né stranieri perché tutti accomunati dalla condivisione, finalmente, di un unico *status*, quello di persona umana, e dal pacifico riconoscimento dell'uguale dignità di tutte le differenze. L'alternativa, dobbiamo saperlo, è un futuro di regressione globale, segnato dall'esplosione delle disuguaglianze, dei razzismi e delle paure e, insieme, delle guerre, dei terrorismi e della generale fragilità e insicurezza.

**LAW IN TIMES OF POPULISM - OPPORTUNITIES AND CHALLENGES: THE
DIGITAL REVOLUTION AND EUROPEAN DEMOCRACY**

THE DIGITAL REVOLUTION AND EUROPEAN DEMOCRACY

Filipe Marques

I.

Let me in first place thank *Neue Richtervereinigung* and Thomas Guddat for the organisation of this conference, the second of the cycle of four conferences that *MEDEL – Magistrats Européens pour la Démocratie et les Libertés* is organising in view of the upcoming elections for the European Parliament of the next month of May.

I also would like to extend a special word of appreciation to Prof. Dr. Jürgen NEYER, who kindly accepted the invitation to come and speak to us this evening about such an important and “state of the art” topic.

II.

Apart from being the ones with lower voter turnout, the elections for the European Parliament are usually centred not on the discussion of European subjects, but more on domestic political facts. This year, however, the elections come in a moment when Europe and the western democratic system face serious challenges that could shape it in the decades to come.

MEDEL, being a European NGO, felt the urge of contributing to the debate, trying to put truly European topics in the electoral agenda.

In his book *The People Vs. Democracy – Why our Freedom is in Danger and How to Save It?* (Harvard University Press, 2018, p. 135), Prof. Yascha MOUNK identifies three main reasons for the rise of populist movements:

- The rise of internet and social media has weakened the traditional gatekeepers, favouring the spread of “fake news” and giving power to politicians and movements until now marginal;
- Unlike what happened in the post-war decades (when citizens experienced a rapid increase in their way of life and created expectations of an even better future), citizens today fear that in the future they will have bigger difficulties;
- Almost all stable democracies were based on monoethnic nations or allowed one ethnic group to prevail – nowadays, this is more and more disputed.

This new reality which modern societies have been facing since the beginning of the new century has led to the increase of populistic movements and parties that, using the tools of democracy itself, may lead to its destruction.

As Professors Steven LEVITSKY and Daniel ZIBLATT explain it in “*How Democracies Die*” (New York: Crown Publishing Group, January 2018), “this is how elected autocrats subvert democracy – packing and “weaponizing” the courts and other neutral agencies, buying off the media and the private sector (or bullying them into silence) and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is

that democracy's assassins use the very institutions of democracy – gradually, subtly, and even legally – to kill it".

The fact that the first step described by these authors on the way to authoritarianism is the weakening of the Judicial power shows us that to the three reasons pointed out by Prof. MOUNK, another one should be added: the weakening of the independence of the Judiciary.

Those four topics (digital revolution, immigration, austerity and social rights and independence of the Judiciary and Rule of Law) are the ones that MEDEL wants to bring to light in this electoral period and they are the main subjects of our cycle of conferences:

- Last Friday, in Rome, in cooperation with *Magistratura Democrática*, we were discussing the European Immigration Policy;
- Today, with *Neue Richtervereinigung*, we will be debating the digital revolution and the future of democracy;
- On March 16th, in Athens, with the *Society of Greek Judges for Democracy and Liberties*, we will be addressing the topic of austerity and social rights;
- Finally, on March 22nd, in Warsaw, in cooperation with *Iustitia – Association of Polish Judges, Helsinki Foundation for Human Rights and Association 61*, we will discuss the Rule of Law from a European perspective.

We hope with this contribution not only to bring these points to the political agenda of the electoral campaign, but especially to draw attention to the important times we are living, and the decisive relevance of the political choices European citizens are called to make.

III.

Showing the relevance of the topic that Prof. Jürgen NEYER will address in a few moments, the most recent number of the *Journal of Democracy* (published for the *National Endowment for Democracy* by Johns Hopkins University Press) started publishing a series of papers under the title "*The Road to Digital Unfreedom*". As Prof. Larry DIAMOND reminds us in the opening article ("*The Threat of Postmodern Totalitarianism*"), in less than a decade, the debate about internet and the social media shifted from "*democrats seeking to circumvent internet censorship and dictatorships that want to extend and refine it*" to "*democrats (...) in a race against time to prevent cyberspace from becoming an arena of surveillance, control, and manipulation so all-encompassing that only a modern-day fusion of George Orwell's Nineteen Eighty-Four and Aldous Huxley's Brave New World could adequately capture it*". In effect, not long ago there was the widespread belief that the rise of internet and social media would be a powerful tool against dictatorships and authoritarian regimes, mainly because of two factors: the free flow of information would circumvent the censorship put in place by authoritarian leaders and governments, helping the citizens of those countries to have access to free and independent information; the organisation of political opposition movements would be made easier by social media.

Unfortunately, things didn't go that way.

In "*Three Painful Truths About Social Media*", Prof. Ronald J. DEIBERT identifies the three main issues concerning social media that endanger democracy.

First of all, the business model of social media companies is based on massive data collection and the commercialization of those data to third companies, so they can use them for, among other, specifically-targeted advertisement purposes. If this is the main core of social media companies' business model, there is no foreseeable way of controlling the way they will manage our data or whom they will sell it to.

Secondly, citizens agree with, or at least tolerate, this business model that puts their personal data on the hands of people unknown to them. Recent studies show that only a very small percentage of internet users read the agreements put before them when downloading apps or registering in social platforms, thus ignoring the amount or quality of data that will be collected or what use will be made of it. Worse than that, social media platforms increasingly use tools and mechanisms directed to create addiction, such as "compulsion loops" based on "variable-rate reinforcement", making it even more difficult for its users to be able to take clear and informed decisions when using them.

The third of these "painful truths" is that social media boost authoritarian practices. The increase in the amount of information, once believed to be the source of more informed and, therefore, free citizens, has proved to have the opposite consequence – the vast majority of users are attracted not by calm and argumentative exchanges of opinions, but by extreme and emotionally-driven contents. The huge variety of opinions and contents that can be found online also leads people to look for support for their previously formed opinions and not for real debate and exchange of views. Moreover, the need for a constant flow of data and information, directed to prevent that the attention of users drifts away to other platforms, generates an environment prone to the dissemination of "fake news", not filtered by the gatekeepers of the traditional media and not subject to any kind of fact-checking. This has also led to the birth of "bots" – users who are not people but machines ready to immediately react to pre-programmed contents – that appear to the eyes of real users as a normal person issuing real opinions. Adding to all of this, what was first seen as the ideal place for opposition movements to flourish, is now more and more seen as the perfect place for authoritarian governments to spy and control them. Internet's inherent insecurity makes it much easier for dictatorships to find out the identity and plans of opposition leaders.

And if with social media the concerns are serious, even more so is the case in what regards artificial intelligence. In the same number of the *Journal of Democracy*, Prof. Steven FELDSTEIN writes about "*How Artificial Intelligence is Reshaping Repression*" and describes how AI tools are being increasingly used by authoritarian regimes to control their citizens, either by controlling protests or manipulating public opinion, through the spread of disinformation.

IV.

It's clear to see that the digital revolution poses a very serious threat to democracy, demanding new and courageous approaches. These approaches will have to deal with the core issues above mentioned, taking democracy protection to the heart of internet and social media. The digital world has come to assume such an importance that we must somehow start looking at digital rights as basic fundamental rights.

These are the reasons why MEDEL decided to take this topic to discussion and we look forward to hearing what Prof. Dr. Jürgen NEYER will teach us about it.

Thank you very much for your attention.

ZEITENWENDE - EUROPÄISCHE IDENTITÄT IN DISRUPTIVEN ZEITEN**Jürgen Neyer**

Zeitenwende

Europäische Identität in disruptiven Zeiten

Jürgen Neyer

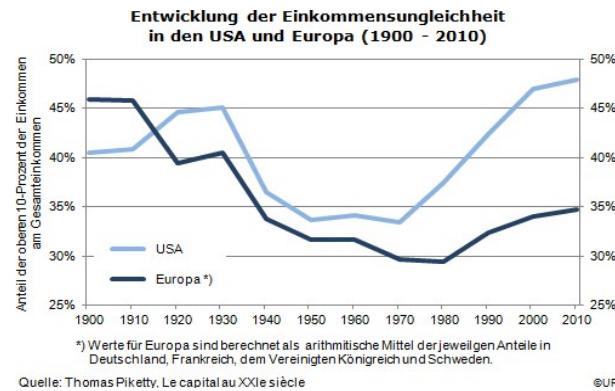


Disruptionen
Kontext
EU-Analyse
Szenarien
Ausblick

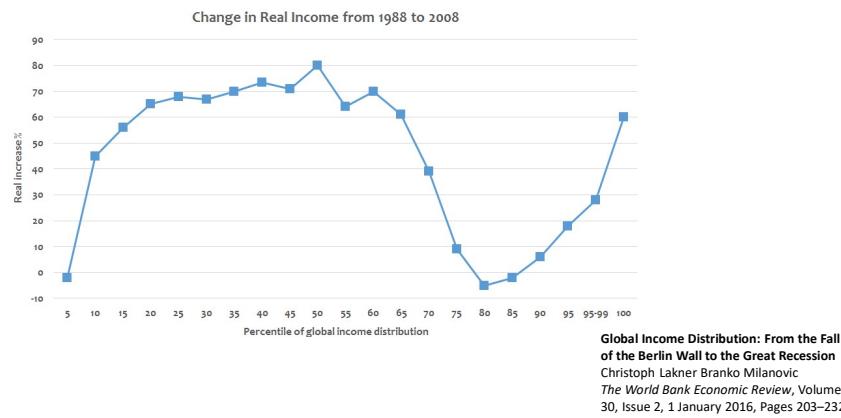
Disruptionen

- von der nationalen zur postnationalen Konstellation
- Digitalisierung als Modernisierung auf Steroiden
- Einsicht in die sozialen Grenzen der offenen Gesellschaft

Disruptionen



Disruptionen



Disruptionen

- Autoritäre Versuchung: Suche nach Stabilität, Geborgenheit, Heimat
- Verschiebung der Grenze des Sagbaren
- Zeitalter des Zorns (Pankaj Mishra)
- Europäischer Bürgerkrieg (Ulrike Guerot)
- rhetorische Bruchlandungen und intellektuelle Verirrungen

Disruptionen

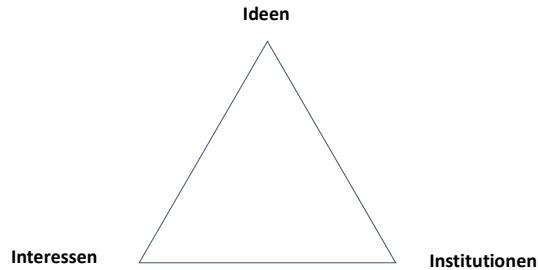
Abschied von der offenen Gesellschaft/ Vereinigten Staaten von Europa,
Hinwendung zu ...?

Disruptionen



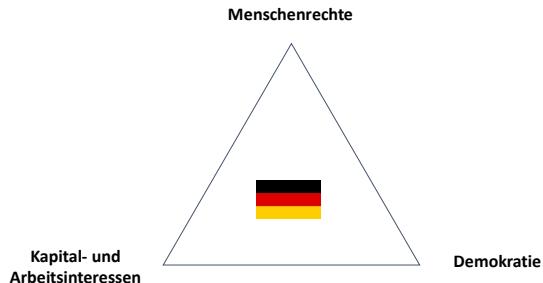
Politik im hegemonialen Zwischenland

Politische Ordnung als konsentierte Struktur aus Ideen, Interessen und Institutionen (Hegemonie)



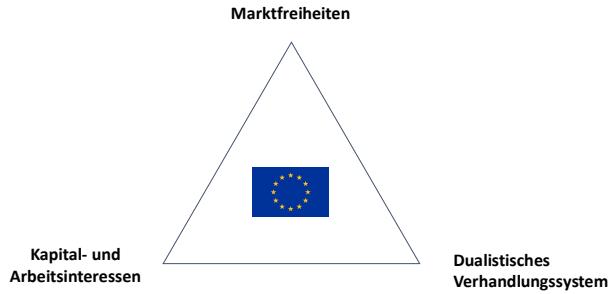
Politik im hegemonialen Zwischenland

Politische Ordnung als konsentierte Struktur aus Ideen, Interessen und Institutionen (Hegemonie)



Politik im hegemonialen Zwischenland

Politische Ordnung als konsentierte Struktur aus Ideen, Interessen und Institutionen (Hegemonie)



Politik im hegemonialen Zwischenland

- Geschichte als Abfolge von Hegemonien
- Hegemonien herausgefordert wenn „philosophische Wahrheiten“ bestritten werden (normative Disruptionen)
- Hegemoniale Übergänge sind konfliktiv
- Institutionen nehmen Dynamik auf (Reform) oder gehen unter (Revolution)
- Dynamische Institutionen sind responsiv und responsibel

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Wie responsiv und responsibel ist Europa?

