

LAW

IN TIMES OF

GLOBAL CONFLICTS

IN A WORLD OUT OF JOINT

SPECIAL EDITION
celebrating 30 years of
ERASMUS NETWORK NANTERRE

Otmar Seul | Stéphanie Rohlfing-Dijoux | Kerstin Peglow
Editors

 **Université
Paris Nanterre**

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Technical Sheet

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Title: Law in Times of Global Conflicts in a World Out of Joint

Editors: Kerstin Peglow, Stephanie Dijoux, Otmar Seul.

Publisher: Iberojur Science Press

Layout: Mariana Dares

Cover Design: Mariana Dares

© Various Authors

Format: Electronic; File Type: PDF / PDF/A

ISBN: 978-989-36822-0-3

Legal Deposit in the Portuguese Library (DL): 562809/26

DOI: <https://doi.org/10.62140/LTGCWOJ2026>

1st Edition: Iberojur Science Press

Rua de Avilhó, 214, Matosinhos (Porto) - Portugal.

March, 2026

Suggested citation: PEGLOW, Kerstin; DIJOUX, Stephanie, SEUL, Otmar (eds.). *Law in Times of Global Conflicts in a World out of Joint*. Iberojur Science Press, 2026. ISBN 978-989-36822-0-3.

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PREFACE

The European academic cooperation network – the “Nanterre Network” – is celebrating this year its 30th anniversary. Founded in the 1990s by Professor Otmar Seul, the Network aimed to embed the integrated French-German Law Curriculum from the University Paris Nanterre within the European Higher Education and Research Area.

Built on agreements under the Erasmus Program, this informal network has evolved in different phases. First, in the wake of German reunification (1990), it incorporated law faculties of Humboldt University of Berlin, Potsdam, Frankfurt/Oder and Dresden (TU), along with other universities in former Eastern Germany. Second, from 2000 onwards, it expanded to include universities in Central and Eastern Europe — notably in Poland and the Baltic states — sometimes even before their countries joined the European Union in 2004. Third, from 2006, it extended to several Turkish universities. Nowadays, the Network spans all over Europe, it includes Spanish, Portuguese, Italian, Austrian, Swiss and Belgian universities. As a very recent development, partners of the Paris Nanterre University within the EDUC – European Digital UniverCity – Alliance joined the Network: Masaryk University in Brno/Czech Republic, University of Cagliari/Sardegna/Italie and Jaume I University in Castiglione/Spain.

Since 1995, representatives of partner universities have met regularly. Following the Bologna Declaration, these annual meetings — held in cities such as Prague, Vilnius, Łódź, Riga, Paris, Fribourg (Switzerland), Istanbul, Sevilla, Barcelona/Andorra, Berlin, Lisboa, Vienna, Potsdam, Salamanca, Porto — have focused in particular on aligning national higher education systems with European standards. Combined with symposia or study days, these gatherings also provide a forum for reflection on broader trends in the ongoing harmonization of law across the European Union.

In this volume, published with the support of the Instituto Iberoamericano de Estudos Jurídicos – Iberojur – Porto, we present the papers delivered at the Nanterre Network meetings held in 2024 in Salzburg, Austria, and in 2025 in Cagliari, Italy. The publication is dedicated to the 30th-anniversary meeting of the Network, which will be hosted by the University of Szeged, Hungary, in late May 2026.

In 2024, we were welcomed at the Paris Lodron University of Salzburg by our long-standing Network fellows and visiting lecturers in the French-German Curriculum at University Paris Nanterre, Ulrike Brandl and Günter Herzig. Many years ago, University Paris Nanterre concluded an Erasmus agreement with Paris Lodron University Salzburg, which has proven highly successful and remains particularly popular among students. In 2025, we were hosted by Massimiliano Piras and Christian Rossi at the University of Cagliari, Sardinia. In recent years, we have also organized joint digital lectures with our Italian colleagues within the EDUC Network. In addition, in-person meetings involving students and faculty from the partner universities continue to take place; in 2025, such a meeting was held following the Network conference in Cagliari.

The internationalization of our programs has become an established reality for our students, who now travel and study across the globe. Many of them have never experienced a time without Erasmus. After the COVID-19 pandemic, which temporarily interrupted international exchange activities, mobility has now returned to, and in some cases surpassed, previous levels.

Nevertheless, the global context has changed significantly. The political environment has evolved in ways that give cause for concern: in 2020, the United Kingdom left the European Union; in 2022, war broke out in Ukraine; and in 2023, armed conflict escalated in the Middle East. Across the world, we observe political leadership that appears ever more indifferent to fundamental democratic principles. In Europe as well, democratic values are under pressure, while profound societal transformations—driven in part by social media, artificial intelligence, digitalization, and advances in medicine—are becoming more pronounced. At the same time, the economic situation within the European Union is a source of growing concern. China has emerged as a major global actor, and Europe faces increasing challenges in global competition, particularly in key technologies such as semiconductors and artificial intelligence. The resurgence of protectionism, especially in the United States, further contributes to a progressively constrained economic climate.

In parallel, our natural environment is under mounting strain. Media reports frequently depict devastating floods that claim lives and impose immense economic costs, while, in stark contrast, severe forest fires recur each summer. Armed conflicts further exacerbate environmental degradation, destroying ecosystems and undermining the livelihoods of countless people.

In response to these challenges, the United Nations adopted the Sustainable Development Goals (SDGs) in 2015 as a universal call to action to end poverty, protect the planet, and ensure peace and prosperity for all by 2030. Yet, in light of the growing frequency of armed conflicts, human rights violations, and environmental destruction, we remain far from achieving these objectives. Global governance continues to suffer from a lack of binding legal frameworks, and even where such rules exist, compliance is becoming more uncertain.

At the same time, there are also encouraging developments. Within Europe, efforts are underway to address environmental harm and human rights violations linked to the activities of multinational companies through both national legislation and European Union law. Sustainable development has become a central objective of the European Union, notably under the European Green Deal, and non-binding international standards are more frequently being transformed into binding legal obligations.

Against this backdrop, the themes of the Nanterre Network meetings in 2024 and 2025 addressed these pressing issues from a legal perspective. The 2024 meeting focused on “Time and Law – Out of Joint?”, while the 2025 meeting examined “Challenges to Achieving the Sustainable Development Goals (SDGs) in Times of Global Conflicts and Climate-Related Emergencies.”

The current edition brings together a wide range of contributions reflecting the diverse academic specializations and research interests of the members of the Nanterre Network. In a time of global crisis, our commitment to academic exchange and cooperation between our universities is more important than ever. We are therefore particularly pleased to dedicate this publication to the 30th anniversary meeting, which will address the theme “Minority Rights and Advocacy in the European Union and Beyond: Successes and Challenges.”

