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Dislocations on understanding the rule of law

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ABSTRACT: This paper analyses the problems of the rule of law in today's legal and constitutional discourse. The criticisms the rule of law principle is subjected to, which contribute to its downgrading and to changes in the legal standards that had been progressively achieved, are especially examined, namely, the so-called hyper-protection of fundamental rights and the difficult harmonization with the idea of efficiency. Furthermore, the author identifies the de facto *conditions that accentuate the identified problems, such as the systemic deficit of the European Union and the jurisdictional deficit that has become evident since the economic crisis.*

KEYWORDS: Rule of law – European Union – crisis – justice.

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*A – The rule of law in current debates**

I – The 'stress' of the rule of law

1. The jurist acquainted with the issue of the rule of law, and in broader terms, with the legal status of communities (based on the rule) of law, is perplexed these days by the turbulence around a principle that was considered stabilised and unquestionable. Some authors get to the point of addressing the *"rule of law under stress"*.[1] Others suggest the idea of dismissing the all-encompassing shape given by such a principle, as all relevant issues concerning the legal status of the juridical-political schemes are settled by the enshrinement of specific principles and rules in the constitutional texts or equivalents (fundamental rights, separation and interdependence of powers, constitutionality of the acts of public authorities, territorial autonomies, excess prohibition, etc.).[2] More recently, attempts have been made to confer precision to the epistemological *status* of the principle, by highlighting its valuing dimension (not primarily formalistic) and its extension to communities politically organised outside the *"sovereign national state"*[3] context. Under this perspective, the rule of law is defined as the version of the Modern state which, founded upon an individualistic philosophy and through processes of diffusion and differentiation of power, attributes to the legal order the primary function of safeguarding civil and political rights, contrasting – due to this purpose – with the natural penchant of power towards arbitrariness and prevarication.[4]

II – The 'protectiveness' hypertrophy

2. The rule of law is also subjected to several criticisms that tend to de-absolutise and change the progressively consolidated standards of the jurisdictional dimension. The 'protectiveness' hypertrophy of the state's jurisdictional dimension and the dangers of building a 'rule of total law' are denounced.[5] The excess of protectiveness is invoked by all those who consider globalisation a challenge to public law. Such a system of organisational and process rules that materialise such jurisdictional dimension is also questioned in the name of the need for 'accelerating', 'simplifying', 'balancing of interests', 'agreeing' and the 'de-formalising', in order to enhance economic development.[6]

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* Editor's note: the English language does not offer an exact match for the Portuguese expression "juridicidade". It finds similar words in French ("juridicité") and in Spanish ("juridicidad"). For that reason, whenever the author used this word it was necessary to adjust its meaning and context. The reader will find the formulas "juridical-ness", "legal status" and "juridicity".

[1] See Roberto Bin, *Lo Stato di diritto* (Bologna: Il Mulino, 2004), 67.

[2] In paradigmatic terms, see Ph. Künig, *Das Rechtsstaatsprinzip* (Tübingen: s/e, 1986), 109 e 457 e ss.; M. Rosenfeld, "Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror", *Cardozo Law Review*, 27 (2006), 767-832.

[3] In a comprehensive manner, G. Palombella, *È possibile una legalità globale* (Bologna: Il Mulino,2012), 69 and ff.

[4] See P. P. Costa e D. Zolo, *Lo Stato di diritto*, 3.ª ed. (Milão: Feltrinelli, 2006), 44 from where I took the formulation of the text; Roberto Bin, *Lo Stato di diritto* …; G. Palombella, È possibile…, 69 and ff.

[5] See for all, K.A.Bettermann, *Der totale Rechtsstaat* (s/e, 1986).

[6] Protectiveness ("garantismo", in the original version) is a neologism with which it is intended to collect the set of techniques of protection of fundamental rights. In a more restricted sense it is linked to the system of procedural guarantees of criminal law, in the classic tradition of liberal criminal thought. See Luigi Ferrajoli, *Democracia y Garantismo* (Madrid: Trotta, 2001), 61.