Mangelnde Responsivität

- Politik auf kleinstem gemeinsamen Nenner
- Grundfreiheiten
- pareto-optimal
- Souveränitätsvorbehalte
- Keine EU-Arbeitslosenversicherung o.ä.

Wie responsiv und responsibel ist Europa?

Mangelnde Responsibilität

- Neue Staatsräson: von, für und mit Regs
- Einstimmigkeit bei Fragen der Kompetenzzuordnung/ Finanzfragen
- Organisierte Unverantwortlichkeit im Mehrebenenverhandlungssystem
- Schwaches EP
- Nat'l Parlamente als Zaungäste
- Verlust des europäischen Souveräns

Wie responsiv und responsibel ist Europa?

Warum keine besseren Institutionen?

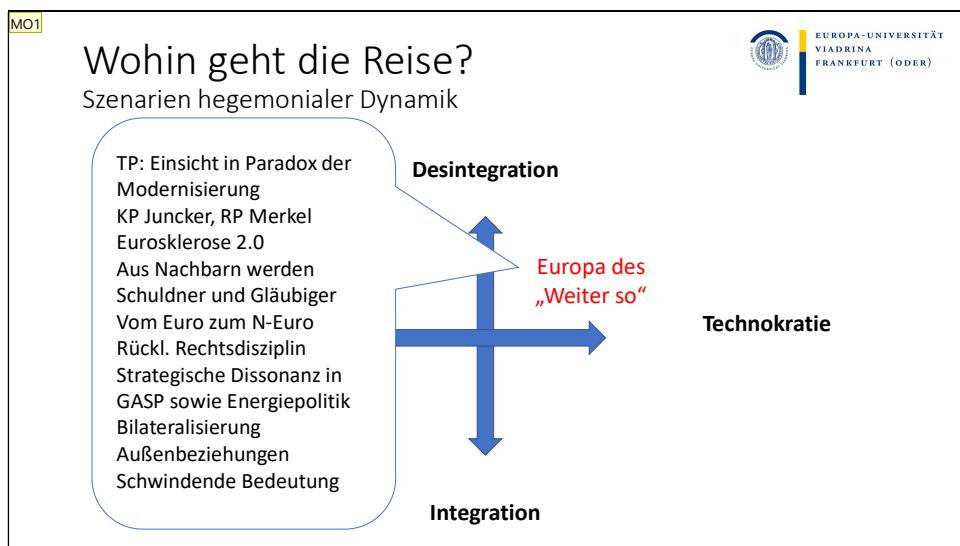
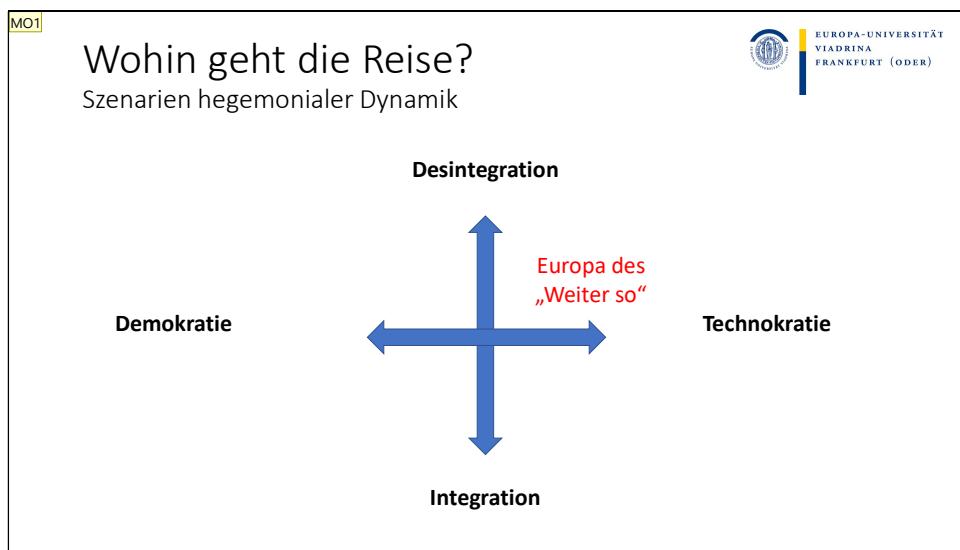
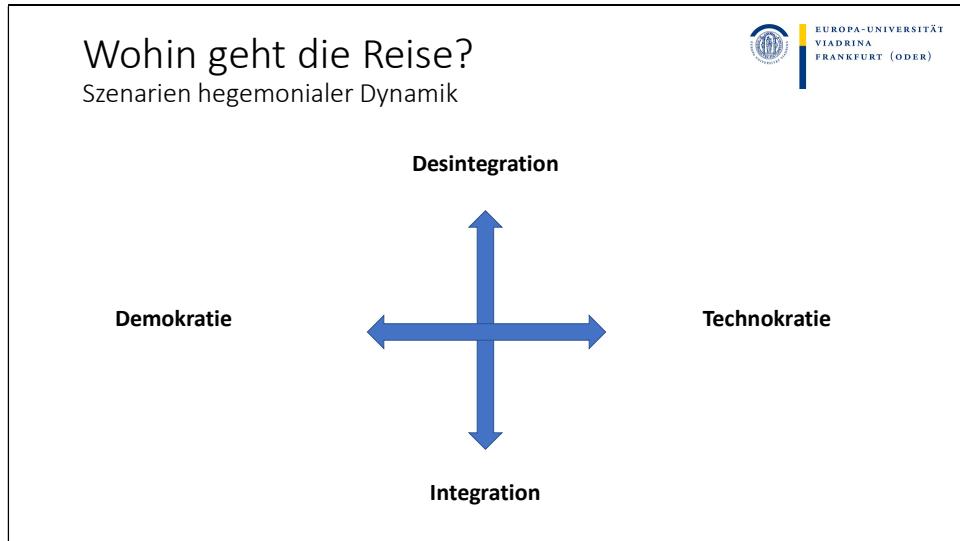
Staatenwelt

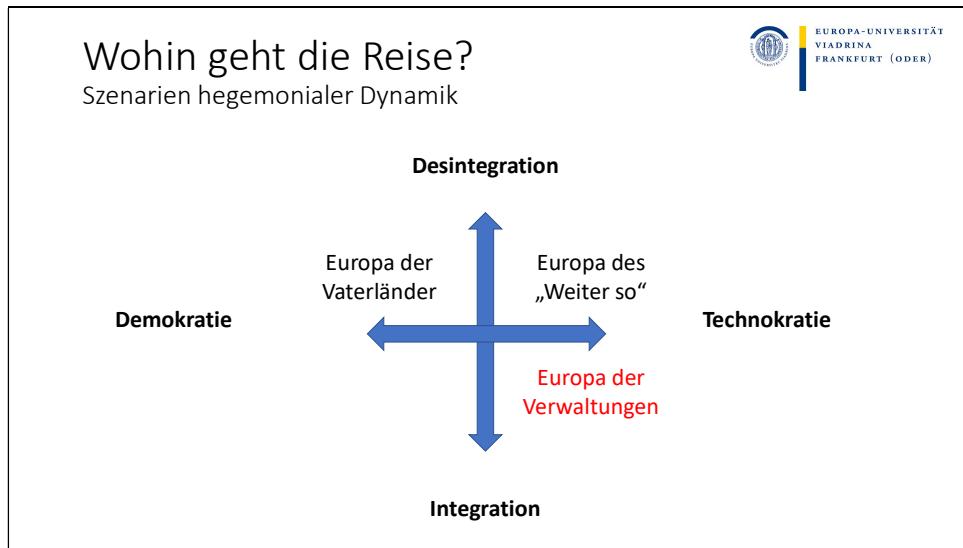
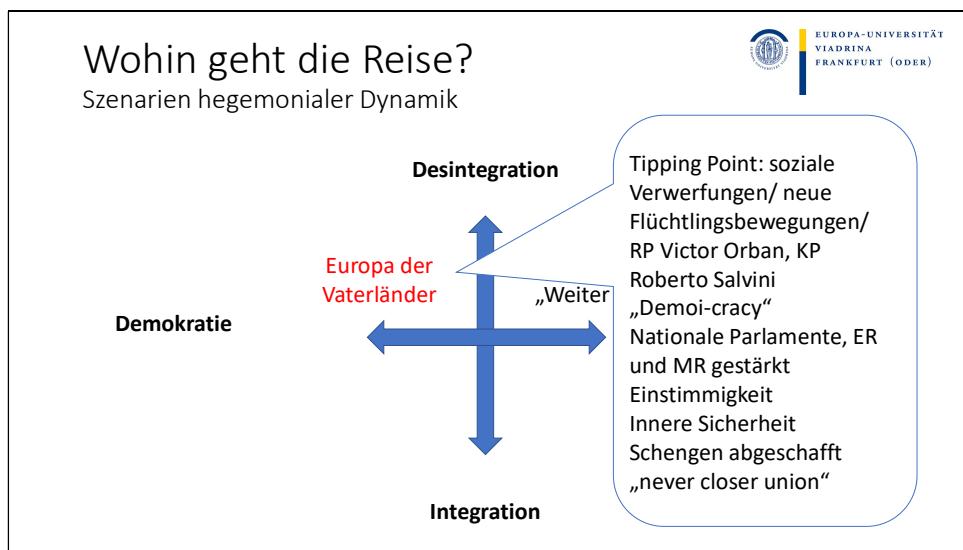
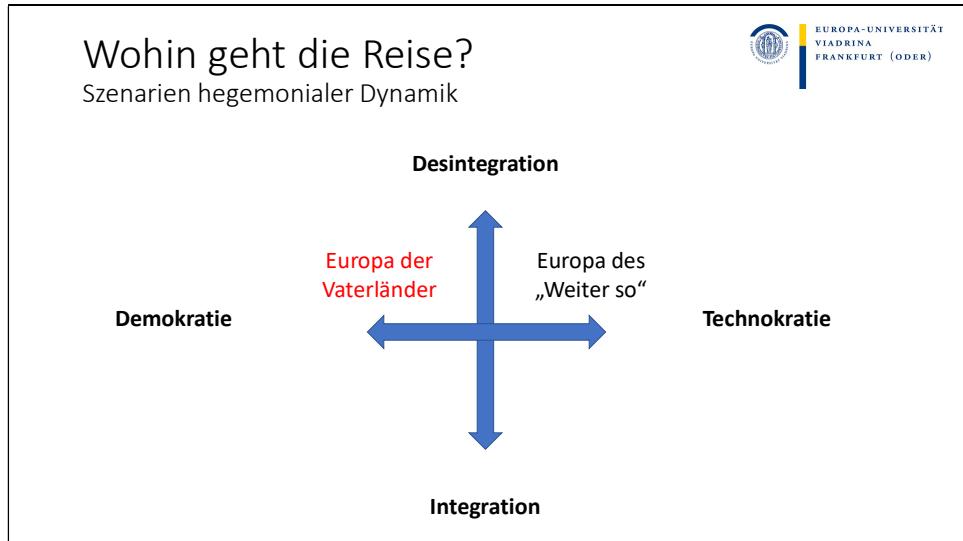
- Auseinanderfallen von Investition und Gewinn: MS-Reg müssen investieren, EU-Institutionen gewinnen
- Neue Institutionen brauchen hegemoniale Führung/ D-F kann/will nicht

Warum keine besseren Institutionen?

Gesellschaftswelt

- Heterogene Werteordnungen
- Man spricht übereinander, nicht miteinander
- Unverbindliche Communities of Practice (Stadler)
- Echokammern (Sunstein) und die Privatisierung der Vernunft
- Gesellschaft der Singularitäten

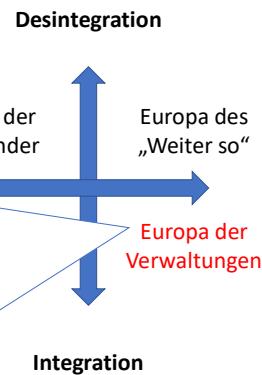




Wohin geht die Reise?

Szenarien hegemonialer Dynamik

Tipping Point: transatlant.,
sino-europ. und euro-russ.
Dissonanzen
(Cyberangriffe)
BVerfG verhindert EP
Agentur für Innen- und
Sicherheitspolitik
Agentur für Demokratie
Europa der Sicherheit +
Grenzen
EU-Armee ohne
Parlamentsvorbehalt



Technokratie

Europa der
Verwaltungen

Europa des
„Weiter so“

Integration

Wohin geht die Reise?

Szenarien hegemonialer Dynamik

Demokratie

Desintegration



Technokratie

Europa der
Verwaltungen

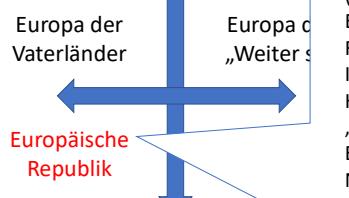
Integration

Wohin geht die Reise?