THE IMPACT OF LEGAL CLINICS IN IMPROVING THE PRACTICAL SKILLS FOR YOUNG LAWYERS (UNIVERSITY OF PRISHTINA PERSPECTIVE)

Muhamet Vokri*

DOI: <https://doi.org/10.62140/MV556037124>

Summary: 1. Introduction, 2. The Context of Free Legal Aid "Pro Bono" – Legal Clinics and Their Impact, 3. Constitutional (legal) aspect in the Republic of Kosovo about Free Legal Aid, 4. Legal framework regarding Free Legal Aid – International Standards, 5. Development of Legal Clinics (Historical Background) - Legal Challenges (Barriers) in the Operation of Legal Clinics in Community Services, 6. Legal barriers to "Live Clinic" (overcoming them) – Reforms and the current process, 7. Conclusion

Abstract: This paper aims to address the context of free legal aid dedicated to vulnerable groups in Kosovo, institutions that provide such "pro bono" services with a focus on the (newly established) Legal Clinics, and in particular the (legal) clinic of the Faculty of Law-University of Prishtina. In this regard, the paper will elaborate on the steps taken towards the establishment of the "live clinic" model, the challenges up to the construction of this model, the course of reforms followed and above all the impact that they (legal clinics) have played for students, law graduates, their preparation for the labor market and to what extent their professional development has affected the practical prism.

Such an approach has imposed the need to research (elaborate) in broad lines the historical development of the concept of legal aid (pro bono) at the global level, the international instruments that refer to the relevant field, the built standards, as well as what is relevant for the Kosovar society, the legislation of the European Union and in this prism the legal framework of the Republic of Kosovo, how much it is in line with the European *acquis* and good practice.

*Muhamet Vokri, PhD., Assistant Professor, Faculty of Law, University of Prishtina "Hasan Prishtina", Agim Ramadani str., n.n., 10000 Pristina, Kosovo; muhamet.vokri@uni-pr.edu; ORCID ID: orcid.org/0000-0003-4052-3925

The final part also addresses the impact that legal clinics have had to push the government of Kosovo to start with the process of amending the current legislation and the readiness of the legislator for legal clinics to be included within the new law (which is in the process of drafting) and at the same time the new dimension that this initiated process has cultivated. The conclusions are a vital part of the summary of the range of actions and products that have been provided and/or are expected to be ongoing.

It should be noted that some aspects of this paper were presented at the conference within the framework of Nanterre Erasmus Network in Law, held in Cagliari (Italy) from 28-31 May 2025, which are elaborated in more depth in this article.

Keywords: Legal Clinic, Free Legal Aid, Kosovo, University of Prishtina, Reform.

1. Introduction

The paper with the relevant subject *"The Impact of Legal Clinics in Improving the Practical Skills for Young Lawyers (University of Prishtina Perspective)"* has a research character and the main purpose of the research is related to the role of legal clinics for future professionals (students/graduate lawyers), in preparing them for the labor market and strengthening the legal system in general.

The paper initially deals with the doctrinal aspect around this area, while the following part is concentrated in the context of the (free) legal aid provided in the territory of the Republic of Kosovo, the historical development, mainly focused after the end of the conflict (1999), the establishment of the United Nations International Mission (UNMIK) and in particular, after the declaration of Kosovo's Independence (2008). A very important dimension was dedicated to the development of legal clinics, the challenges for their functionalization, the curricular reform (implemented from 2023/2024 academic year) by the Faculty of Law-University of Prishtina, where the main basis of the reform was the reconceptualization of clinical learning, the transition from the classical system to

the hybrid model and the impact that the reform has had on the practical development of students and the process started for the inclusion of legal clinics in the national legal system.

The study aspect of the legal framework of free legal aid at the national level in relation to international instruments and EU legislation in the relevant field, as well as the comparative models of some universities in Europe and the USA, on the functioning of legal clinics and their inclusion in the legal systems of the respective countries, is a result of the analysis and work that has been done in recent years by the University of Prishtina in the functionalization of legal clinics and consequently, their involvement in the provision of free legal services to the community, i.e. to people who are enabled by national legislation to benefit from such (legal) services.

As it is known, the rights of citizens to legal protection are guaranteed by international conventions and at the same time they are embodied as fundamental human rights, in the constitutions of most states, regardless of the form of government or the economic development of the states. In this regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantees the right to due process, as a special human right based on the ideas of natural justice, the realization of which is of fundamental importance for the development of democracy and the rule of law, and in this line the jurisprudence of the ECHR through its judgments that undoubtedly represent the framework of European good practice.

The work methodology used in writing this paper is standard that is generally used in social sciences and especially in legal science. It should be noted that the paper is conditioned by the study approach in the normative aspect of the national and international level of study. During the treatment of the topic, I have used the following legal methods: normative legal method, comparative legal

method, legal analytical method and other methods that have been imposed on me during the work and the drafting process of the paper.

In general, the paper is based on a working methodology which contains or has a reference to a contemporary scientific and professional literature, being served with books, scientific journals, normative legal acts, strategies and other relevant documentation from the relevant field.

2. The Context of Free Legal Aid "Pro Bono" – Legal Clinics and Their Impact

Before analysing the legal clinics in the Kosovar context, especially at the University of Prishtina (UP) and the organisation itself, we consider it important to address the doctrinal aspect about free legal aid that is applied in most universities (law schools) across the countries that apply such models, and that they have served as inspirational references for building an appropriate system and above all with the aim of their sustainability and assistance to the community and/or vulnerable groups.

Clinical learning (Legal Clinic) was born as a teaching method to help students in the practical learning of law, and was later developed in the form of free legal aid, as a special (additional) part of the work, in addition to the academic aspect. More precisely, legal clinics provide practical experience for law students in law faculties, as well as various legal services in terms of paperwork, mainly vulnerable of the population who are unable to provide such paid professional assistance ([Moliterno, 1996](#)).¹

¹James E. Moliterno, "Legal Education, Experiential Education, and Professional Responsibility," *William and Mary Law Review* 38 (1996): 71.

Legal clinics across the academic spectrum (within faculties), offer pro bono work in several areas of law, i.e. providing free legal services to clients ([Barrow, Glover, and Hervey, 2020](#)).² In this regard, students give their contribution through research work, drafting legal documents or meeting with clients, from and clinic professors and/or professionals in the field, in most cases lawyers, mentor the work of certain students in their cases.

Most clinics in law (school) faculties have developed assistance clinics, which aim to provide legal assistance or various legal services free of charge, to citizens who are part of social assistance schemes, or even those who are not in (social) schemes, but from their annual income, they are not able to cover the expenses for lawyers ([Grimes, 1996](#))³ or for firms/law firms, in order to seek or defend their rights guaranteed by the Constitution, international conventions and applicable legislation. Such an approach and commitment and/or a respective methodology for putting it into practice is being developed by the Faculty of Law-University of Prishtina as a result of the course of reforms followed, and in particular the re-conception of Clinical Learning, which has as a reference the transition from the curricular model to the hybrid model of clinical development.

On the most basic level, the law school clinic is a teaching law office where students can engage in faculty-supervised law practice. It is a method of teaching law students to represent clients effectively in the legal system, and at the same time to develop a critical view of that system. Law students in the clinic learn that legal doctrine, rules and procedure; legal theory; the planning and execution of legal representation of clients; ethical considerations; and social, economic and political

² Daniel Barrow, Louise Glover, and Tamara Hervey, "European Journal of Legal Education," *European Journal of Legal Education* 1, no. 1 (May 2020): 117–154.

