

RULE OF LAW AND HUMAN RIGHTS: RECALLING THE CONNECTION¹

Direitos Humanos e Rule of Law: relembando a ligação

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PAULA VEIGA*

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

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

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

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

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

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

* University of Coimbra, Faculty of Law.

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

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

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

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

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

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

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

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

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

At this most basic notion, this concept of the Rule of Law refers to a system in which law is able to impose meaningful restraints on the state and individual members. It directly relates to the notions of *a government of laws*, the *supremacy of the law* and *equality of all before the law*. This narrow concept stresses the formal or instrumental aspects of Rule of Law². In this sense, laws must be *general, public, prospective, clear, consistent, capable of being followed, stable and enforced*.

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

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

One reason is that – given the predominantly domestic legal origin – different states, regions, cultures and legal systems prefer different notions over others, turning the Rule of Law into an essentially contested concept³⁻⁴. The domestic legal origin explains why ‘Rule of Law’ was, from the start, different from ‘Rechtstaat’ and from ‘État de

² See, for all, Joseph RAZ, ‘The Rule of Law and Its Virtue’, in *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press, 1979.

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

⁴ Rüdiger BREUER, ‘Konkretisierungen des Rechtsstaats- und des Demokratiegebots’, in *Festgabe 50 Jahre Bundesverwaltungsgericht*, 2003, 223–253.

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

A broad notion of this concept maintains that the Rule of Law, in addition to the attributes of a narrow notion (the so-called classical notion), also promotes certain substantive values which, among others, include Justice, Human Rights and Democracy. This broad notion can also apply to the international arena⁶. Of course it is a difficult, almost an impossible task, to agree on a common definition of the international Rule of Law in the form of 'one size fits all'⁷⁻⁸. Of course there will always be questions raised about the type of Human Rights that should be included in such a notion and how the Rule of Law can be distinguished from other concepts such as Justice. Of course, others may suggest that Human Rights are independent from Law.

But the international legal order in the 21st Century reveals the paradoxical increase of all things constitutional, such as constitutionalisation or quasi-constitutional settings and practices. The resulting changes in international affairs raise deeper questions about the normative underpinning of international relations concerning justice, fairness and legitimacy. This phenomenon of constitutionalisation on a global scale has been observed, namely in the environment of supranational or international organisations. It reflects the need to put innovative regulatory or principled practices into place. In the European context, the most successful example of constitutionalisation is, as we all are aware, the European Union. But this process is always a two-way one: national constitutionalism⁹ influences the international

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

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

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

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

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

legal order and international law induces national legal orders¹⁰. By this methodological approach it is possible to link the Rule of Law and Human Rights. However, it is important to stress that this bond can, in any case, be part of the problem or part of the solution...

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

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

Again, this third millennium traces a new trend in the field of linking Human Rights and Rule of Law. In a global context, namely in the 2000 Millennium Declaration, States agreed to spare no efforts to strengthen the Rule of Law and respect for all internationally recognized Human Rights¹². And five years later, in the 2005 World Summit Outcome, States also recognized the Rule of Law and Human

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

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

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

Rights as belonging to the universal and indivisible core values and principles of the United Nations¹³. At the same time, the Human Rights Council has actively advanced the Rule of Law, namely by a series of resolutions that directly relate to both concepts (Human Rights and the Rule of Law).

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

In another hand, the European Commission for Democracy through Law – the so-called Venice Commission – recognised and explained, in 2011, in a research report, that the British concept 'Rule of Law', the German concept 'Rechtsstaat', and the French concept 'État de droit' have different origins¹⁴. However, as the Venice Commission also noted, the underlying standards for Rule of Law are the same. These entail: (i) legality; (ii) legal certainty; (iii) prohibition of arbitrariness; (iv) access to justice; (v) non-discrimination and equality before the law; and (vi) last, but not the least, respect for Human

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

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

Rights.

These standards coincide to a large extent with what the European Court of Human Rights has underlined in its case-law over the last few decades. Here, Rule of Law is even considered to be part of the *spirit* of the Convention. This judicial organ used the concept *Rule of Law* for the first time in *Golder v. United Kingdom* in February 1975, basing its interpretation of article 6 (§1) of the Convention (right to a fair trial) on the reference to the Rule of Law in the Convention's Preamble. In this decision, the Court emphasised that this principle should not be seen as merely a 'more or less rhetorical reference', devoid of relevance for those interpreting the Convention¹⁵. Since then, the Rule of Law has become a guiding principle for Strasbourg. In this context, the Court has offered further clarifications on a number of key themes which underpin the Rule of Law, including: (i) the separation of powers; (ii) the role of the judiciary; (iii) impunity; (iv) a court established by law; (v) sufficiently accessible and foreseeable law.

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

4. Some fundamental conclusions

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

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

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

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

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

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

Thank you very much for your attention.