Szenarien hegemonialer Dynamik

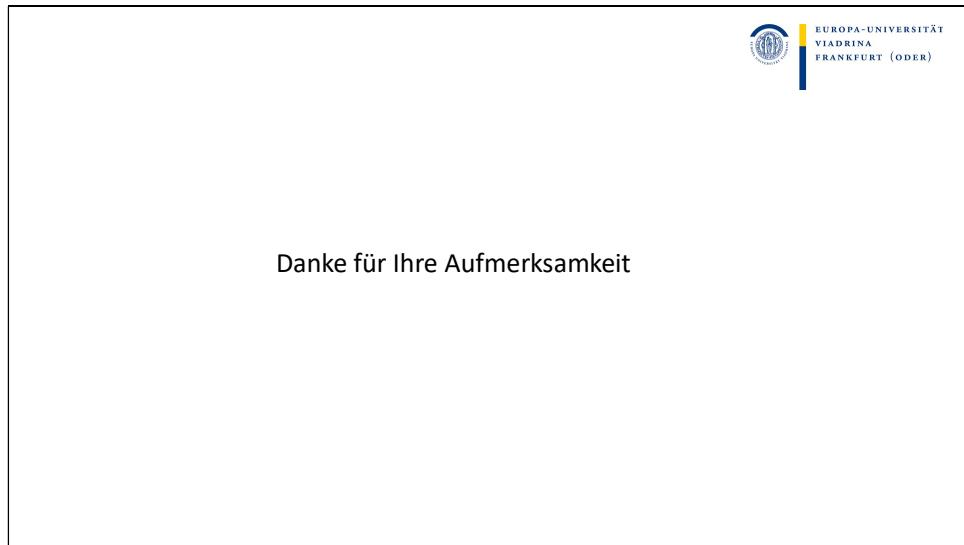
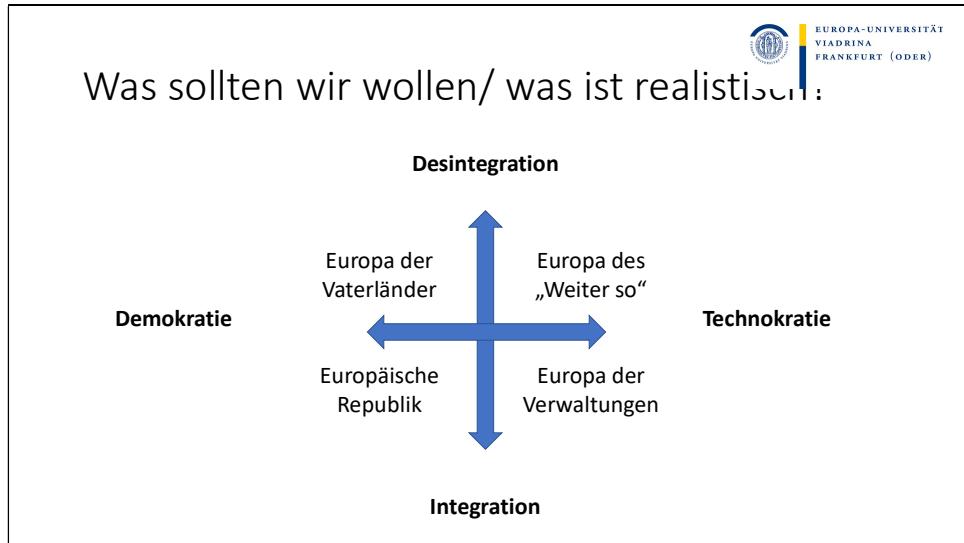
Demokratie

Desintegration



Tipping Point: EP-Wahlsieg
der Populisten als
Erweckungsmoment
(Klein-)Europa der Liberalen
Einstieg in Vergem.
Finanzpolitik
Initiativrecht und
Haushaltrecht für EP
„ever closer democracy“
Europäische Sozialpolitik
Neue Begeisterung für
Europa

Integration



Danke für Ihre Aufmerksamkeit

AUSTERITY AND SOCIAL RIGHTS

WELCOME SPEECH

Michael Pikramenos

I welcome you at the conference "Freedom and Social Rights" co-organised by Magistrats Européens pour la Démocratie et les Libertés (MEDEL) and the Association of Greek Judges for Democracy and Freedoms that is a member of MEDEL.

Today's conference forms part of a series of MEDEL conferences in the run-up to the election of representatives at the European Parliament. Two of these conferences have already taken place; the first on 1 March under the title "Immigration policy - For a Europe of Rights and Solidarity" and the second on 8 March in Berlin under the title "Law in the Times of Populism - Opportunities and Challenges: The Digital Revolution and European Democracy ", while on March 22, 2019, the last conference of these series will take place in Warsaw under the title "The Rule of Law from a European Perspective". MEDEL is comprised by 23 judges' associations from 16 countries around Europe and it has achieved great accomplishments in defending judicial independence, the rule of law, citizens' rights and freedoms and democracy. With announcements, conferences, seminars, performances at the European institutions, visits to all European countries, MEDEL is fighting for the institutions of democracy, proving that judges and prosecutors have public discourse and a sense of responsibility towards society, Europe and the European institutions.

Besides, MEDEL's initiative to hold four conferences in view of the European elections reveals the sensitivity of the Board and its members in front of critical problems of a difficult time that the institutions of liberal democracy are being tested by the screams of populism and the European construction is threatened by extreme political forces that have been born during the economic and social crisis of the last decade.

I would like to congratulate the MEDEL Board and, in particular, President Filipe Marques on the important initiative they have taken, but also on other initiatives that have been taken in favor of democracy, the rights and the independence of the judiciary in countries where there is a systematic violation of democratic institutions and the freedoms of the individual. This is a consistent democratic attitude that has to be praised.

On the occasion of today's conference, our Association, of which are members judges of all jurisdictions and prosecutors, celebrates its 30th anniversary since its establishment, having left its trail in the public life of the country through conferences and speeches, publication of books, its active participation in international and European affairs, with the aim, as defined in its statute, to defend the independence of the judiciary, the rule of law for citizens' rights and democracy.

The Honorary Vice President of the Council of State, President of the National Commission for Human Rights and Former Minister George Stavropoulos, who took the initiative to set up the Association, he was president and founder of its activity in Greece for many years, always

showing particular dedication and a great zeal for consolidating its action across the country as well as for continuous and productive contact with the European colleagues from MEDEL. He succeeded him in the presidency, where he remained for several years, the Honorary President of the Council of State and already Chairman of the Personal Data Protection Authority, Kostas Menoudakos, who continued the important activity of the Association stamping his work with his personality. Prosecutor Stavros Mantagiozidis, who assisted to promote the Association's activities and strengthen its presence both as President and as a member of the Board of Directors, while next in the presidency was Evi Palaiologou, from the judges of County Court, which has decisively contributed to the Association's action both within the country and in Europe with the excellent relations she has cultivated with her colleagues from MEDEL.

Many of its members contributed decisively to the Association's thirty-year productive course, which, either by their election to the Board of Directors, either by participating in the organisation of activities or by attending MEDEL events showed that Greek judges and prosecutors have a permanent, serious and productive presence in national and European developments on major issues concerning citizenship and democracy. I would like to mention that this tradition is continued by the members of the Association as well as the members of the Board of Directors during the current period 2017-2020: Margarita Steniotis, judge of Appeal Court, first vice-president,

the Vice-President of the Court of Auditors, Costas Tolis, second Vice-President, the judge of the Court of Appeal Maria Papadimitriou, General Secretary, the President of the Court of First Instance Alkis Feresidis, special secretary, the judge of the County Court Niki Metenitis, treasurer, the ex judge of the Court of Appeal Charilaos Kloukinas, the judge of the Court of First Instance Katerina Koutsopoulou and Prosecutor of the Court of First Instance Rosalia Lalli, members of the Board.

Warm thanks to those who have been invited to participate in the sessions of today's workshop with their presentations and to contribute to the debate on critical issues. In particular, I would like to thank the Board of Directors of the Association, the former President of the Constitutional Court of Portugal and Professor of Coimbra, Joaquim Coelho de Sousa Ribeiro, the European Commission's Head of Press, Margaritis Schinas, the Emeritus Professor of the University of Athens and former Minister Tassos Giannitsis, the judge of the Supreme Court of Cyprus Tefkros Ekonomou. Many thanks also to the representatives of the parties that have elected parliamentarians at the European Parliament for the current period, in particular to Deputy Minister Theano Photiou on behalf of SYRIZA, former Minister and MP K. Hatzidakis on behalf of New Democracy, to the former Minister, MP and Professor Andreas Loverdos on behalf of KINAL, Vangelis Katsiavas on behalf of KKE and to the Professor and MP Giorgos Mavrotas on behalf of Potami.

AUSTERITY AND SOCIAL RIGHTS

Filipe Marques

Your Excellency, the President of the Hellenic Parliament, Mr. Nikolaos Voutsis

Your Excellency, the Honorary Vice-President of the Council of State, Mr. Georgios Stavropoulos

Your Excellency, the President of the *Society of Greek Judges for Democracy and Liberties*, Mr. Michail Pikramenos

Your Excellencies, guest speakers:

Mr. Joaquim Sousa Ribeiro, former President of the Portuguese Constitutional Court

Ms. Dionysia Bitzouni, Judge of the Greek Supreme Court

Mr. Tefkros Economou, Justice of the Supreme Court of Cyprus

Mr. Margaritis Schinas, European Commission Chief Spokesperson

Mr. Tasos Giannitsis, Professor of the University of Athens

Your Excellencies, the representatives of the political parties

Dear colleagues from Greece and all the other MEDEL member associations

Ladies and Gentlemen,

I.

First of all, I would like to express my sincere appreciation and gratitude to the Hellenic Parliament, in the person of its President, Mr. Nikolaos Voutsis, for so kindly hosting this conference.

It is an honour and a privilege for MEDEL to debate such important issues in the House of Democracy, in the exact place of its birth, and this only reveals that you, Your Excellency, understand the importance of civil society and non-governmental organisations for a truly open and democratic Parliament. Once again, as in the past, may the Greek example in this matter inspire other Parliaments throughout the world.

II.

Secondly, I would like to congratulate the *Society of Greek Judges for Democracy and Liberties* for its 30th anniversary. It is a pleasure for us to participate in this joyful event, and an honour for MEDEL to count your association among our members. I would also like to extend a special word of gratitude to its president, Mr. Michail Pikramenos, for having enthusiastically embraced from the very first minute the project of organizing this conference and for the excellent programme he has put together.

Having "Democracy" in its name, MEDEL could not be more connected to Greece, as we have shown when in 2015 we decided to commemorate our 30th anniversary in this beautiful city of Athens.

III.

This is the third of a cycle of four conferences that MEDEL has organised in this month of March, in view of the European Parliament elections of the next month of May.

Trying to fight the low voter turnout and the discussion of exclusively domestic political facts

that usually are a characteristic of European Parliament elections, MEDEL – being a European NGO – felt the urge of contributing to the debate, trying to put truly European topics in the electoral agenda.

These elections come in a moment when Europe and the western democratic system face serious challenges that could shape it in the decades to come: massive immigration from poor and war-torn countries; the digital revolution and the challenges and risks of internet and the social media; the decrease of quality of life and the fear of even greater difficulties in the future; the attacks against the Judiciary in several countries, including in the European Union. All these factors have contributed to the rise of populist movements, who claim themselves as true bearers of the “will of the people”, but most of the times end up seeking to destroy democracy from the inside, using its own mechanisms, as Professors Steven LEVITSKY and Daniel ZIBLATT explain in their book *“How Democracies Die”* (New York: Crown Publishing Group, January 2018).

Those four topics (immigration, digital revolution, austerity and social rights and independence of the Judiciary and Rule of Law) are the ones that MEDEL wants to bring to light in this electoral period and we decided to discuss them in the places where they have most been felt:

- On the 2nd of March, in Rome, in cooperation with *Magistratura Democratica*, we were discussing the European Immigration Policy;
- On the 8th of March, with *Neue Richtervereinigung*, we debated the digital revolution and the future of democracy;
- Today, with the *Society of Greek Judges for Democracy and Liberties*, we will be addressing the topic of austerity and social rights;
- Finally, next Friday, March 22nd, in Warsaw, in cooperation with *Iustitia – Association of Polish Judges, Helsinki Foundation for Human Rights* and *Association 61*, we will discuss the Rule of Law from a European perspective.

We hope with this contribution not only to bring these points to the political agenda of the electoral campaign, but especially to draw attention to the important times we are living, and the decisive relevance of the political choices European citizens are called to make.

IV.

Today's conference is on a topic that can easily be viewed as merely economic.

The rise of an “economic speech” in the media that we have been witnessing in the last decades has many times led to the consideration of the problems of austerity as a merely economical, therefore purely technical, matter. In academic terms, it is all seen as the never-ending struggle between two main economic schools, as if *Keynes vs Hayek* could explain it all¹.

This perspective, however, fails to see the political implications of the problem.

Prof. Yascha MOUNK, in his book *The People Vs. Democracy – Why our Freedom is in Danger and How to Save It?* (Harvard University Press, 2018, p. 135), identifies as one of the three main reasons for the rise of populist movements the fact that, unlike what happened in the post-war decades (when citizens experienced a rapid increase in their way of life and created expectations of an even better future), citizens today fear that in the future they will have bigger difficulties and that their children will have worst conditions than theirs.