³ R. Grimes, "The Theory And Practice of Clinical Legal Education" in J. Webb and C. Maugham (eds.) *Teaching Lawyers' Skills* (1996).

implications of the legal advocacy, are all fundamental interrelated (Stephen Wizner, 2002)⁴.

Legal education plays an important role in socializing the next generation of lawyers, judges and public policymakers. As gatekeepers to the profession, law schools have a unique opportunity and obligation to make access to justice a more central opportunity (Iken & Wisner, 2010)⁵. Nevertheless, law schools do have some obligation to contribute to the solution of the crisis in access to justice, and it seems obvious that the obligation is best accomplished by law school clinics assisting low-income individuals and communities that are underserved or have particular difficulty obtaining lawyers because of the nature of their legal problems⁶.

With regard to the Kosovo, legal clinics were introduced to Kosovo's legal education system through donor support from different international organizations and/or missions accredited there. In the very beginning, they were as pilot tests and gradually became part of the curricula of the Law Faculties, started within the University of Prishtina⁷ and further to other academic institutions. The imperative to align the curriculum with the job market's needs, particularly in the context of justice system reforms in Kosovo, necessitated the adoption of a more pragmatic approach to teaching methodologies in Law Faculties.

Free Legal Aid in Kosovo was initially provided by the European Agency for Reconstruction from 2001 – 2005, through the Project "Free Legal Aid in Civil and Administrative Matters" implemented by the Kosovo Bar Association and

⁴ Stephen Wizner, The Law School Clinic: Legal Education in the interests of Justice, Fordham Law Review Vol.70, 2002, p. 1931.

⁵ GEORGETOWN LAW Faculty Publications, Jane H. Iken and Stephen Wizner, Teaching and Doing: The Role of School Law Clinics in Enhancing Access to Justice, March, 2010, p. 997.

⁶ Ibid.

⁷ The very beginning process of establishing the legal clinics has started on 2005.

implemented by local NGOs (Free [Legal Aid Agency, 2017](#)).⁸ Such an opportunity was very useful, considering the level of poverty that was then in Kosovo.

In the first poverty assessment, made in 2000, World Bank findings showed that over half of the population (50.3%) lived in poverty, while 11.9% of the population lived in extreme poverty ([GAP, 2022](#)).⁹ Seven years later, poverty levels had fallen slightly, or 45% of the population was living in poverty¹⁰, while extreme poverty had risen to 14%. Comparison with the statistics provided by relevant international institutions are also a clear indicator of the level of social assistance (protection) of Kosovo citizens, who have potentially been exposed to requests for various free legal services. Further, on the basis [of UNMIK Regulation](#)¹¹ 2006/36 issued by the United Nations Special Representative (SRSG), the Commission on Legal Aid (HLC) was established, which had the mandate to provide certain services to groups in need.

Kosovo declared its independence in 2008. As is well known, the main basis for the Declaration of Independence (17 February 2008) and the Constitution (9 April 2008) was the comprehensive proposal for the settlement of the Status of Kosovo, drafted by the United Nations Special Envoy, Marti Ahtisari, a document known as the "Ahtisaari Package". The document in question, finalized in March 2007, was intended to serve as a guide for Kosovo on its path towards full independence and the resolution of its status, which independence was somehow "supervised" by the international factor until 2012, when eventually the International Civil Office (ICO), as a supervisory institution, ascertains the successful finalization of this process.

⁸ Annual Report of the Agency for Free Legal Aid, p. 4, 2017, accessible at: <https://anif.rks-gov.net/page.aspx?id=1,15>

⁹ GAP Institute Report, Reforming the Social Assistance Scheme, p. 7, 2022.

¹⁰Ibid.

¹¹The United Nations International Mission in Kosovo (UNMIK) was deployed in Kosovo based on Resolution 1244/1999, issued by the United Nations Security Council.

3. Constitutional (legal) aspect in the Republic of Kosovo regarding Free Legal Aid

The Constitution of the Republic of Kosovo¹² defines legal aid as a constitutional category by and according to Article 31 (6) it is specified that *"Free legal aid shall be provided to those who do not have sufficient financial means, if such assistance is necessary to ensure effective access to justice"*.

The constitutional guarantee of the right to legal aid obliges the state to provide the conditions for the enjoyment and protection of this right. Consequently, the state has the duty to legally regulate the provision of legal aid, which also implies the obligation (of the state) to ensure the provision of free legal aid. Beyond this, the Constitution in Article 31 (2) guarantees the right to a fair and impartial trial, the right to legal aid, as a special human right, Article 30 (5)

In 2012, the Assembly of Kosovo adopted the Law No. 04/L-017 On Free Legal Aid¹³ as amended and supplemented by Law No. 08/L-035. This law aims to create a functional system for free legal aid in civil, criminal and misdemeanor proceedings¹⁴, through which effective access to justice is ensured for citizens who do not have sufficient financial means, as well as the legal aid providers (Free Legal Aid Agency), ¹⁵its users and other aspects related to the organization are determined.

Until September 2022, the Legal Aid Agency was an independent institution established and supervised by the Kosovo Assembly. In the process of reforming the public administration in Kosovo with the

¹²Constitution of the Republic of Kosovo, 9 April 2008.

¹³Official Gazette of the Republic of Kosovo: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2803&langid=2>

¹⁴Article 1 of Law No. 04/L-017.

¹⁵Ibid., Article 2.

amendment/supplementation of the legislation from the relevant field, the agency has become an integral part of the Ministry of Justice.

Taking into account the strategic directions of development of the Republic of Kosovo and the efforts made by the state for the full establishment of the rule of law, in accordance with international standards, as a precondition for membership in the European Union, in the system of free legal aid (so far), important but not quite sufficient steps have been taken towards the establishment of an effective and financially stable legal aid system, in accordance with international standards and European practice.

Kosovo in its basic legal document¹⁶ recognizes all obligations arising from the implementation of international conventions and treaties. In fact, the Constitution of the Republic of Kosovo, specifically (Article 19.2) defines the incorporation of international law into domestic legislation and specifies that *"Ratified international agreements and legally binding norms of international law have priority over the laws of the Republic of Kosovo"*. At the same time, the Constitution (of Kosovo) encourages international cooperation by recognizing general international law and a wide number of international conventions that are directly implemented in the country's legal system, even though Kosovo is not yet a contracting party to these conventions (Hajredin Kuçi, 2018).¹⁷ As far as the Kosovo-EU relationship is concerned, the most important document that concretely (practically) proves the acceptance of legal "obligations" between Kosovo and the EU, to harmonize its national legislation with EU law, is the Stabilisation¹⁸ and Association Agreement (SAA) signed on 28 October 2015, effectively in force from 1 April 2016. As the first contractual agreement between the two parties, the SAA represents a new

¹⁶Articles 19 and 22 of the Constitution of the Republic of Kosovo

¹⁷Hajredin Kuçi, International Legal Cooperation between Kosovo and Other States and Organizations, Review of Central and East European Law, 43 (2018), p. 314 – 330.

¹⁸ <https://eur-lex.europa.eu/EN/legal-content/summary/stabilisation-and-association-agreement-with-kosovo.html>

phase in political relations between Kosovo and the EU. As an international agreement ([Government Document Practical Guidelines](#))¹⁹ it sets out the formal mechanisms and deadlines for the implementation of all reforms that will progressively align Kosovo with the EU in all policy areas until all EU standards are met. Therefore, Kosovo, as a country aiming for EU membership, should adopt the entire Acquis during the integration process, up to accession²⁰ and make it part of the domestic legislation, including free legal aid.