3. The 'excess of jurisdiction' and 'protectiveness' is an obsessive motto of the supporters of the 'Security State'. The 'growing criminality', 'terrorism', individual and common 'insecurity' would demonstrate that the 'risk society' and the 'danger society'[7] demand different legal and political approaches (mostly in the area of constitutional law, criminal law, criminal procedure and administrative procedural law), clearly distinct from the ones proposed by the liberal-Enlighted thought on the restriction of rights. The objectives of 'zero tolerance' and 'enemy criminal law' are inserted in this critical perspective. 'Safeguards', 'formalities' and 'procedures', which do not endanger its own capacity of performing, are required from the classic rule of law.[8]

III – Jurisdiction and economy

4. The rule of law does not get along well with economic criteria. Alongside 'jurisdiction' and 'justice', the principles of effectiveness and efficiency, economically considered, convey deconstructions (e.g.: deconstruction of the 'state bureaucracy', of 'public services', of the 'public sector of the economy') and reconstructions of organisational schemes ('privatisation', 'deregulation', 'de-formalisation') with the consequent creation of new forms of action in the exercise of public authority ('cooperation between public powers and private powers', 'assurance of viable economic results', 'outsourcing'). The inability or insufficiency of law as an instrument of conformance of the social-juridical order must be underlined. The 'law-making inflation', the loss of the 'validity of the state law' in the context of globalisation, the insufficient capacity of prognosis by public officials, the clear limits of the linguistic formulations of normative acts, the possibility of concrete situations relying on economic criteria to the disadvantage of traditional legal acts (statutes, regulations, administrative acts) force the consideration of forms of non-juridical regulation, contrary to the strict requirements of the law.[9] The rule of law does not get along well neither with the information and communication society. The difficulties of the management of the state before the kaleidoscopic downloads and the "pirate parties" haggler of the free and costless are only recent signs of the loss of the conforming force of the juridical measures and proceedings of the rule of law.

IV – The rule of law and its cultural presumptions

5. Everything that has been shown deserves an open and demanding reflexive

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[7] For this point, the following books by U. Beck, *Risikogesellschaft*, (Frankfurt/M: s/e, 1986); *Weltrisikogesellschaft* (Frankfurt/M: s/e, 2007).

[8] See the important book by J. Perez Royo and M. Carrasco Durán (ed.), *Terrorismo, democracia y seguridad*, Madrid and others, 2010. There are relevant studies written in Portuguese: D. Freitas do Amaral, "Reflexões sobre alguns aspectos jurídicos do 11 de Setembro e suas sequelas", *Liv. Hom. Isabel Magalhães Colaço*, III, Coimbra (2006), 236 and ff.; Nuno Piçarra, "Terrorismo e direitos fundamentais: as *smart sanctions* na jurisprudência do Tribunal de Justiça da União Europeia e no Tratado de Lisboa", *Est. Hom. Gomes Canotilho*, III, Coimbra (2012), 711 and ff.

[9] An example of great accuracy is provided by the discussion around the sustainability of the public debt. From the legal point of view, it would be justified to stop the indebtedness, in order to prevent that budgetary bankruptcy leads to confiscation or interference in the legal constitutional positions of the citizens and that, in terms of generational justice, there is an overburden either of the current generation or of the future generations. Maxi Koem, *Eine Bremse für die Staatsverschuldung* (Tübingen: Mohr Siebeck, 2011), 155 and ff.

suspension. It should be noted, however, that the rule of law is not a legal device, that is, 'a set of technical-legal gadgets' only adapted to the philosophical and political premises of the 'liberal state' and the 'bourgeois individualism'. The enabling possibilities of its appearance and consolidation represent the cultural and political presumptions[10] of the rule of law. In fact, the principle of the state's legal character constitutionally ensures the adequate 'extent and form' of the action of the public powers in an organised community. The ambiance of such constitutional presumptions relies on a true legal culture and civilisation (individual and collective freedom, rights and guarantees, professional and impartial public administration, equal access to public offices, access to law and effective judicial protection, bond of all powers to the constitution, accountability of public authorities or private authorities who have public powers for the damage caused to individuals whilst performing those powers, administrative justice with proper procedural structures). The current difficulties force us to rethink the principle of the rule of law. They do not result in placing this cultural acquisition in the 'juridical oldies' shelf. Even there, where the *"ground zero of the rule of law"*[11] seems to justify the pessimism vis-à-vis the inoperability of the principle of the state's jurisdictional dimension outside its cultural frameworks, an open and reflexive questioning is indispensable.

B – Systemic deficit and jurisdictional conflict in the European Union

I – Constitutional crisis and jurisdictional crisis

1. Jurisdiction as a constitutive dimension of the European Union

1.1. Systemic deficit

1. The state's jurisdictional dimension is normatively enshrined as one of the constitutive values of the European Union (TEU, Article 2). Given the constitutive dimension of this principle, it is understandable that it is not immune to the current crisis of the EU, from the 'debt crisis' or 'over-indebtedness' to the 'constitutional crisis', both of the Member States and the EU. More concretely, there is a systemic deficit that disturbs the promotion of the rule of law in the legal order of the European Union. Rule of Law is threatened when a significant number of agents, in several sectors, cease to ensure normative expectations to the point of creating a deficit in the trust of the law and in public institutions.[12]

1.2. Indicators

2. Through several indicators, monitored by numerous structures of control and regulation,[13] it is possible to work with data relating to corruption ('control

[10] See for all P. Häberle, *Verfassungslehre als Kulturwissenschaft*, 2nd ed. (Berlim: Duncker & Humblot, 1998).