This fear many times leads to the search of greater stability, which often comes with the

¹ Nicholas WAPSHOTT, *Keynes Hayek: The Clash that Defined Modern Economics*, W. W. Norton & Company, Inc., New York, September 2012.

surrender of basic fundamental rights. For citizens who face hardship and see no positive impact of the work of their elected representatives in their daily lives, alternatives such as autocratic regimes or the so-called “illiberal democracies”, that in many parts of the world have proven to be economically successful, appear as tempting, even if they imply giving up many fundamental rights.

So, at the end it all comes down to democracy, not economy. In modern days, politicians, economists and technocrats often present “black and white” choices to citizens, saying they are unavoidable, as giving up privacy rights in exchange for protection against terrorism or giving up social rights in exchange for economic development. What this leads to is giving up democracy itself.

We believe this hasn't necessarily to be like this. The social consensus upon which democracy was built has been seriously shaken in the last decades, and austerity and the attacks on social rights have played there an important role. This does not mean, however, that democracy has failed or is inexorably on its way to the dustbin of history.

It is up to us – citizens, civil society, non-governmental organisations, politicians, economists and technicians – without unilateral visions of society or democracy, to find new forms of consensus on which democracy can work.

It is a modest contribution to this debate that MEDEL wants to make with this conference, which we hope will be highly interesting.

Thank you very much for your attention.

LES MESURES D'AUSTÉRITÉ ET LA COUR CONSTITUTIONNELLE PORTUGAISE

Joaquim de Sousa Ribeiro

1. La crise de la dette souveraine et les difficultés subséquentes de financement de l'État portugais l'ont conduit à prendre, entre 2010 et 2014, des mesures d'austérité drastiques. Pour l'essentiel, celles-ci se sont traduites par des baisses de salaires des fonctionnaires et des pensions de retraite et de bien d'autres prestations pour la sécurité sociale, par des hausses d'impôts, par l'imposition d'une contribution extraordinaire pour la sécurité sociale et par la flexibilisation des relations de travail. La plupart de ces mesures furent introduites dans les lois des Budgets de l'État et présentées, à partir de 2012, comme donnant exécution aux Protocoles d'Accord, célébrés avec la Commission Européenne, la Banque Centrale Européenne et le Fonds Monétaire International – ladite TROIKA.

Leur mise en œuvre a déclenché une confrontation politique et sociale qui a rapidement fait irruption sur l'arène de la juridiction constitutionnelle. Ceci fut facilité par la raison que la Constitution Portugaise prévoit qu'un dixième des députés, à savoir 23 députés, peut requérir auprès de la Cour Constitutionnelle la déclaration d'inconstitutionnalité des normes légales, ayant force obligatoire générale. Des groupes de députés des partis de gauche, alors dans l'opposition, ont fait un usage systématique de cette ressource, et ont contesté des normes portant sur des mesures d'austérité figurant dans toutes les lois des Budgets de l'État entre 2011 et 2014. Une telle initiative fut également prise, pour ce qui est du Budget 2013, par le Président de la République et l'Ombudsman.

La portée de ces normes suscite, à vue de la Constitution Portugaise, des questions pertinentes de constitutionnalité, puisque celle-ci consacre, en même temps que les traditionnels droits de liberté, une longue liste de droits économiques et sociaux, ayant le statut de véritables droits fondamentaux. Parmi eux, la Constitution prévoit spécifiquement le *droit à la rémunération du travail*, «de manière à garantir une existence digne» et le *droit à la sécurité sociale* grâce à un système de protection des citoyens dans des situations “de manque ou de baisse des moyens de subsistance ou d'aptitude au travail”, ‘notamment en cas de maladie, de vieillesse ou de chômage.

Les nombreux arrêts par lesquels la Cour Constitutionnelle a apporté une réponse aux demandes de fiscalisation de constitutionnalité des normes d'austérité constituent, dans leur ensemble, ce que l'on désignera par la suite par “jurisprudence de la crise”. Ce sont les traits essentiels de cette jurisprudence que je me propose de vous exposer ici.

2. Dans toutes ces décisions, la Cour a reconnu la légitimité des mesures extraordinaires de réduction du déficit budgétaire, face à la gravité de la situation financière.

Mais, de la même manière, elle a rejeté l'idée de l'inévitabilité des choix concrètement faits, comme les seuls conformes à la rationalité économique et financière, et indispensables pour une sortie de la crise.

La Cour ne s'est jamais montrée complaisante avec cette perspective fonctionnaliste. Au contraire, il est implicite dans ses décisions que, malgré les circonstances exceptionnelles, elle considérait que la normativité constitutionnelle devait rester pleinement en vigueur.

Il n'y a qu'une seule Constitution, et pas une Constitution de la crise et une Constitution de la normalité. Pour la Cour, la crise fut un facteur de pondération dans l'application des paramètres constitutionnels, non une cause justifiant la suspension de leur validité. Elle n'a donc jamais fait le moindre doute que la crise ne mettait pas les droits sociaux à la disposition du législateur. Mais la Cour a également reconnu que les obligations et les contraintes engendrées par une situation que l'on définissait comme "absolument exceptionnelle" devaient être prises en compte, à leur juste mesure, lors d'une évaluation ouverte et contextualisée, ce qui a abouti à certaines décisions de non-institutionnalité, qui, dans un autre contexte, n'auraient pas été dans ce sens.

Comme on l'a laissé clairement écrit dans l'Arrêt n.º 353/2012: «*La Constitution ne peut aucunement être indifférente à la réalité économique et financière et en particulier au constat d'une situation qui peut être considérée comme étant d'une difficulté extrême. Mais elle jouit d'une autonomie normative spécifique qui empêche que les objectifs économiques et financiers prévalent sans limites (,,,)».*

3. Traiter certaines interventions législatives comme des limitations aux droits fondamentaux presuppose qu'on en détermine, au préalable, le contenu. Or, on extrait difficilement, de la plupart des normes consacrant les droits sociaux, un contenu précis des garanties, vu leur faible densité normative. Par ailleurs, s'agissant d'un *facere*, des conduites positives dont l'État est en charge, il existe de nombreuses options possibles, ce qui rend les droits sociaux plus ou moins à même de satisfaction. Et en général la Constitution ne se compromet pas avec des niveaux de satisfaction déterminés.

Néanmoins, ce qui était en cause, dans le cadre de la crise, c'était la régression du niveau déjà atteint de réalisation de droits sociaux, au cours de la médiation législative précédente. Or, la Cour Constitutionnelle est partie du principe que, lorsque la législation ordinaire a donné un visage précis à ces droits, la concrétisation ainsi obtenue, est, dès lors, directement protégée par la Constitution. Comme on le sait, ce point se prête à de multiples controverses de dogmatique constitutionnelle. La Cour n'est pas entrée dans des considérations théoriques d'encadrement justificatif, mais elle s'est toujours régie par la certitude que, avec la détermination qu'ils acquièrent à travers la concrétisation légale, les droits sociaux acquièrent également une capacité de résistance aux changements normatifs en contractant leur degré de réalisation.

4. Cette orientation a permis à la Cour de contrôler la constitutionnalité des interventions législatives de réduction des droits sociaux, suivant la méthodologie applicable aux restrictions aux droits fondamentaux, avec l'élargissement de la justification à des causes financières. Une fois admise, comme condition préalable, l'admissibilité de ces fins, il fallait vérifier si, dans leur cas concret, les mesures contestées respectaient les principes constitutionnels structurants. Presque tous les principes furent convoqués, en particulier ceux de *proportionnalité*, *d'égalité* et de *protection de la confiance*.

Dans son rôle de contrôle, la Cour n'a, en général, pas adopté, s'agissant des droits à objet pécuniaire, un critère, disons, *substantialiste*, dans lequel, en se focalisant sur la

protection de chaque droit, elle évaluerait si un contenu, vu comme inviolable, avait été affecté. Elle ne l'a fait que dans un cas, sur lequel je reviendrais, dans lequel la mesure portait atteinte au *droit au minimum de subsistance*. Ce droit, encore qu'il ne soit pas entériné expressément dans la Constitution, avait été reconnu, par un Arrêt de 2002, comme un corollaire du *principe de la dignité de la personne humaine*.

Il n'en reste pas moins évident que le montant des baisses de salaires et de pensions a beaucoup pesé sur le sens des décisions. Non en soi, du point de vue de l'intangibilité d'un "*minimum core*", puisqu'il n'est pas possible, dans le cadre spécifique de chaque droit social, de le fixer précisément. Mais plutôt comme l'expression quantitative du sacrifice infligé, pour le pondérer, suivant des critères de proportionnalité, avec les bénéfices recherchés.

La Cour a eu également le souci de distinguer les solutions à caractère temporaire de celles à caractère définitif, les premières étant plus facilement acceptables. Dans certains cas, la qualification s'est avérée difficile et a suscité des controverses, devant une formulation législative qui n'est pas toujours explicite.

Le sens des décisions fut aussi influencé par la mesure où les droits des plus démunis, de la population à maigres ressources, ont été sauvegardés. Ce critère reflète les valeurs inscrites dans le programme constitutionnel de l'État social, qu'il faut préserver dans la mesure du possible, et ce même dans le cadre de mesures régressives ou onéreuses.

5. Voilà esquisonné le panorama général. Je vais maintenant passer à une analyse casuistique.

Parmi les interventions concernant les recettes, à travers les hausses d'impôts, il faut souligner celles qui, dans le Budget 2013, ont porté sur le régime de l'impôt sur le revenu. La Cour a estimé qu'aucune d'elles ne violait les règles et les principes de la constitution fiscale.

Le Budget 2013 a également remanié ladite *contribution extraordinaire de solidarité*, qui s'est alors appliquée sur les pensions supérieures à 1350 euros, avec une progressivité extraordinaire des taux, allant de 3,5% à 50%. Il a beaucoup été discuté si cette contribution devait être considérée comme un impôt, ce qui aboutirait à une décision d'inconstitutionnalité. La Cour a plutôt choisi de la qualifier comme une "contribution financière en faveur des services publics" – une catégorie constitutionnellement prévue, à côté des impôts et des taxes.

L'appréciation de sa constitutionnalité est l'une de celles qui a le plus divisé la Cour. Il fut décidé, à 7 votes contre 6, qu'elle n'était pas inconstitutionnelle.

Si les mesures d'aggravation fiscale ont échappé à des déclarations d'inconstitutionnalité, il n'en va pas de même pour ce qui est des baisses des salaires des fonctionnaires et des pensions.

Seules les premières baisses, dans le Budget 2011, portant sur les revenus supérieurs à 1500 euros, avec une progressivité des taux pouvant atteindre les 10%, ne furent pas déclarées constitutionnellement non conformes. Il a été considéré que d'autres solutions qui auraient pu mieux préserver l'égalité dans la distribution des charges publiques n'auraient pas produit, à court terme, des résultats aussi immédiats et sûrs dans la réduction du déficit budgétaire. Ainsi, la mesure était pertinente et nécessaire, et se situait encore dans les limites d'un sacrifice non excessif, vu son caractère temporaire et les montants des réductions.

Le Budget 2012 a beaucoup aggravé le montant des baisses, puisque, on a ajouté, à la réduction imposée initialement, et qui est restée en vigueur, la suspension, à partir de 600 euros, du versement du treizième mois et des congés payés, correspondant chacun à un

montant équivalent à celui d'un salaire mensuel. La norme fut déclarée inconstitutionnelle, par un arrêt de juillet 2012. Si l'on avait suivi le régime normal, la déclaration aurait eu des effets rétroactifs. Mais la Cour, exerçant un pouvoir que la Constitution lui confère, a limité la validité temporelle de la déclaration, en ne l'appliquant pas à l'année budgétaire en cours. Le Budget 2013 a suspendu seulement le versement des congés payés, pour autant la décision de la Cour est allée dans le même sens d'inconstitutionnalité. Il en est allé de même pour ce qui est des baisses prévues dans le Budget 2014.

Toutes ces déclarations d'inconstitutionnalité se sont appuyées sur la violation du principe d'égalité, associé à des paramètres de proportionnalité.

La convocation du principe d'égalité était incontournable, puisque, étant en cause un intérêt public concernant tous les citoyens, seuls deux groupes étaient frappés par cette mesure : les fonctionnaires et agents de la fonction publique et les retraités.

Le principe d'égalité repose sur des critères plus ou moins exigeants ce qui explique que le résultat de son application puisse diverger selon le critère utilisé.

Entendu comme simple *interdiction de l'arbitraire*, ce principe n'allait pas à l'encontre de la conformité constitutionnelle. En vérité, la différence de traitement avait un fondement plausible, rationnel. Dans le cadre d'une stratégie de réduction à court terme de la dépense publique, il semblait sensé que les baisses portent sur ce qui pesait le plus sur le budget de l'État : les rémunérations payées par les deniers publics – les seules dont l'État pourrait se saisir. Du point de vue du contexte et de la fin des normes, la solution trouvée pourrait difficilement être considérée comme arbitraire.

Mais l'interdiction de l'arbitraire n'est que l'expression la plus immédiate et élémentaire du principe d'égalité. Il y a des disparités de traitement qui heurtent les exigences d'égalité sans que, pour autant, elles puissent être qualifiées d'arbitraires. Dans le cas en question, on se trouvait devant un traitement différent de certaines catégories d'individus, à qui on avait imposé, en touchant à leurs droits fondamentaux, un lourd sacrifice dont les autres étaient exonérés. C'est pourquoi, on a considéré qu'il était justifié d'appliquer un critère rigoureux d'égalité, dans un examen strict de la constitutionnalité.