4. Legal framework regarding Free Legal Aid – International Standards

According to the legislation in force, defined in [the Law on Free Legal Aid](#)²¹, free legal aid is provided throughout the territory of the Republic of Kosovo, in criminal, civil, administrative procedure, etc. as primary and secondary aid, which includes: information and legal advice related to legal procedures; preparation of documents and all other technical assistance related to the completion of the case; representation in civil procedure, criminal, administrative and misdemeanour, defence and representation at all stages of the criminal procedure; information and legal advice related to tort proceedings, and information, legal advice and assistance in mediation and arbitration proceedings, as provided for by applicable laws.

In terms of criteria, the applicable legislation defines the qualifying criteria²², which can be enjoyed by Kosovo citizens residing in Kosovo, persons

¹⁹Practical Guidelines for the Approximation of the Legislation of the Republic of Kosovo with the Legislation of the European Union, April, 2014, p. 37.

²⁰The term *acquis* contains: the political principles and objectives envisaged in the treaties establishing the EU as well as its subsequent amendments, the legislation issued on the basis of these treaties, the case law of the European Court of Justice, declarations and resolutions issued in the EU Framework, international agreements and agreements signed between a number of EU states, related to the activities of the European Community.

²¹Law No. 04/L-017 Supplemented/Amended 08/L-035.

²²Article 7 and Article 8 of Law No. 04/L-017 On Free Legal Aid

residing in Kosovo and other persons according to the principle of reciprocity, then the financial criteria, where legal aid is provided to "all persons who benefit from the social (assistance) scheme, or are in a similar situation to persons who benefit from the right to social assistance, while secondary legal aid is provided to all persons whose total family income is less than the average family income, as well as the aspect of legal criteria, from and assistance is provided to them by assessing the merits of the case, according to the real value of the claim, the argumentative strength of the evidence presented by the claimant, as well as the likelihood of success of the claim (Article 9).

Recently, with [the Amendment/Supplement of the Law No. 04/L-017 on Free Legal Aid](#)²³, special categories of beneficiaries of free legal aid have been defined²⁴, who (category) will be able to benefit from free legal aid, regardless of the criteria required by Articles 8 and 9 of the Basic Law, where such (legal) aid is offered to: persons sexually abused during the Kosovo war in 1998-1999; victims of domestic violence; witness victims of violence, who are dependent on victims of domestic violence; victims of gender-based violence, victims of any type of sexual violence, including sexual harassment, victims of trafficking in human beings, child victims.

In the prism of international law, the provisions for the provision of legal aid are more extensive. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in Article 6 (1) guarantees the right to due process, as a special human right based on the ideas of natural justice, the realization of which is of fundamental importance for the development of democracy and the rule of law. More precisely the Convention standard for due

²³Official Gazette of the Republic of Kosovo, accessible at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=55138&langid=2>

²⁴ Article 10/A Law No. 08/L-035 On Amending Law No. 04/L-017 On Free Legal Aid.

process includes a number of special rights ([MarkWilliams, 2023](#)),²⁵ such as the right to effective access to justice, the right to be heard, equality in the use of special authority, the right to a trial by an impartial and independent tribunal established by law, etc.

According to the ECHR, the obligation to provide free legal aid exists when it is dictated by the "interests of justice". The criteria used as a basis for such an assessment (of the interests of justice) have been developed in the long practice of the European Court of Human Rights (ECHR) and have been expressed in its numerous judgments²⁶. In this regard, the Constitution of the Republic of Kosovo, in Article 53, stipulates that human rights and fundamental freedoms guaranteed in the Constitution shall be interpreted in harmony with the court decisions of the ECHR, which obliges courts in the Republic of Kosovo to take into account the case law of the ECHR when deciding in similar cases.

In the EU, the right to legal aid represents one of the fundamental rights, the exercise of which ensures effective access to justice. In this regard, in addition to many other legal acts and documents, [the EU Charter of Fundamental Rights of 2000](#)²⁷, adopted alongside the Treaty of Nice (2001), stipulates that *"every person shall be given the opportunity to be advised, protected and represented"*. More precisely, Article 47 of the Charter states that *"legal aid shall be made available to those who lack sufficient resources to the extent that such assistance is necessary to ensure effective access to justice."*

Other legal instruments within the EU are [Council Directive 2000/43/EC](#)²⁸, which encourages Member States to include civil society

²⁵ Mark Williams, Report on the Study/Evaluation of the Provision of Free Legal Aid in Kosovo – Inputs to the Concept Document on Legal Aid Law Reform, USAID Kosovo Justice Project, December, 2023

²⁶Ibid.

²⁷The Charter of Fundamental Rights of the EU, takes on a binding character in the Treaty of Lisbon (2009)

²⁸Council Directive 2000/43 of 29 June 2000 on the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin.

organizations in the provision of legal aid when the state, due to insufficient financial and human resources, is unable to meet the requirements for free legal aid. Such an approach and logic even though it is not a member of the EU, but with the intentions of integration within this Union, has also been followed by the Republic of Kosovo, where not only in terms of legal definition, but also in practice, it has enabled the implementation of free legal aid through various NGOs, financially supported by various international missions/organizations and projects operating within the Republic.

In order to assess the current situation regarding the provision of free legal aid in Kosovo (where legal clinics are not currently included), it is important to address the key aspects related to the amount of legal aid, the quality of legal aid, and the funding mechanisms that are provided at the country (state) level.

As noted earlier, there are various legal aid providers operating in Kosovo: 1) the legal aid provided by the Free Legal Aid Agency which mainly focuses on civil and administrative cases (with limited amounts in criminal cases), which assistance is provided by the agency's legal officers, or by lawyers appointed by the Kosovo Bar Association, as a result of the memorandum of cooperation between these two institutions; 2) criminal legal aid ([GIZ-National Report, 2023](#)), ²⁹mainly for serious cases (not excluding other cases), through the system of assignment according to official duty by the Kosovo Bar Association and financed by the Kosovo Prosecutorial Council, when requested by the police or the Prosecutor (with reference to the obligations under the Criminal Code) or by the Kosovo Judicial Council, in cases where judges request the appointment of a lawyer mainly for cases that are known as "forced" protection for serious cases ([Document](#)

²⁹ Legal reform for economic development in the Western Balkans (GIZ), National Report-Free Legal Aid Women in Kosovo, May 2023.

concept)³⁰ and 3) all types of legal aid that are provided by various non-governmental organizations, mainly with funding from donors³¹. In this regard, the European Commission's 2022 Progress Report³² states that: *"The level of legal aid (for both victims and suspects/accused), while improved, remains insufficient due to conflicting legislation, lack of public awareness, and different systems for providing free legal aid."*

5. Development of Legal Clinics (Historical Background) - Legal Challenges (Barriers) in the Operation of Legal Clinics in Community Services

Since the establishment of the University of Prishtina in the 1970s, Kosovo's legal education system has predominantly adhered to conservative teaching methodologies, a trend that persisted until the late 1990s in all Ex Yugoslavia and elsewhere in Europe. As a result, there was limited flexibility to integrate innovative and practical teaching methodologies into the Faculty of Law's program.