[11] The work of Guinean jurist Emílio Kafft Kosta "O grau zero do Estado de direito" is a remarkable expression of this pessimism.

[12] See Armin Von Bogdandy e Michael Joannidis, "Das Systemische Defizit, Merkmale, Instrumente und Problem am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahren", in *ZaöRV*, 2 (2014), 283-328.

[13] For instance: Worldwide Governance Indicators (WGI), *World Justice Project* (WJP).

of corruption'), quality of regulation, rule of law, and government effectiveness regarding the quality of service. Specifically dedicated to the 'rule of law Index', the World Justice Project (WJP) analyses nine categories: constraints on Government Powers; absence of corruption; order and security; fundamental rights; open government; regulatory enforcement; civil justice; criminal justice and informal justice. The mobilisation of such data has indicated that the rule of law of the EU was confronted with a 'weak rule of law' in several Member States, namely in the promotion of macro-economic statehood and sustainable development. Facing the negative externalities detected in various categories, it has become indispensable to impose constraints through 'memoranda of understanding' and a procedure of supervision of the rule of law. Through the latter, it is specifically intended to control several aspects of the rule of law – principle of legality, legal certainty, prohibition of arbitrary executive power, effective and independent judicial control, right to a fair trial, division of powers and equality under the law –, with the European institutions being competent to issue a recommendation (*rule of law recommendation*).[14]

1.3. Functionalisation of the rule of law

3. It is clear that the rule of law supervision procedure seeks to solve dysfunctions of the rule of law, in order to neutralise, at the legal system level, structural fragilities that vary from fighting organised crime and corruption to the inoperability of the justice system. The problem with this systemic approach is to judge the legal systems of the Member States, so that policies of economic and financial adjustments are legitimised. Such policies made the system of state 's jurisdiction weaker through countless actions – financial, fiscal, social, labour – derogatory of insurmountable principles of the rule of law (principle of the protection of trust and legal certainty, principle of proportionality, principle of non-retroactivity of tax law and statues restricting fundamental rights). The narrative about the fragility of the principle of the rule of law may be opposed to the one that is subjacent to the doctrine of the 'systemic deficit', highlighting the infringement of human rights and fundamental rights by the pack of economic-financial actions imposed to citizens of some Member States.[15] Even in serene analysis, focused on economic and financial aspects,[16] the problem of the conflict of jurisdictions – the jurisdiction of the EU and of the Member States – justifies the reframing of the meaning of 'rule of law' and state jurisdiction. The 'economic-financial harassment' forces a jurisdictional suffering: it must be noted that the constitutional courts are in pain today, in the countries that (such as Portugal) had to submit themselves to traumatic external demands. The option between principles of high legal value and the conscience of the potentially destabilising effects of judicial rulings, in an atmosphere of economic assault, induces judges to search for a difficult balance, where sometimes the possibility of pragmatically stalling the temporal effects of judgments is also included. The issue

[14] See the presentation by Armin Von Bogdandy and Michael Joannidis, "Das Systemische Defizit…, 322. The procedure referred to in the text has the following title: "Communication from the Commission to the European Parliament and the Council: A New Framework to Strengthen the rule of law", 11.3.2014, COM (2014) 158.

[15] See Andreas Fischer-Lescano, *Human Rights in Times of Austerity. The EU Institutions and the Conclusion of Memoranda of Understanding* (Baden-Baden: Nomos, 2014).

[16] See Adriano Giovannelli, "Vincoli europei e decisione di bilancio", *Cuaderni Costituzionali. Rivista Italiana di Diritto Costituzionali*, XXXII, 4 (2013), 933 and ff.

of the conflict of jurisdictions takes us back, after all, to a critical discourse about the European view on the systemic deficit: the principle of the rule of law strictly functionalised to economic policies. The consequences of such an understanding of the rule of law destroy its very own *ratio essendi*. The principles or requirements convened to densify the European jurisdiction are destined to serve the new form of *gubernaculum*, that is, the European governance. The idea of the dual character of law that has always been present in the consolidation of the state's jurisdiction or of the rule of law – the existence of a positive law beyond the positive law of the political-economic domain - is dissolved in the systems of 'multi-level financial constitutions'.[17] The last step in this direction may also be detected in the introduction of categories as 'public interest' and 'right of political-administrative need'.

[17] See the critical considerations of G.Palombella, *È possibile*…, 235 and ff.