La Cour a alors avancé vers un second niveau d'évaluation, dans lequel elle devait juger si l'inégalité de traitement, en soi justifiée, restait encore, au niveau où elle avait été concrétisée, dans les limites raisonnables et proportionnées. Elle a non seulement examiné la rationalité du fondement pour établir cette différence, mais aussi la raisonnableté de la mesure de la différenciation. Comme elle l'a expliqué dans l'Arrêt n.º187/2013:

«[l'inégalité de traitement devra, quant à la mesure dans laquelle elle se trouve imposée, être proportionnelle, tant aux raisons qui justifient le traitement inégal (...), qu'à la mesure de la différence qu'on constate entre le groupe des destinataires de la norme différenciatrice et le groupe de ceux qui sont exclus de ses effets (...)]».

6. Dans un cas, le principe de la proportionnalité a mis en lumière une dimension autonome de *raisonnableté*.

La proportionnalité valorise le poids relatif des sacrifices et des avantages, et la relation pondérée des moyens et des fins. Mais cette opération doit être soumise à une restriction déontologique, résultant de la non-valeur intrinsèque du contenu de la mesure

restrictive. Dans certains cas, la gravité du sacrifice imposé est d'une telle portée, la sphère privée des gens touchés étant si gravement atteinte, que, quel que soit le poids des avantages recherchés, elle surpassé ce qui peut être raisonnablement tenu pour tolérable.

Ce jugement de *raisonnabilité* fut appliqué par la Cour aux *contributions sur les allocations de santé et de chômage*, de 5% et 6%, respectivement, décrétées dans le Budget 2013. Ces contributions qui, dans la pratique, constituaient des baisses du montant des prestations, furent déclarées inconstitutionnelles. La décision s'est fondée sur l'inexistence d'une *clause de sauvegarde* établissant des limites minimales, ce qui remettait en cause le *droit à vivre dignement*.

Dans le Budget 2014, le législateur, ayant introduit cette clause de sauvegarde, a persisté dans la mise en œuvre de cette mesure. Pour autant, la Cour a réitéré sa déclaration d'inconstitutionnalité. La déclaration s'est alors appuyée sur le fondement explicite de violation du *principe de raisonnableté*, dans la mesure où elle affectait des individus particulièrement vulnérables, et qu'elle aggravait des carences antérieures provoquées par la baisse considérable des revenus du travail.

7. Un autre principe convoqué dans presque toutes les décisions fut celui de la *protection de la confiance*. Ce principe ne jouit pas d'une consécration constitutionnelle explicite, mais il est unanimement considéré comme une dimension subjective du principe de sécurité juridique, inscrit dans le principe de l'État de droit.

Le champ d'application du principe de la *protection de la confiance* est constitué, par excellence, par les solutions légales d'*efficacité rétrospective*. Si la loi rétrospective produit des effets seulement pour l'avenir, contrairement aux lois de rétroactivité pure, elle porte sur des situations instaurées et régies par une loi antérieure qu'elle révoque ou modifie.

La Cour a toujours considéré que, lorsque cela se produit, quand les choix législatifs ont, d'une manière quelconque, des répercussions sur le passé, la liberté du législateur, découlant du principe démocratique, n'est pas illimitée. Il faut répondre aux attentes légitimement fondées dans la continuité de l'ordre juridique, en fonction desquelles les citoyens ont organisé leurs vies.

Mais les conditions, pour reconnaître comme légitime une position de confiance, ont toujours été fixées de manière très exigeante, justement parce que leur tutelle contrarie la liberté basique de conformation législative. Et il ne suffit pas que ces exigences soient remplies : la trahison de la confiance n'est inadmissible que lorsqu'elle n'est pas justifiée par la sauvegarde d'un intérêt public qui, suivant des critères de proportionnalité, doit prévaloir.

Les modifications introduites dans le régime des retraites ont fourni une bonne aubaine pour l'application de ces directives. Avant la crise, les nouvelles solutions avaient ciblé seulement l'âge de départ à la retraite et les modalités de calcul des futures pensions. On remettait en cause un droit encore en formation. La Cour a toujours considéré qu'il n'était pas légitime de supposer que l'objet de ce droit se maintiendrait inaltérable, quelles que soient les circonstances à venir.

Ce que la crise a apporté de nouveau c'est l'atteinte au droit à la pension, comme un droit actuel, certain et liquide, déjà constitué dans la sphère juridique de son titulaire.

La Cour a reconnu qu'il existait ici une position de confiance, requérant un haut degré de tutelle, ce qui, dans certains cas, a conduit à des déclarations d'inconstitutionnalité. C'est ce qui s'est produit, quant à la *contribution de soutenabilité*, de 2% à 3,5% sur le montant

mensuel des pensions. En provoquant, dans la pratique, une baisse définitive des pensions versées, l'intensité de ce sacrifice exigeait l'indication précise et motivée d'un intérêt public supérieur, la Cour jugeant qu'il ne suffisait pas d'*«invoquer génériquement un objectif de soutenabilité du système public des retraites»*.

On a suivi ici, avec une évidence toute particulière, la "loi de pondération" de Robert Alexy. L'Arrêt l'a formulée dans les termes suivants: *«plus le degré de non satisfaction d'un principe constitutionnel est intense (...) plus intense encore doit être la raison qui justifie cette non satisfaction»*.

Le principe de la protection de la confiance a également servi de fondement à la déclaration d'inconstitutionnalité concernant la baisse permanente de 10% des pensions de retraite des anciens fonctionnaires publics, d'un montant brut mensuel supérieur à 600 euros. La mesure fut prise sous le prétexte de promouvoir une convergence avec le régime général, considéré comme moins favorable. La Cour a jugé, à une rare unanimité, que cela n'avait pas été suffisamment démontré et a estimé que la confiance des retraités, par rapport à la continuité des critères légaux, ne pouvait être frustrée, par le même législateur qui les avait mis en vigueur, que lors d'une réforme structurelle du système de sécurité sociale. Or, cette baisse des pensions ne représentait qu'une mesure isolée et aléatoire de baisse des dépenses. Et quand bien même on admettrait que l'intérêt public pouvait justifier cette baisse, une conciliation juste avec les expectatives des gens frappés par la mesure, dans une situation juridique qui demande la stabilité, imposerait des *solutions gradualistes* qui viendraient à atténuer l'impact des mesures sacrificielles.

8. Je vais conclure.

La tâche de contrôler la constitutionnalité d'une véritable avalanche de mesures d'austérité, dont je viens de vous brosser un portrait très partiel, a constitué pour la Cour Constitutionnelle portugaise un grand défi. Par-dessus tout, la Cour a dû agir dans une atmosphère de médiatisation exacerbée et sous la pression de certains acteurs politiques, y compris des hauts représentants des institutions européennes.

Dans ce contexte difficile, ce qui est demandé à une cour constitutionnelle c'est que, dans l'exercice de ses pouvoirs souverains, elle reste fidèle à sa fonction juridictionnelle indépendante. Sans se dérober mais aussi sans outrepasser les limites de sa compétence propre.

Je crois que la Cour Constitutionnelle portugaise a suivi cette ligne d'action.

AUSTERITY AND SOCIAL RIGHTS

A COLLUSIVE RELATIONSHIP

George Stavropoulos

Social rights have been somewhat late in human rights. The defensive protection of individual rights against state insults was reasonably preceded, as well as the safeguarding of the civil rights which has been necessary for the functioning of democratic politics. However, social rights are equally important, as they aim at protecting the most vulnerable groups, such as patients, unemployed, children, elderly, disabled, etc., and this is of particular importance to the low-income people. The more specific content of these rights was not stable, as it was often interdependent with the economic development of the particular country in question. This lasting clash of economic and social elements has been their great weakness.

However, the economic measures that are adopted at the time in order to develop a country or to deal with an economic crisis cannot ignore their respective implications on human rights. As early as the year 1979, the Secretary-General of the United Nations had highlighted the need to study the impact on human rights before adopting specific, of an economic nature, measures. It has been pointed out that the model of environmental impact studies should also be applied regarding the impact on human rights. This has been highlighted not only by the UN bodies (including the Committee on the Application of Social, Economic and Political Rights, the Committee on the Rights of the Child and others), but also by the European Union institutions such as the European Commission and the European Ombudsman.

Economic times, however, are often relentless. The global economic crisis that preceded, and the bad economic policies led to the adoption, in some countries, of austerity measures. Especially in our country, uncontrolled lending and poor management of public finances led the economy to the brink of collapse. The country's fiscal needs were temporarily met with the money provided by the Memoranda of Understanding, except that the fulfillment of the conditions for payment had adverse consequences for the enjoyment of human rights. The Declaration of the National Commission on Human Rights of 15.7.2015, which states that the imposed austerity measures have affected the constitutionally guaranteed human rights, such as the principle of equality and its more specific expression, the principle of the contribution of citizens to public charges in proportion to their means, their rights to equal access to education, the enjoyment of the right to property, to health, to work, to social security, to trade union freedom, to the principle of social solidarity, while the principles of proportionality and the protection of public confidence in state institutions were not respected. It has been stressed that the austerity measures have even undermined the very value of man, the respect and protection of which is a primary duty of the State, and seriously hampered the development of each person's personality but also shook the social rule of law. The same findings were reached by the Association of Greek Judges and Public Prosecutors for the democracy and the liberties in the Announcements of 15.12.2013 and 24.2.2014, while

especially in the first one it is pointed out that the under-operation of the social rule of law provided by the Constitution has reached a marginal point.

The general unfavorable impact of the austerity measures on human rights has been highlighted in international texts, including the European Parliament (Resolutions of 18.4.2013 and 13.3.2014), the Parliamentary Assembly of the Council of Europe (Resolutions 1884/2012 and 2035/2015), the Commission of the International Council of the United Nations. on economic, social and cultural rights (2012). The reaction to the austerity measures in Greece, in particular the one from the European Committee of Social Rights, was significant, as it highlighted that the impact on human rights was not assessed in the austerity measures. In particular, the European Committee of Social Rights stated that setting lower wages for young people without assessing their impact and without taking measures to support those affected was a degradation of the living standards of young people and a discrimination against them in violation of the European Social Charter. The European Commission also considered that some reductions in insurance benefits were not, in themselves, a breach of the European Social Charter, but their cumulative effect brought about a significant deterioration in the standard of living of many pensioners. The EU Commission has also pointed out that, by failing to investigate and substantively analyze the impact of such important measures, the Government did not find out whether other measures could be adopted in order to reduce their damaging consequences in any event [appeals in the years 2011 and 2012].

The austerity measures imposed on Greece as conditions for its lending in the context of fiscal consolidation programs were taken, on the basis of invocation, on particularly serious grounds of public, general or social or financial interest and with the aim to ensure the sustainability of social security institutions. The Council of State with its first Judgment No 668/2012 and other subsequent judgments, limited its control to a marginal review of the constitutionality of the austerity measures implemented under the First Memorandum, considered that the measures in question were not, in principle, inappropriate, but noted that the general legislative intervention in the property (in the broad sense) of the persons affected must not be disproportionate to the objective of public interest pursued. The Court further accepted that, in principle, it cannot be excluded that the level of salary or pension benefit is differentiated on the prevailing current conditions, but noted that the reductions cannot jeopardize the dignity of the people concerned.

The obligation of social solidarity, in the event of a particularly serious financial problem or to ensure the viability of social security institutions, but the measures taken must also respect the principles of equality and proportionality. The austerity measures imposed by the First Memorandum were rather limited and were judged by the above judgment, constitutionally. But, the other pension reductions which had followed after about two years, in particular by Law 4093/2012, were no longer judged constitutionally tolerated by the Council of State. In its judgment No 2287/2015, the Supreme Administrative Court emphasized the following: that the State, as a guarantor, ought to ensure the adequacy of benefits and the viability of the Insurance Funds in the form of public entities and has also the primary responsibility for covering their deficits. Retirement benefits must be capable of ensuring a satisfactory standard of living as close as possible to that earned by the insured person during his / her working life. In the case of extremely unfavorable budgetary conditions, it can not be ruled out that pensions are now reduced, but this reduction can not be unlimited in order not

to breach the core of the pension entitlement and to deny the dignity of pensioners. For this purpose, the State should draw up a prior study on the impact of pension reductions on diet, clothing, housing, hygiene, health care and social retirement, taking into account both previous pension cuts and the state of the economy in terms of employment and tax burdens. It was also necessary to take into account the cost of goods and the retirement debt obligations of the pensioners. For the new pension reductions, no such impact study was preceded with the use of the above criteria, and these reductions were imposed later than the initial ones when there was no longer a threat of an immediate collapse of the economy, because only in circumstances like these a study would not be required, and solely the legislator's justification would suffice. The Court also noted that the newer reductions undermined the equitable balance between the general interest and the property rights of pensioners, as set out in Article 1 of the First Additional Protocol to the ECHR.

Similar to these, were the judgments of the Portuguese, Latvian, Estonian, and Spanish courts, and essentially the German's Federal Constitutional Court.