Following the post-1999 period, the Kosovo legal education system underwent a transitional phase, aiming reformation.³³ During this process, the curriculum of the Faculty of Law at the University of Prishtina experienced a profound transformation, with similar changes widely adopted by the law faculties of later-established private colleges and Public Universities in Kosovo. The imperative to align the curriculum with the job market's needs, particularly in the

³⁰ Concept document on the reform of free legal aid, p.10, accessible at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=42514>

³¹ Ibid.

³² <https://integrimievropian.rks-gov.net/raporti-per-kosoven-2022-eng/>

³³ The Kosovo legal education has (then) adopted the Bologna system.

context of justice system reforms in Kosovo, necessitated the adoption of a more pragmatic approach to teaching methodologies in Law Faculties.

Therefore, the post-war environment in Kosovo in 1999, marked by the establishment of justice institutions and the presence of numerous judges, prosecutors, and legal professionals from diverse global legal systems, significantly influenced the discourse on justice system reform. In this context, the support of various donors, notably from the U.S. government, in particular from USAID³⁴ the European Commission, and individual partner countries, prompted a more open-minded approach to incorporating practical legal education into the curricula of law faculties and other educational institutions. This inclusive perspective extended to the judicial academy, the bar association, and civil society organizations. The late were also focused on providing more proactive and practical approach towards education of lawyers. The active involvement of students and professors from the University of Prishtina and other universities in international conferences, seminars, and competitions has played a crucial role in shaping a nuanced understanding of the legal education system. Recently, a cycle of reforms launched within the University of Prishtina (2021-2025), which focused on the Bachelor's curriculum of the Faculty of Law, a new and very special dimension was dedicated to the reconceptualization of clinical learning or otherwise known as "legal clinics". The reconceptualization of clinical learning in the Faculty of Law, among other things, has had the main goal, to change the model of (legal) clinics from the pure curricular model to a hybrid model, where students would be enabled to provide pro bono legal aid and the same through institutional mechanisms as well as to be enabled to contact with labor market actors, respectively with judges, prosecutors and lawyers, who will be part of the clinical learning. Such a re-conception, too, has

³⁴Berisha, Qerkin Teaching and Learning Methodology in the Legal Clinical Education Programs in the Public Universities in Kosovo, in: A guidebook on best practices in running live client clinics, Faculty of law University of Pristina "Hasan Pristina" 2023, p.141.

raised the need to create technical mechanisms that will enable the better organization of clinical learning within the new program, which has started to be implemented from the academic year 2023/2024.

The Faculty of Law has accredited the new program, according to the decision of the Accreditation Agency. The basic studies program of the Faculty of Law has been accredited, for the years 2023-2028. Within this program, clinical learning is integrated into two dimensions: *The first dimension includes clinical courses which are integrated within the program plan and which are qualified as elective subjects; The second dimension of clinical learning, in the new program includes certification programs, which are dedicated to students who have completed the fifth semester, students of the fourth year as well as those who are enrolled in the master's level.*

The new program of the Faculty of Law aims to develop clinical learning in such a way that the clinical learning courses that are included in the syllabus, are developed according to the concept of clinics with real clients as well as based on imaginary cases and the certification programs will be developed with labor market actors, respectively judges, prosecutors and lawyers. Certification programs are conducted according to accredited syllabuses, where part of the classes (mainly beginners) are held by professors of clinical subjects, while the rest of the classes are held by relevant judges, lawyers and prosecutors, selected by the Faculty of Law, according to cooperation agreements. The certification programs are dedicated to students of basic studies and master's degrees, of the respective programs (Criminal or Civil Justice).

A very important aspect in the framework of the reform followed in the curriculum of the new program of the Faculty of Law (accredited and implemented since October, 2023), and especially the re-conception of clinical learning (legal clinics), has been the approach to labor market actors and their treatment as equal partners in the design of programs and their (practical) engagement in the processes initiated within the Faculty of Law. This cooperation has been extended to several

dimensions and has included the institutions of the justice system, the free legal professions as well as those from the private sector.

In this regard, the management of the Faculty of Law has conducted close discussions and consultations with all (partners) without exception, who have been considered relevant and helpful in the processes initiated by the academic unit, especially around the re-accreditation of programs and collaborations beyond, which were necessary to materialize the objectives set for implementation. One of the steps taken by the Faculty of Law, in order to create mechanisms for the implementation of the new clinical learning model, is the re-functionalization of the advisory body, which was established by the decision of the Council of the Faculty of Law (30 September 2022).

6. Legal barriers to "Live Clinic" (overcoming them) – Reforms and the current process

Be that as it may, what is relevant in this paper (especially for the part of legal clinics) has to do with the (current) legal framework, where the reference is to the "providers" of free legal aid, or more precisely to which institutions, companies/communities or organizations have the competence (specifically according to the law) to provide these types of legal services within the Legal Aid Agency (Free). In this regard, Article 26 of the Law No. 04/L-017 On Free Legal Aid in detail defines the authorities which can provide these types of services, as follows: Regional offices; Mobile Offices for free legal aid; Lawyers advocates; Non-Governmental organizations in cases when they enter in partnership with Agency.

From an initial assessment, a priori, it can be observed that in the current law, some of the providers of such (free legal services) do not include the Law Faculties (schools) of Kosovo. Seeing such an obstacle, the Faculty of

Law/University of Prishtina (as the oldest and largest Faculty in Kosovo) as a result of the reform initiated in the curriculum of the program and in advance the engagement in the framework of a very important project for legal clinics³⁵ in the framework of the Erasmus+ program funded by the Office of the European Commission, since 2021, had started a close consultation with the Free Legal Aid Agency, as the main institution at the Republic level that provides these services (which process will be discussed in the following part), to negotiate the ways or possibilities of involving the Faculty of Law/UP in the process of providing pro bono services to vulnerable "vulnerable" groups. This is as an alternative to a momentary solution, until the appropriate conditions and circumstances are created for the Assembly of Kosovo to proceed with the change/completion of the legal basis (which has already begun), to recognize the right of law faculties to provide legal services to the community as independent entities.

In this regard and in the light of the normative provisions respectively by the law that refer to entities that can operate as mobile units of the Free Legal Aid Agency, i.e. enabling this status (in interpretation of Article 26 of the law) also to legal clinics, after some activities developed by the Faculty of Law -UP, as well as taking into consideration the aim of building an efficient legal system that aims to protect the rights of the citizens of Republic of Kosovo and above all in order to create an effective access to justice, after a constructive engagement of the parties to the process and other stakeholders, on October 17, 2022, the Cooperation Agreement was signed between the Faculty of Law – University of Prishtina and the Free Legal Aid Agency ([Reference No. 10/133](#))³⁶, through which the Faculty of Law gains the opportunity to initially operate as a mobile unit (under the umbrella of Agency), where possible cases with real clients can be accepted and

³⁵The project "Legal Clinics in service of vulnerable groups: improving the employability of law students through practical education (ENEMLOS)" accessible at: <https://enemlos.ucg.ac.me/>

³⁶ Reference of the Agreement for the Faculty of Law-UP No.Prot. 10/133, dated 17.10.2022.

worked on by students in collaboration and mentorship with professors of the field and responsible officials of FLAA.