The reflection that arises not only from the recent Greek experience, addresses the question of whether austerity and social rights may or may not coexist. Does the value element collide with the economic one? The answer seems to be affirmative in practice as the economic element is absolutely dominant, and the International Memoranda of Understanding nowhere seem to predict the impact of any budgetary adjustment on human rights, and especially on social rights, contrary to the explicit imperatives of the international legality. Particularly frustrating was the attitude of certain European Union institutions, which, ignoring explicit commitments stemming from the Charter of Fundamental Rights of the Union itself and from other legal texts of both primary and secondary European law, ignored the need to support of the income of the weaker, despite the so frequent labeling in many official texts of the principle of solidarity within the Union.

Austerity in Greece lasted very long and had a particularly painful cumulative effect on most sections of the population. Let us hope that the many mistakes made, on almost all sides, both Greek and foreign, will not be repeated in the future.

AUSTERITY AND SOCIAL STATE IN CRISIS

Tassos Giannitsis

The concept of 'Social State' is based on three important levers: an economic, a social and an institutional one. A society that fails to achieve satisfactory levels of economic growth is compelled to have a weak Social State (in absolute terms). Conversely, a society having as its main objective economic growth while degrading the importance of the social dimension is doomed to fail in terms of economic welfare and living standards as well. These two dimensions require a strong, stable but adaptive and efficient institutional system. Successful paradigms refer to societies that have achieved a stable and effective balance between these three dimensions. The determinants of such an equilibrium cannot be prescribed. Success is based on the contribution of various heterogeneous factors, including patterns of governance, dominant perceptions, historical memory, pragmatism, a flexibility to respond successfully to the challenges of the times and wider social capabilities.

The conventional criterion of social protection is the relation of public expenditure on social protection to GDP. However, a range of policies and expenditures such as expenditure for education, health, public safety and security or the judiciary system, are not included in the formal definition of social expenses, even though they affect significantly the level and quality of social protection. Furthermore, expenses reflect only one aspect of social protection. It is important to focus also on changes of the disposable income of households caused by changes on taxation and, in particular, by decreasing other types of public expenditure. To the extent that the disposable income is reduced as a result of increased taxes and social contributions or because private expenses have to be increased as a result of lower provision of specific public services, even if public expenditure on social protection remains stable, social protection is negatively affected. Last but not least, social protection differs if public expenditure is indeed benefiting individuals in need or is granted in the framework of clientelistic practices.

1. Social policy in Greece and the crisis

During the years of crisis (2009 to today) Greece experienced the greatest decline since the mid of the last century in the living standards and the social status of the largest part of society, followed by serious upheavals regarding the structure of the social protection. In particular:

- In 2009 Greece ranked 11th among the EU-28 countries in terms of expenditure on social protection to GDP (24.8% vs. 28.7%), while in 2016 it ranked 10th (26.6% vs. 28.1% of EU-28 average). However, Greece was the only country among the crisis countries (Greece, Ireland, Portugal, Spain, Cyprus), that experienced a decline of the expenditure on social protection in absolute terms (-5.5% between 2007 and 2016). All other countries attained important increases. Furthermore, the increase of the ratio 'expenditure on social protection to GDP' in Greece by 1.8 percent points is a general indicator hiding crucial and significant changes at a more detailed level.

- Expenditure on social protection in Greece compared to the average of EU countries reveals a significantly different distribution. About 66.5% of total social expenditure is directed to pensions (compared to an average of 44.8% in the EU-28 countries), while the rest (i.e. 33.5%, compared to 55.2% in the EU-28) is directed to cover poverty, disability, etc. This difference reveals a strong asymmetry in the coverage of poverty and other basic needs of the weaker social strata.

- Regarding pensions, Greece is faced with a disastrous failure for which governments and society have been completely responsible, and the disaster is not over yet. The cumulative deficits created by the pension system between 2001 and 2009 which have been covered by state funding, amounted to 134 billion EUR and corresponded to 84% of the increase in total public debt in the same period. In the name of social sensitivity, the pension-pillar proved to be the most powerful lever of the derailment of the social protection of millions of citizens and of an unprecedented economic, social and political destabilization of the country, with far reaching implications.

- It could be assumed that, precisely because of the relatively high rank of Greece in terms of Social Expenditure to GDP, the country would have a similarly good position among EU countries regarding inequality and poverty. In fact, the reality was exactly the opposite. Before crisis Greece ranked among the top five OECD countries with highest inequality. During the crisis inequality increased slightly in the years 2010-14, to fall back to its previous level afterwards. Equally, in 2017, Greece held the top position regarding poverty risk, with 20.2% (as against 20.1% in 2008), compared to an average of 16.9% of the EU-28 countries (16.6% in 2008, respectively).

Overall, a system of social protection has been established in the country which, though exceeding that of many other European countries in quantitative terms, was at the same time associated with comparatively higher levels of inequality and poverty. Shall the goal of social policy be to tackle social problems such as poverty, inequality, exclusion and lack of trust in social and political institutions, an oxymoron is evident in the case of Greece.

1.1. Crisis and Incomes

GDP of Greece was reduced by about 25% in the period since the onset of the crisis in 2009 until the end of 2018. Additional taxation further reduced incomes by an average 9% compared to before-crisis tax burden, while it was also imposed asymmetrically upon low and high incomes (see Table 1). Hence, taking into account the tax increases (direct, indirect and real estate taxes) during the crisis, the total disposable income dropped by 38%-39%. In reality, this is an average figure. Incomes were reduced by this rate for a part of citizens, another part suffered from much higher income losses (up to 90%), for others the reduction was much less, while some others succeeded in improving their income. The figures in Table 2 show the development of the cumulative income from different sources (before taxes) for all households between 2008 and 2012, while Table 3 shows the very different changes which affected the household's income as distinguished by deciles.

Table 1: Tax burden on lower and higher income deciles

	Average tax burden per household, in EUR		Total tax burden for each group of deciles, in EUR millions		% change 2012/2008
	2008	2012	2008	2012	
Direct taxes					
Lower income deciles (1-5)	103.3	233.2	269.9	609.6	125.9
Higher income deciles (6-10)	4,722.0	4,298.5	12,341.1	11,234.1	-9.0
Property taxes					
Lower income deciles (1-5)	20.2	307.1	52.8	802.6	1,420.1
Higher income deciles (6-10)	80.1	937.9	209.3	2,451.1	1,071.1
Total					
Lower income deciles (1-5)	123.5	540.3	322.6	1,412.1	337.7
Higher income deciles (6-10)	4,802.1	5,236.3	12,550.4	13,685.2	9.0
Structure (%)					
Lower income deciles (1-5)	2.5	9.4			
Higher income deciles (6-10)	97.5	90.6			

Source: Calculations based on tax data in T. Giannitsis, St. Zografakis, Crisis management in Greece. The shaping of new economic and social balances (Hans Böckler Stiftung, IMK Studies Nr. 58, 2018)

Table 2: Total annual declared income by sources (in EUR millions)

	2008	2012	% change	2008-2012 Change
1. Wages and Salaries	47,817.8	34,736.5	-27.4	-13,081.3
2. Pensions	25,767.6	29,077.3	+12.8	3,309.7
3. Income from business activities	9,306.1	4,902.8	-47.3	-4,403.3
4. Income from self-employment	4,423.7	3,196.2	-27.7	-1,227.5
5. Income from agricultural activities and subsidies	3,041.4	3,838.3	+26.2	796.9
6. Income from dividends, earnings	16,250.7	7,542.5	-53.6	-8,708.2
7. Rents	8,861.2	7,066.3	-20.3	-1,794.9
8. Other incomes	5,320.4	3,121.7	-41.3	-2,198.7
9. Total income (1-8)	120,788.9	93,481.6	-22.6	-27,307.3
10. Income from capital (3+5+6+7)	37,459.4	23,350.0	-37.7	-14,109.4
Ratio:	2008	2012	Diff.	
11. (1) / (10)	1.28	1.49	+0.21	
12. (1) / (4)	10.81	10.87	+0.06	
13. (1) / (4+10)	1.14	1.31	+0.16	

Source: Calculations based on tax data in T. Giannitsis, St. Zografakis, Crisis management in Greece. The shaping of new economic and social balances (Hans Böckler Stiftung, IMK Studies Nr. 58, 2018)

1.2. Pauperisation and poverty

Such large income cuts entailed a widespread pauperization of most social strata, which probably was the most important impact of the crisis. Despite the broader pauperization of the

Greek society, the poverty rate rose by just 0.1 percentage points between 2008 and 2017². This curiosum is explained by the fact that the poverty index is related to the average income in a society. Poor, according to the prevailing definition, is anyone with an income of less than 60% of the median income per capita. Consequently, when the average income of the whole society drops by 25%, then the poverty threshold drops accordingly. However, in contrast to the relatively small deterioration of the poverty rate, the ‘intensity of poverty’ –how poor the poor are- has seriously increased³.

Table 3: Evolution of annual total income of households including imputed income (in EUR), by deciles of income

Deciles	2008	2012	2012/2008 %
1st	1.247	5.575	347.1
2nd	5.423	6.877	26.8
3rd	8.294	8.460	2.0
4th	10.942	9.915	-9.4
5th	13.645	12.105	-11.3
6th	17.146	14.736	-14.1
7th	21.632	17.686	-18.2
8th	27.990	21.855	-21.9
9th	38.733	29.037	-25.0
10th	86.034	52.598	-38.9
Total	23.109	17.884	-22.6
Top 1%	265.855	110.695	-58.4
Top 0.1%	1.106.894	295.115	-73.3

Source: Calculations based on tax data, in T. Giannitsis, St. Zografakis, Crisis management in Greece. The shaping of new economic and social balances (Hans Böckler Stiftung, IMK Studies Nr. 58, 2018)

1.3. The impact of shrinking public expenses

In addition to decreasing income and increasing tax burden, households were hit by severe cuts in public services, striking all categories of social protection except pensions. Table 4 shows the significant cuts which have been made regarding unemployment, sickness, disability and family support. A further effect of such cuts is reflected on an increasing private expenditure for health, education and other basic services, which is not shown in the Table.

Table 5 shows the extremely low public support for the unemployed. State unemployment benefit represents only 9.5% of the income of the poorest households the members of which belong to wage earners or unemployed persons. Equally, out of the recorded 1.1 million unemployed in Greece, only ca. 110 thousand receive the official unemployment benefit. In fact, unemployed persons are under a wider pressure. They are lacking employment, income

2 Based on EU-SILC data.

3 T. Giannitsis, St. Zografakis, Crisis management in Greece. The shaping of new economic and social balances (Hans Böckler Stiftung, p_imk_studies 58_2018), p. 180.

and government support and they are facing worsening conditions in health care and other social services.

Table 4: Expenditures on Social Protection (ESSPROS data)

	Million Euro				Percentage structure			
	2008	2012	2014	2016	2008	2012	2014	2016
Sickness	15,213	11,325	8,303	9,354	28.2	21.6	18.2	20.5
Disability	3,334	3,361	2,938	2,691	6.2	6.4	6.4	5.9
Old age	25,311	28,081	25,199	25,097	46.9	53.6	55.3	55
Widowhood	5,092	5,042	4,554	4,640	9.4	9.6	10	10.2
Family	2,101	1,855	2,040	1,812	3.9	3.5	4.5	4
Unemployment	2,849	2,641	1,908	1,691	5.3	5	4.2	3.7
Social exclusion	95	124	614	376	0.2	0.2	1.3	0.8
Total	53,995	52,429	45,556	45,661	100	100	100	100

Source: ELSTAT

Table 5: Income sources of households with an unemployed head and low incomes

– From work	0.9
– From old age pension	2.1
– From survivor's pension	7.8
– From disability pension	1.4
– From property	4.9
– From other members of the household	8.2
– From persons which are not members of the household	54.2
– From state benefits/allowances	9.5
– Do not know/Do not answer	11.1
Total	100.0

Source: Calculations based on data from ELSTAT's Labour Force Surveys, in T. Giannitis, St. Zografakis, Crisis management in Greece. The shaping of new economic and social balances (Hans Böckler Stiftung, IMK Studies Nr. 58, 2018)

2. Austerity and social policy: An assessment of a complex relationship

The question on the relation between austerity and social policy has many theoretical and practical aspects, which cannot be discussed in the framework of this presentation. I would like to focus on four points:

- a) In conditions of severe income shrinkage, even a relatively stable inequality index, as is the longer term picture in Greece, indicates in fact an increase in social inequality. Statistically stable value of inequality does not imply stable inequality regardless of whether incomes are increasing, staying steady or decreasing. In fact, any squeeze in low incomes (e.g. 20%) and a

similar reduction in wealthier groups is not leading to neutral relative positions in terms of inequality.

b) The issues related to the Social State, austerity or solidarity cannot be convincingly analyzed, if one is disregarding that even within crisis and due to state incapability or even tolerance, significant tax evasion is detected in many professions and income sources and in all different income ranks, and that tax exemptions and special tax privileges for specific professions (farmers, etc.) are left unchanged.

c) A serious issue is related to the fact that, as mentioned, the narrowly defined spectrum of social protection expenses disregards other crucial determinants of the social conditions in a country. For instance, the extent of cuts in public investment in Greece (by about 60% in comparison to before 2009), aiming at presenting lower fiscal deficits or allowing lower decreases in current or social expenses, has at the end a significant impact on both inequality and social protection in the following years.

d) A fourth issue concerns the dimension of timing. Policies and policy measures implemented during the crisis are closely related to what happened also before the crisis, what forms of imbalances had been caused, through which decisions and with what consequences. If, before the crisis, policy or other choices and stances entailed significant social or economic imbalances, requiring counterbalancing measures, then the impact of the latter cannot be assessed by disassociating present from past developments and choices that triggered the crisis.

Moreover, the social impact of measures or policies leads to different conclusions depending on whether assessment is based on a short- or long-term view. A very long period does not allow conclusive assessments, while the focus on the impact of a policy over a short period may conceal important side-effects having a negative social impact. The derailment of the pension system in Greece is an emblematic example of this case.

Finally, various decisions in Greece seem to have been altered over the crisis years, resulting to opposite effects from those originally aimed. For instance, measures addressing indiscriminately all social groups or favorably the weaker ones have been differentiated in a later phase, leading to changes in inequality due to state, judicial or other decisions. Consequently, conclusions are different depending on whether political or judicial decisions are assessed within a narrow or a longer time frame, whether the focus is only on government decisions, or also on additional, complementary, decisions of other institutions, the impact of which was to reverse an initially more egalitarian approach.

3. Austerity and a ‘negative redistribution’

In the first years of crisis, wage and pension cuts were, in general, higher for higher wages and pensions and lower for the weaker income categories. Solidarity appeared to have influenced policy making, if not across the board, at least regarding fundamental issues. However, as mentioned, the most crucial impact of the crisis on incomes was related to the decrease of GDP. In fact, all income categories (wages and salaries, income from independent, commercial and agricultural activities, housing rents, interest, capital gains etc.) safe pensions were affected by the recession and market developments, while wages, salaries and pensions were also determined by political decisions (details are shown in Table 2).

Austerity policy and policy measures during the crisis were not characterized by neutrality. They affected significantly the relative ranking of citizens in the income distribution scale and entailed new, different, inequalities. Absolute neutrality would require income cuts of the same degree for everyone. In a hypothetical scale in which all those with the same income stand on the same step, neutrality would mean that the income-gap, in relative terms, between each person before and after the measures, would remain unchanged. However, since 2008, every year, households were constantly changing steps on this income scale, moving either downward or upward. Other households fell to the lowest steps, others moved just few steps down, other maintained their position and others moved upwards. Reversals and rearrangements were widespread. I shall mention four cases:

First, the significant shifts regarding the social composition of poverty. After all these years, the social composition of today's poor is very different from that before the crisis. In the past, the vast majority of the poor were farmers, pensioners of the Organisation of Agriculture Security, low-paid and single-parent families. Unemployed represented only a small fraction of poor. Today's poor mostly are those of young age and families with one, two or three unemployed members. Furthermore, poverty has affected differently the different age groups. Young people, aged 18-25 years, are in the worst position (poverty 21.5%), followed by children and young under 18 years (18.7%), then by the group age of 25 to 65 years (15.4%), the employees with income below the poverty line (13.6%), and last, i.e. in the best position, are older people over 64 (8.6%)⁴.

Secondly, wage cuts for employees in the public and private sectors have been strongly asymmetric. According to data from the Bank of Greece, the average cumulative reduction in public sector salaries or wages between 2008 and 2015 was 9%, as against 22% in the private sector. This asymmetric wage and salary cut in the years of the crisis led to increased inequality within the group of dependent employees⁵.

Thirdly, contrary to the initial decisions, governments implemented an extensive array of additional measures concerning employees in the public sector, through which the initial decisions have been bypassed:

- they invented the concept of 'personal difference' through which an extra amount of about 500 to 1000 euro has been added to the newly reduced salary of about 75.000 civil servants employed mainly in three ministries (Finance, Justice and Culture),
- a number of public institutions or companies refused to implement salary cuts as set forth by law,
- salary cuts in the public sector were partially or totally offset through bonuses, internal promotions or other concessions for many employees.

All these measures changed the previous income hierarchies and allowed significant changes in the relative position of employees within the public sector, and, obviously, between the public and the private sector, as well as between employees in the public sector and those

⁴ OECD, Income Inequality Update Nov. 2016, Table 1.

⁵ T. Giannitsis, St. Zografakis (2018), p. 201.

who lost their jobs, suffered significant cuts, or whose full-time employment was changed into part-time.

The fourth form of inequality arose from judgments of Supreme Courts, following the implementation of austerity measures. These decisions cancelled the general arrangements for wage and pension cuts, for particular groups. In these cases too, the relative position of those concerned, was obviously improved, while the relative position of the 'others' worsened.

In conclusion, austerity went hand-in-hand with phenomena of a 'reverse solidarity' and new kinds of inequality imposed by institutional decisions. The income equilibrium between different groups which was based on the pre-crisis GDP was reversed. In absolute terms, it was obviously impossible that everyone continues to get his pre-crisis income or pension, since the source of this income (i.e. a greatly-sized GDP) no longer existed. However, besides the absolute incomes, social policy could better protect the relative income hierarchy. Instead, concepts such as 'poverty', 'decent living standard', 'social rights degradation', 'satisfactory living standard as possible close to that achieved during past working life' have been interpreted in arbitrary ways. All these attitudes and/or decisions led to conflicting relations within different segments of society, since preserving 'dignity' at past levels for some social segments, caused lower dignity in the present for the weaker and most vulnerable ones.

4. Concluding remarks

The following points have to be underlined:

- After ten years of crisis, either because of the recession or policy decisions, or because reality has changed, the socially vulnerable situations have also changed considerably. In contrast, social policy continues as if such significant shifts did not occur, increasing the vulnerability of those mostly exposed to the impact of the crisis.
- It is very strange that social claims and policy decisions always disregard completely the fact, that any benefit to a group entails adverse consequences to other parts of the society. Any decision affecting the established income hierarchy and any beneficial treatment, however defined, has a cost that has to be paid by others on real time. Since the onset of the crisis, it is no longer feasible to shift this cost to the future, to next generations, by increasing foreign debt as in the past. Any unjustified unequal beneficial treatment has to be paid also by the poor, the unemployed, the low-paid, all those who stand in the dark side, unaided and voiceless, paying VAT, indirect taxes or suffering cuts in health services, social support, education and housing support. Tax evasion, which is frequently referred to as a major potential source for additional fiscal revenues, is left out of the real policy agenda of all governments.
- The relevant statistics do not reflect the whole reality. In fact, more and more parts of society, and especially the younger generations, face increasing risks, individually or collectively, placing them in a much more unfavorable situation than previous generations. This is a common reality in many advanced countries, but is even more significant in the context of a country hit by a severe crisis. These groups are confronted with significant risks related to the availability and conditions of employment, medical coverage, the probability of improving their position in the foreseeable future, the protection of their constitutional rights and democratic governance and the perspective of their future retirement. The absence of effective

development policies and the entrapment of the economy in conditions of limited growth or even stagnation, all impose extreme difficulties to the most vulnerable social groups in addressing these risks, while increasing uncertainties and inequalities.

- Technological race and geo-economic changes create winners and losers within the society -as always in history. However, the specific outcome of such rearrangements is often determined by national policies and decisions of the institutional actors of a country. World development shows that the same broader changes in the external environment lead to very different outcomes in different societies, mainly because of different national choices, policies or environments. To the extent that inappropriate choices and measures are also associated to an increase in inequality beyond a critical threshold, they cause political reactions that either pose powerful obstacles to the smooth development of a country or result in authoritarian governance forms. Then the typical outcome is greater intensity of inequalities and social and developmental destabilization.
- A deeper inequality between Greece and Europe can be observed. During the crisis, Greece's GDP fell by about 25%, while in E.U.-15⁶ it increased by 25%. Greece, in 2009, had reached 85.3% of the average per capita GDP of the EU-15 countries. This rate collapsed within a few years to 62.8%, corresponding to Greece's relative position towards these countries fifty-five years ago, in the mid-1960s. This development affects the country's position in the European and international system and undermines its ability to adapt to the deep changes in its external environment.
- Finally, during crisis, a peculiar and growing inequality within the society can be detected, in the form of an increasing gap between wider social groups regarding their collective perceptions, education, skills, knowledge about external developments and risks, the geopolitical context of the country, the real options in dealing with new or old problems, and the ability to address risks of falling behind in economic, social, cultural and political terms. Such a divide is not reflected in economic and social figures. Nevertheless, it exerts deeper influences on the society's ability to perceive, decide and act. It also asymmetrically affects the expectations of particular segments of society in ways that actually diverge dangerously between them, preventing urgent economic and social development choices. Stubbornness to outdated practices coupled to the protection of power interests has caused significant and multifaceted losses to the country, while the minimal attempt to adapt to the new realities -not to mention climate change- is causing an accordingly minimal preparation to confront these risks. Low social and political capabilities to understand the wider significance and implications of these issues imply that complex problems risk becoming more difficult.

⁶ E.U.-15 is used instead of E.U.-28 because it allows comparisons between Member-States for much more years.

AUSTERITY AND SOCIAL RIGHTS

Tefkros Th. Economou

In Cyprus, the level of institutional protection for social rights, is high. The Constitution enshrines rights of a social character, like the right to dignified living and social security (Article 9), the right to employment (Article 25) and the right to education (Article 20). Equally, the Republic of Cyprus has ratified, with superior force, the International Covenant on Economic, Social and Cultural Rights (Law 64/1967), the European Convention for the Protection of Human Rights and Fundamental Freedoms together with the Additional Protocol (Law 39/1962) and the European Social Charter (Law 64/1967) as well as the Revised European Social Charter (Law 27(III)/2000).

The plexus of protection is supplemented by a series of statutes in relation to and *inter alia*, employment rights, collective labour agreements and the acknowledgement of an institutional role to trade unions (Law 55/2012)⁷, emoluments protection (Law 35/2007)⁸, Social Insurance (Law 59/2010)⁹, Social Protection (Law 8/1991)¹⁰, State Pension Scheme (Law 97/1997)¹¹, etc.

In practice, the institutional acknowledgment and protection of social rights was challenged by the unsettling conditions caused by the economic crisis. Even before the ‘Memorandum of Understanding’ was signed with ‘Troika’ (European Commission, European Central Bank, International Monetary Fund), in March of 2013, legislative measures were taken ‘to limit public expenditure and refrain from causing further worsening to the fiscal situation’.

The enactment of a statutory restriction¹² to State Officials’ ‘double / concurrent pensions’ was merely the starting point. Provisions were made to address situations where a State Official was entitled to more than one pension, such an occasion would arise if for example, one was a civil servant before taking up post as a Minister and in that instance, the sum of his/her pensions cannot exceed half the amount of his/her highest ones.

This, of course, was an individual measure; in contrast to what followed.

First, a scaled contribution of 3,5% was imposed on all employees’ gross monthly income, in both the public and private sector (Law 112(I)/2011¹³ and Law 202(I)/2011¹⁴, respectively)¹⁵.

⁷ Trade Union Recognition and the Right to Provide Trade Union Amenities for Recognition Purposes Law of 2012 (Law 55(I)/2012)

⁸ Protection of Emoluments Law of 2007 (Law 35(I)/2007)

⁹ Social Insurance Law of 2010 (Law 59(I)/2010)

¹⁰ Public Welfare Benefits and Services Law of 1991 (Law 8/1991) and Minimum Guaranteed Income and Social Welfare Benefits Law of 2014 (Law 109(I)/2014)

¹¹ Pensions Law of 1997 (Law 97(I)/1997)

¹² State Officials’ Pensions (General Principles) Law of 2011 (Law 88(I)/2011)

¹³ Exigency Contribution of State Officials, Employees and Pensioners in the Public Sector and the Wider Public Sector Law of 2011 (Law 112(I)/2011)

¹⁴ Exigency Contribution of Employees, Pensioners and Self-Employed Persons in the Private Sector Law of 2011 (Law 202(I)/2011)

¹⁵ Exigency Contribution was terminated on 31.12.2016.

Reductions to emoluments and pensions, followed. They were reduced by up to 14,5% of the gross remuneration (Law 168(I)/2012¹⁶, ¹⁷). At the same time, wage increments and the cost-of-living-adjustment based on the price index (A.T.A.), were ended, for both emoluments and pensions (Law 92(I)/2011)¹⁸.

Furthermore, the reforms on pension entitlements in the public sector were of a drastic nature (Law 216(I)/2012)¹⁹. Primarily, for “reasons of sustainability of the State Pension Scheme”, provisions were made for a 3% reduction on monthly pensionable income. The retirement age was gradually raised to 65 years. Income tax was imposed, on the until then tax-free ‘lump-sum’ payment or gratuity given to civil servants upon retirement.

This is however, no longer the case for all civil servants, since the newly-appointed civil servants are no longer included in the State Pension Scheme, by virtue of the said Statute and hence they have no right to a pension and to the lump-sum payment upon retirement.