Undoubtedly, the relevant activities have played an important role in preparing students in several dimensions, especially in the drafting of memoranda (especially in moot international competition), legal drafting and other aspects from the practical field. However, despite these aspects addressed, it must be acknowledged that legal clinics lacked their main purpose or objective which is present everywhere in universities in many countries in Europe and especially those in the USA, which has to do with engaging students in working with real clients, or as they are otherwise known as "Live Clinics".

Seeing such a shortcoming, and not only, University of Prishtina³⁷, managed to find the formula of cooperation within the funds offered by the EU through Erasmus+ programs, creating a synergy and at the same time giving a new spirit to this process, in actualizing and starting the study of different models of operation of legal clinics, for performing, respectively, providing free legal services to the community. As part of the project, the academic staff or more precisely the legal educators from the respective universities had the opportunity to attend the trainings first through the online platform (as a result of the Covid 19 pandemic), to continue with study visits to Zagreb (Croatia³⁸), then to several partner universities in Poland³⁹, and the one in London (United Kingdom)⁴⁰. The realization of the relevant visits had turned out to take place at the time when the Faculty of Law-University of Prishtina, as a result of the re-accreditation process,

³⁷ The ENEMLOS project funded by the Erasmus + included universities with a long tradition of legal clinics from EU and the United Kingdom.

³⁸ Legal educators of the University of Prishtina visited the Legal Clinics at the University of Zagreb, January 2022.

³⁹ A part of the academic staff, visited several Universities in Warsaw and Krakow, as part of The Polish Legal Clinics Foundation, April, 2022.

⁴⁰ The last visit under the ENEMLOS project took place at Regent's University London from 7-11 June 2022.

had started a process of reforms in the new curriculum assisted/assisted by the Council of Europe Office in Prishtina ([Letter for the Assessment, 2022](#)), ⁴¹which had included several segments, especially that of legal clinics, otherwise known as the re-conception of clinical learning⁴², which document had emerged as a model of inspiration from the program applied mainly at the University of Zagreb and which was subsequently enriched in some segments by the model of legal clinics in Poland.

Also in the framework of international support, the Faculty of Law of the University of Prishtina has found support from the project ([Muhamet Vokrri](#))⁴³ “*Expanding and Improving Practical Legal Education in Kosovo*” with one of the most prestigious universities UC Hastings College of Law, currently known as *University of California San Francisco Law School*. The reconceptualization of clinical learning (legal clinics), among other things, had as its main goal the change of the model of clinics from a pure curricular model to a hybrid model, enabling the students to provide pro bono legal assistance, and contact through institutional mechanism the actors of the labour market, respectively judges, prosecutors and lawyers, who will be part of legal clinics⁴⁴.

All this had come as a result of the concrete agreements that the Faculty of Law had concluded with the relevant institutions that were mainly or entirely dedicated to legal clinics, initially with [the Kosovo Judicial Council](#)⁴⁵, to continue

⁴¹ Accompanying Letter for the assessment of the bachelor’s degree studies curriculum of the Faculty of Law in the University of Prishtina, The Council of Europe, March, 28, 2022.

⁴² The re-conception of clinical learning approved by Faculty of Law Council alongside the new draft program of the Faculty of Law (Curriculum of the Bachelor program), accessible at: <https://juridiku.uni-pr.edu/page.aspx?id=1,3>

⁴³ Muhamet Vokrri, Clinical learning at the Faculty of Law of the University of Prishtina towards the new model: a transition from the full-curricular model to the hybrid, “live clinic” model, in: A guidebook on best practices in running live client clinics for the academic and non-academic community, p. 114.

⁴⁴ Ibid.

⁴⁵ <https://juridiku.uni-pr.edu/page.aspx?id=1,35,1079>

with [the Kosovo Prosecutorial Council](#)⁴⁶ and [the Kosovo Bar Association](#)⁴⁷. Within the framework of the implementation of the new model of the re conception of legal clinics, the Faculty of Law has taken concrete steps to create the mechanisms that will enable the more efficient implementation of this new model. The steps taken regarding the creation of mechanisms that will enable the easier implementation of legal clinics, according to the new model, are: a) creation and functionality of the Legal Clinic Center ([Decision of the Governing Council](#))⁴⁸, b) creation and functionality of the advisory board of the Faculty of Law ([Decision of the Council](#)),⁴⁹ and c) the conclusion of the agreements with the labor market actors, which enable their involvement for legal clinic matters at the Faculty of Law.

This new program which besides other aspects of offering to learn (e.g. legal drafting, working in simulation cases, preparing the students for moot competitions) includes also the providing *pro bono* assistance to the community (citizens in the economic and social condition who qualify for assistance) includes all clinics as separate sections, such as: *Civil Clinic, Criminal Clinic, Constitutional Clinic, Labour Clinic, Fiscal Clinic, Human Rights Clinic (Refuge Clinic and Anti Discrimination), Administrative Clinic, EU Law Clinic* ([Faculty of Law, Self Evaluation Report](#)).⁵⁰

Undoubtedly, as a result of these steps taken by the public university and especially the practical implementation, through the integration of the students of the Faculty of Law - University of Prishtina, through the Agency for Free Legal Aid in the provision of free legal services, as a result of the Cooperation Agreement between the two institutions (referred to above), the Government of Kosovo,

⁴⁶ <https://juridiku.uni-pr.edu/page.aspx?id=1,6,1153>

⁴⁷ <https://www.oak-ks.org/al/lajmi/3706>

⁴⁸ The Governing Council of the University of Prishtina, nr.prot. 683, date 24/03/2023.

⁴⁹ Decision of the Council of the Faculty of Law on the creation of the Advisory Board, dated September 30, 2022.

⁵⁰ The Self Evaluation Report of the Faculty of Law, accredited by the Kosovo Accreditation Agency.

respectively, the Ministry of Justice, has established the working group for the drafting of the new law on Free Legal Aid ([MD – Decision](#)),⁵¹ where part of the group is also the representative from law schools (specifically from UP) from and the main goal, among other aspects, is the involvement of Law Faculties (Schools) as independent institutions in the provision of free legal aid for the categories defined in the legislation.

The working group tasked by the Ministry of Justice has finalized the [concept document](#)⁵², and what is important for the process is the fact that in whichever variant of the new (draft) law goes, the unwavering disposition of all the stakeholders involved is the recognition or inclusion of legal clinics as providers of legal aid for vulnerable groups respectively those who need such services and that for this initiated process (which is expected to be finalized). The curriculum reform and in particular the one referring to legal clinics have played a great role.

7. Conclusions:

So, as it was elaborated above, crucial for the materialization of the objectives set by the Faculty of Law and in this context by the Legal Clinic Center (LLC), in addition to increasing the professional capacities of the students of legal clinics, is also the finalization of the legislative reform by the Government (as a result of the deep reform by the Faculty of Law in the reconceptualization of

⁵¹ Decision No. Prot. 387/2024, date 13/11/2024 by the Ministry of Justice, Government of the Republic of Kosovo.

⁵² The concept document has been approved by the Government of the Republic of Kosovo. Decision nr.12/220, dt. 11.09.2024, accesible at: [chrome-extension://efaidnbmnnnibpcajpcgiclfndmkaj/https://kryeministri.rks-gov.net/wp-content/uploads/2024/09/Koncept-Dokumenti-per-Ndihme-Juridike-Falas.pdf](https://efaidnbmnnnibpcajpcgiclfndmkaj/https://kryeministri.rks-gov.net/wp-content/uploads/2024/09/Koncept-Dokumenti-per-Ndihme-Juridike-Falas.pdf)

clinical learning), for the recognition of the legal status of legal clinics, so that this process takes the form it deserves.

Regarding the role of the functionalization of legal clinics, what is important to emphasize is the fact that the impact of the functionalization of legal clinics on students who are part of legal clinics within the University of Prishtina and especially those who are directly involved in the process of "Live Clinics" who in the (momentary) supervision of FLAA have been engaged in real cases in the service of the community, it has had a very high positive impact.

Beyond this aspect, a very important dimension of their activity in the legal clinic has also influenced the process of preparation and assistance offered to colleagues and students in international competitions (Moot Competition), especially in their preparation in drafting memoranda, then the construction of hypothetical cases, the provision of cases from case law, which can serve you in international competitions (Moot Competition), where currently the Faculty of Law-UP, is a regular participant in the 3 prestigious international competitions: The Jessup Competition, Vis International Commercial Arbitration Moot and Nuremberg Moot Court, and where an essential role in advancing their knowledge has been played by the operation of the Legal Clinic Center and the help or cooperation that local partners from the labor market and international have provided to the Center (Clinic).

This is also reflected in the official report of the Agency for Free Legal Aid for the years 2023 and 2024 in the practical learning part⁵³, where it recognizes the role and contribution of interns and that the effect of this commitment has borne fruit. At the same time, it should be noted that most of the students of legal clinics, in the subsequent period, have continued their professional engagement,

⁵³ Annual Report of Kosovo Free Legal Aid Agency, p. 23, accesible at: <https://anjf.rks-gov.net/page.aspx?id=1,15>

mainly in the judicial branch, the legal system and also in the free legal professions, where their connection with the Legal Clinical Center (LLC) is imperative for the further successes of the legal clinic and at the same time in helping and preparing the new generations for their future.

The direct connection of the LLC with the relevant partners of the labor market, has influenced that students who are part of the legal clinics and/or those in the certification programs, have much easier access or involvement in the relevant institutions and consequently the contribution to the legal system and the continuous liaison with the Faculty of Law respectively the Legal Clinic Center in other cooperation projects and forums.

References/Bibliography

Moliterno, James E. "Legal Education, Experiential Education, and Professional Responsibility." *William and Mary Law Review* 38 (1996): 71.

Barrow, Daniel, Louise Glover, and Tamara Hervey. "European Journal of Legal Education." *European Journal of Legal Education* 1 (1) (2020): 117–154.

Grimes, R. "The Theory and Practice of Clinical Legal Education" in J. Webb and C. Maugham (eds.) *Teaching Lawyers' Skills* (1996).

Wizner, Stephen. "The Law School Clinic: Legal Education in the interests of Justice", *Fordham Law Review* Vol.70, 2002, p. 1931.

Iken, Jane H., & Wizner, Stephen. "Teaching and Doing: The Role of School Law Clinics in Enhancing Access to Justice". *Georgetown Law Faculty Publications*, March 2010, p. 997.

Annual Report of the Free Legal Aid Agency.

GAP Institute Report, *Reforming the Social Scheme*, June, 2022.

Resolution 1244/1999, issued by the United Nations Security Council.

Constitution of the Republic of Kosovo, 9 April 2008.

Official Gazette of the Republic of Kosovo/ Nr. 03/ 22 February 2012, Prishtinë.

Kuçi, Hajredin International Legal Cooperation between Kosovo and Other States and Organizations, Review of Central and East European Law, 43 (2018).

Stbilisation Association Agrrement (SAA) between Kosovo and European Union (2015).

Practical Guidelines for the Approximation of the Legislation of the Republic of Kosovo with the legislation of the European Union (Kosovo Government Document), April, 2014.

Law Nr. 04/L-017 on Free Legal Aid.

Official Gazette of the Republic of Kosovo Nr.8/25 February, 2022.

Law Nr.08/L-035 for amendment/suplementation Law Nr.04/L-017 on Free Legal Aid.

Williams, Mark. Report on study/ of the provision of free legal aid in Kosovo. Inputs regarding the concept document about the legislation reform refered to Free Legal Aid field. USAID Project for Justice in Kosovo, 2023.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

EU Charter of Fundamental Rights, 2001.

Council Directive 2000/43, of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Legal reform for economic development in the Western Balkans (GIZ), National Report-Free Legal Aid Women in Kosovo, May 2023.

The reference of the Agreement between Faculty of Law (UP) – Free Legal Aid Agency, Nr.Prot. 10/133, date 17.10.2022.

Accompanying Letter for the assessment of the bachelor's degree studies curriculum of the Faculty of Law in the University of Prishtina, The Council of Europe, March, 28, 2022.

Muhamet Vokri, A guidebook on best practices in running live client clinics for the academic and non-academic community, p. 114.

<https://integrimievropian.rks-gov.net/raporti-per-kosoven-2022-eng/>

<https://anjf.rks-gov.net/page.aspx?id=1,15>

<https://juridiku.uni-pr.edu/page.aspx?id=1,35,1079>

<https://juridiku.uni-pr.edu/page.aspx?id=1,6,1153>

<https://www.oak-ks.org/al/lajmi/3706>

<https://juridiku.uni-pr.edu/page.aspx?id=1,3>

<https://enemlos.ucg.ac.me/>

Decision of the Governing Council of the University of Prishtina, nr. prot. 386, dt. 24/3/2025.

Decision of the Council of the Faculty of Law on the creation of the Advisory Board, dated September 30, 2022.

The Self Evaluation Report of the Faculty of Law, accredited by the Kosovo Accreditation Agency.

The Decision nr. prot. 387/2024, dt. 13/11/2024, issued from the Ministry of Justice, Government of the Republic of Kosovo.

The concept document of the Ministry of Justice.

KOSTRUBA Anatoliy, Professor of Civil Law in Ukraine, Contractual researcher University Paris 1 Panthéon Sorbonne, Paris, France

VOICES FROM THE PERIPHERY: A CRITICAL ANALYSIS OF INDIGENOUS PEOPLES' EDUCATION AND DEMOCRATIC PARTICIPATION IN INDIA

Karan Choudhary¹

Siddharth Choudhary²

DOI: <https://doi.org/10.62140/KCSC162176221>

Abstract: Law and policy plays crucial role in functioning of the body politic. Often, their orientation -in the critical legal studies sense - is reflection of the prevalent social realities and interplay of various dynamics in the society at large. This chapter offers a critical analysis of Indigenous Peoples' education in India, emphasizing the need to situate educational challenges within a broader socio-legal and political context. The National Education Policy (NEP) 2020, along with judicial interpretations of relevant laws, presents a timely opportunity to critically engage with the education of Indigenous communities and address persistent educational disparities. Education plays a vital role in fostering resilience and improving life outcomes. It is not merely a developmental tool; it is fundamental to democratic participation, identity assertion, and socio-political empowerment. Yet, systemic biases and institutional neglect continue to marginalize Indigenous voices in both policy-making and practice. Drawing on comparative insights from Australia and other jurisdictions, this chapter highlights that 'institutional attitude' manifested in systemic bias and structural neglect continues to hinder meaningful educational inclusion of Indigenous peoples'. By deconstructing these barriers, the chapter calls for a reimagining of education policy as a participatory and rights-based process. Insights from this chapter can inform development of responsive laws and policies that empower Indigenous communities education and thereby enabling them to realize their full potential, reclaim their public voice, and actively participate in the body politic.