Further to the above, a number of other legislative measures were taken to contain public expenditure in the public and the wider public sector. I shall not elaborate, since my primary purpose is to refer to the case-law development, which has evolved exclusively, or at least, mainly because of judicial review recourses lodged by employees of the public and wider public sector against pay cuts and reductions imposed on emoluments, pensions and benefits/entitlements.

It should be stated from the outset, that the strenuous balancing act between the need to acknowledge the financial necessities and reality, on the one hand and the need to safeguard social rights, on the other, were raised in Cyprus as a question of correlation of the provisions of Article 1 of the Additional Protocol of the European Convention with the provisions of Article 23 of the Constitution of Cyprus. Lead by the case-law, this is now the matter on which, I shall concentrate.

The first decided cases of the Full Bench of the Supreme Court, were a number of judicial review recourses, where the applicants, who were civil servants, challenged the pay cuts imposed on their income as an exigency contribution of up to 3,5%, by virtue of Law 112(I)/2011 (as subsequently amended by Law 113(I)/2011) (Charalambous and others v. Republic of Cyprus, Joined Cases No.1480/2011 and others, 11.6.2014).

The main grounds raised in favour of annulment were the infringements of the principle of equality (Article 28 of the Constitution) and tax equality (Article 26 of the Constitution), of the principle of proportionality and of the right to property (Article 23 of the Constitution) and of Article 1 of the First Additional Protocol.

¹⁶ Reduction to Emoluments and Pensions of the State Officials, Employees and Pensioners of the Civil Service and of the wider Public Sector Law of 2012 (Law 168(I)/2012)

¹⁷ The percentage rose to 17,5% from 1.1.2014, however, in July of 2018 a Governmental Bill for the gradual elimination of reductions on income and pensions and their final termination by 1.1.2023, was passed by Parliament (Law 94(I)/2018)

¹⁸ The non-provision of Increments and Cost-of-Living-Adjustments based on the Price Index on Emoluments of the State Officials and Employees and on Pensions of Pensioners of the Civil Service and of the Wider Public Sector Law of 2011 (Law 192(I)/2011)

¹⁹ Pension Benefits of Civil Servants and Employees of the Wider Public Sector, including Local Authorities (General Provisions) Law of 2011 (Act 113(I)/2011) which was replaced by Law 216(I)/2012

The majority judgment ruled that there was no infringement of the principle of equality, as the applicants had argued that the strain on public finances was not distributed amongst all categories of workers in the labour force but was placed upon salary-earners, with civil servants being the first. The Court pointed out that one of the main areas of concern in relation to public finances was the State pay-roll and reference was made to the wide discretion of the State in managing the affairs of public finances, especially during periods of economic crisis, including the enactment of legislative measures for particular groups of citizens, under the condition that the interference serves the public interest and does not jeopardise the citizen's dignified living. With this in mind, and after taking into account the amount of the scaled contribution and the exigency nature of the measure, the Court ruled that there was no infringement of the principles of equality and proportionality. On the contrary, it was held that, after taking into account the severe dangers to the economy and its potential collapse as well as the breakdown to the foundations of the social web, the sacrifice imposed on the salary-earners, did not exceed the expected limits and a fair balance was struck between the aimed public interest and the aggrieved persons' individual rights.

Before I continue to embark upon what was decided in relation to Article 23 of the Constitution of Cyprus²⁰ which enshrines the right to property, I owe to point out its main difference to Article 1 of the First Protocol of the European Convention on Human Rights²¹, Article 17 of the Charter of Fundamental Rights of the European Union and Article 17 of the Greek Constitution:

20 "ARTICLE 23

1. Every person, alone or jointly with others, has the right to acquire, own, possess, enjoy or dispose of any movable or immovable property and has the right to respect for such right.

The right of the Republic to underground water, minerals and antiquities is reserved.

2. No deprivation or restriction or limitation of any such right shall be made except as provided in this Article.
3. Restrictions or limitations which are absolutely necessary in the interest of the public safety or the public health or the public morals or the town and country planning or the development and utilisation of any property to the promotion of the public benefit or for the protection of the rights of others may be imposed by law on the exercise of such right.

Just compensation shall be promptly paid for any such restrictions or limitations which materially decrease the economic value of such property:

such compensation to be determined in case of disagreement by a civil court.

.....
21 "Article 1 - Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

While property rights according to the Protocol may be restricted for the public benefit or for the public interest, the conditions for restriction as prescribed by Article 23.3 are narrower and refer to grounds of: (a) public safety, (b) public health, (c) public morals, (d) town planning and development and utilisation of any property to the promotion of the public benefit or for the protection of the rights of others.

Quite notably, the term “public benefit”, as a separate and distinct ground of restriction to the right to property, is absent from Article 23.

The increased protection of Article 23, was acknowledged in the aforementioned case of Charalambous, whilst the Court interpreted widely the term movable property. As a matter of fact, the Court followed the wide interpretation of the Greek Council of State’s case-law as well as the interpretation given to the term “property” of Article 1 of the Protocol of the European Court of Human Rights, which includes not only rights in rem but also in personam property rights subject to being a legitimate expectation for their recovery based on national law. Therefore, with only one separate opinion on the subject-matter, according to which, under the ambit of Article 23, the expectation for future wages is to be differentiated from the right of earned wages and from the right to crystallised pensions, it was ruled that the pay cuts on wages were property rights within the meaning of Article 23.1. and “subsequently any interference shall be considered as an interference within Article 23 of the Constitution”.

Despite this, the matter in issue was not reviewed under the conditions prescribed by Article 23.3., since it was ruled that the right to property does not extend to the level of one’s wage. The question at issue, focused on whether a small pay cut of 1,5%-3,5%, in the form of an exigency measure, leads to passiveness or to a substantive restriction of the right. It was held that the relatively small pay cut did not affect the core of the right on wages, which remains intact and by no means passive to the degree that it would be considered a deprivation beyond the scope of Article 23 legally permitted grounds. This approach reflects the ECtHR’s jurisprudence according to which Article 1 does not enshrine a right to a salary or pension of a certain level and subsequently it does not exclude, in principle, the differentiation, under certain conditions, on the level of the wage or pension in situations of financial urgency while one’s dignified living is not jeopardised²² (see Judgment of the Council of State 668/2012 (Plenary)).

Ultimately, the Court ruled against the applicants. For the same reasons, the Court also rejected, a fortiori, the allegation of infringement of the less restrictive Article 1. In contrast, the dissenting judgment ruled that, since the restriction imposed on wages, whether material or not, did not fall within the permitted exceptions as expressly prescribed by Article 23.3., the Statute alone infringed, the Constitution.

Such was the approach taken in the subsequent judgment which concerned the confinement of double/concurrent pensions of State Officials by virtue of the aforementioned Law

²² Kanakis and Others v. Greece, Case No. 59142/00, 20.9.2001 (ECtHR), Juhani Saarinen v. Finland, Case No. 69136/01 (ECtHR), 28.1.2003, Andrejeva v. Latvia, *supra*, §77, Stev and Others v. The United Kingdom, Case No. 65731/01 and 65900/01 (ECtHR), 6.7.2005, Mateus v. Portugal and Januario v. Portugal (ECtHR), Applications 62235/12 and 57725/12, 8.10.2013, Valcov and others v. Bulgaria, Appl. No. 2033/04, 8.3.2012, §84 and Panfile v. Romania, Appl. No. 1390/2011, 20.3.2012, §15 and §18, Koufakis v. Greece, Appl. No. 57665/12 and 57657/12, 7.5.2013

88(I)/2011 (Coutsellini-Ioannidou and others v. Republic of Cyprus, Joined Cases No. 740.2011 and others, 7.10.2014). Given the already decided inclusion of the crystallised pension benefits/entitlements within the ambit of Article 23 protection, the majority held that the restriction would have been permissible only under the grounds prescribed by Article 23.3²³. Therefore, it was ruled that there was no need to strike a balance between the general interest of society, on the one hand and of the individual property rights of the applicants, on the other, as done under Article 1 of the First Protocol. Besides, the Court noted that no public interest grounds were invoked in the Explanatory Notes, but rather grounds of “modernisation of the pension system”. Nevertheless, the substance of the matter was that it concerned an unjustified restriction, a restriction not expressly prescribed by Article 23.3.

Distinctive of the difference in approach, is the judgment of the ECtHR in the case of Panfile v. Romania, Application No. 13902, 20.3.2012, which concerned issues similar to those raised in the Coutsellini case, which, however, was decided on account of the legal and democratically legitimate public interest of Article 1 and according to the principles of proportionality and fair balance, knowing that the requisite balance will not be found if the person concerned had to bear an individual and excessive burden. Such a balancing act does not appear to have been acknowledged as permissible under Article 23.3, by the Coutsellini case.

The Supreme Court’s judgments of Charalambous and Coutsellini, were followed by judgments of the Administrative Court (first instance court).

The case of Afxentiou and others v. Republic of Cyprus, Joined Cases No. 7672/2013 and others, 15.11.2016, concerned double / concurrent pensions of State Officials. The Administrative Court (Plenary) bound by the case of Coutsellini, proceeded to clarify that the question in issue, in light of Article 23, was not whether the restriction was material or not, but whether it was permissible on the grounds prescribed by Article 23.3.

The same approach was taken by the Administrative Court, sitting in a single-judge composition, in judicial review recourses of civil servant, who were pensioners and who challenged the reductions imposed on their pensions (Avghousti and others v. Republic of Cyprus, Joined Cases 898/2013 and others, 27.11.2018). In the aforementioned case, the Court examined the correlation between Article 1 of the First Protocol and Article 23, with particular reference to the level of protection provided by each one separately and it pointed out that according to Article 53 of ECHR and Article 53 of the Charter of Fundamental Rights of the European Union, it is not comprehensible to invoke an ECHR right or liberty in order to restrict or negate a fundamental right safeguarded by national law.

The subsequent approach of the Administrative Court on pay cuts or reductions, was determined by the preceded judicial review decision in the case of Charalambous, in relation to the prospective future income as a protected commodity under Article 23.

Bearing this in mind, the Administrative Court (Plenary) in the case of Hadjipanayioti and others v. University of Cyprus, Case No. 6182/2013, 28.12.2018, which concerned the termination of a special benefit granted to University Professors calculated on the basis of a 12% on their remuneration, proceeded to distinguish it from pay cuts imposed on an exigency

²³ While for the minority, there was no deprivation or restriction within the meaning of Article 23 from the outset.

basis, which was a determinative factor for the case of Charalambous. Therefore, by application of Article 23.3. “criteria”, it was held, that pay reductions (benefits) for reasons other than those explicitly prescribed by Article 23.3. constituted an unconstitutional measure unable to be rescued under the “public interest” ground of Article 1 of the First Protocol.

The Administrative Court had the opportunity to review a similar matter of benefit reduction, however this time, under the prism of Article 1, where, due to insufficient pleadings, Article 23 arguments were not validly put forward (Christodoulou and others v. Republic of Cyprus, Joined Cases 441/2014 and others, 12.11.2018, Plenary). The cases concerned night-shift benefit reductions and overtime compensations of civil servants. Without the restrictions prescribed by Article 23, the Court referred to the case of Koufakis v. Greece, Appl. No 57665/12 and 57657/12, 7.5.2013, where it was decided that the abolition of Christmas, Easter and Leave of Absence benefits, as well as the reduction of 20% to the special benefit given, did not constitute a deprivation to property, but a legitimate and justified restriction, since its aimed purpose was a legitimate one of public benefit, namely that of financial resolution.

The case was reviewed under the principle of proportionality and of fair balance which needs to be struck between the general interest on the one hand, and the imperative need to protect fundamental human rights, on the other. The severe fiscal crisis, the obligation to abide by the Memorandum of Understanding, the need for austerity, the balancing of the budget, the modernisation of entitlements / benefits of civil servants, the fact that a plethora of other austerity measures were taken, tax measures as well as the fact that social benefits were now pursued based on one’s financial resources, were all factors taken into account. The Court ruled that the applicants did not dispense the burden of proving an Article 1 infringement and that both the principle of proportionality and of fair balance were observed in light of the crucial financial reality and the imperative and pressing need for public finances resolution and confinement of public expenditure.

It ought, however, to be mentioned that the decisions of the Administrative Court are subject to appeal before the Supreme Court and to the best of my knowledge, all the aforementioned cases have been appealed. The Supreme Court will therefore, have the opportunity to develop and clarify the case-law as laid down in Charalambous and Coutsellini.

THE RULE OF LAW FROM A EUROPEAN PERSPECTIVE

HOW TO SAFEGUARD JUDICIAL INDEPENDENCE AS A CONSTITUTIONAL VALUE OF THE EUROPEAN UNION BASED ON THE RULE OF LAW

Thomas Giegerich



How to Safeguard Judicial Independence as a Constitutional Value of the European Union Based on the Rule of Law

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Prof. Dr. Thomas Giegerich, LL.M.
Europa-Institut, Saarland University

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- I. The Commitment to Constitutional Values of the EU and its Member States
- II. The Special importance of the Rule of Law for European Integration: The EU as a “Union Based on the Rule of Law”
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- (3) Inclusion of Violations of Art. 2 TEU in the Infringement Procedures?
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VII. Conclusion: The Defence of European Constitutional Values Is a Common Obligation of the Friends of Constitutionalism in Europe

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