¹ Judge, under aegis Hon'ble Delhi High Court. The views expressed are those of the author, in his personal capacity and do not necessarily reflect that of his office or the Government of India.

² Doctoral Scholar (Law), Université Paris Nanterre, France.

Keywords: Indigenous Peoples’ Education, Citizen Participation, Constitutional Law, Institutional Attitude, Social Justice.

Introduction

Education is considered to be an important means by which an individual can realise their full potential. It plays a vital role not only in individual development but also in the advancement of society. It is considered to contribute to the smooth functioning of the society, overall stability of the system and acquainting especially the younger generations with the rules (including codes of conduct and engagement) of the system and thereby making them informed and meaningful participant as a citizen. Recognizing the importance of promoting scientific temper, Sustainable Development Goal 4 of United Nations ‘Transforming our World: the 2030 Agenda for Sustainable Development’ states and highlights the need to “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all” (United Nations, 2015, p. 14).

Education can also be seen as an implement, meaning thereby, it can be used as a tool to further one’s agenda. Often the nature of education, syllabus/curriculum design, system’s orientation and others, are manners in which specific agendas can be furthered. For instance, ‘white man’s burden’ to educate the natives/barbarians (education system permitted civilizing barbarians which included killing them, forcible proselytization, looting/plundering their wealth); systems of education which permits chastising child/corporal punishment, reinforcing oppressive structures including patriarchal norms, perpetuating caste-based hierarchies.

However, broadly speaking importance of education in general cannot be gainsaid. Education along with the research and development *inter alia* has led to scientific and technological advancements. A quick glance at the Constitution of India, reveals recognition of the importance of education. In the spirit of

progressive realisation, Article 21-A was inserted in Part III of the Constitution of India which is titled as Fundamental Rights. Article 21-A states 'Right to Education' in the following terms "the state shall provide free and compulsory education to all children of the age of six to fourteen year". Article 51-A situated in Part IV-A of the Constitution enumerates the fundamental duties of Indian citizen. Clause (h) of Article 51-A states "to develop the scientific temper, humanism and the spirit of inquiry and reform". Further, clause (k) states "who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years". The MDMS (Mid-Day Meal Scheme) provides free of cost meal to all school going children studying in class I-VIII in government and government aided schools. Scheme is considered important policy intervention to promote enrolment of children in schools and consequently their education.

Vitals pertaining to Indigenous Peoples in India

Before analyzing the educational realities of Indigenous Peoples in India, it is essential to first outline key aspects of their legal and demographic status. There are various provisions in the Constitution itself, concerning different aspects of indigenous peoples lives, including protection of their interests. But before we delve any further, it is important to unpack the term "Indigenous Peoples" which is quite recurrent in this paper. In common parlance, various terms viz. 'aboriginal people', 'Aboriginal people' (with capital A), 'native people', 'first nations' peoples, 'first peoples', 'Indigenous People' (with capital I and P), 'indigenous peoples', 'autochthonous people, *adivasi*' are treated as fungible terminologies. However, they are not. Generally, indigenous peoples have unique social, cultural and economic conditions vis-a-vis other sections of the national community (See, Article 1 of ILO's Convention 169: Indigenous and Tribal Peoples Conventions,

1989). It is pertinent to note that in India, many official documents use terminologies viz. tribes and tribal. I shall use terminology ‘indigenous peoples’ in this paper unless I’m quoting an official document wherein I shall use the terminologies as are stated there.

Article 366 (25) of the Indian Constitution defines ‘scheduled tribes’ as “such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 (which states procedure for declaring scheduled tribes) to be scheduled tribes for the purpose of Constitution”. Each federal (or quasi-federal) units in India has a list of scheduled tribes which is stated in the Constitution (Scheduled Tribes) Order, 1950. This list is amended from time to time. Presently, there are 705 ethnic groups in ‘Schedule tribes list’.³ In *Marri Chandra v. Dean, Seth G.S. Medical College* [(1990) 3 SCC 130], it was held that “member of any schedules tribe in one state does not carry that status if (s)he moves to a state where that tribe is not recognized as scheduled tribe”. It can be considered to have a chilling effect on some of the fundamental rights particularly the freedom of movement. There are also provisions in the constitution which are indicative of the constitutional solicitude – for instance, Part X (Tribal Areas), Part XVI (Special Provisions relating to certain classes), Schedules – 5th and 6th of the Constitution. Demographically, they constitute 8.6% of the whole population i.e. 10.42 crores approx. (Census Report 2011, Government of India).

³ Please check for amendments, if any, for the most recent data.

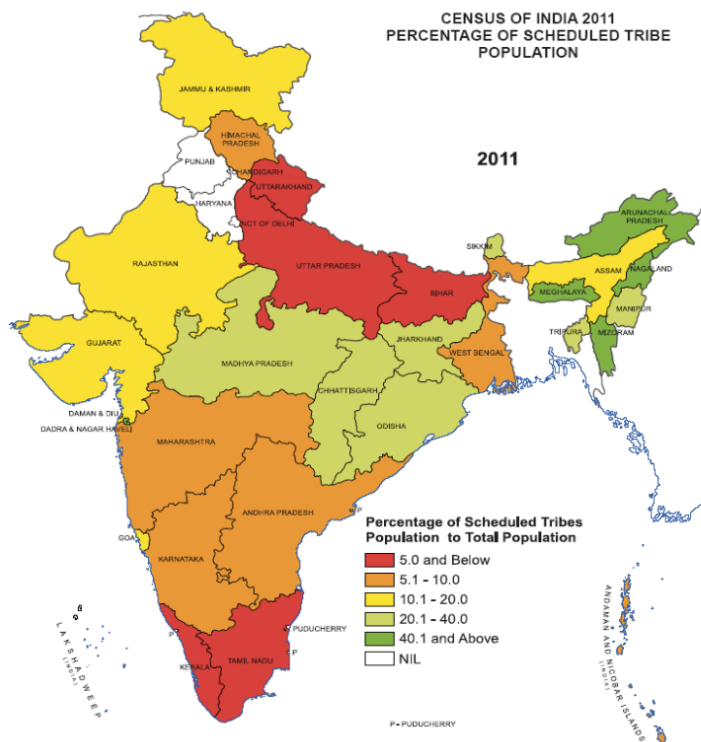


Figure 1. Demography of Scheduled Tribes in India based on 2011 Census⁴

Reference to figure 1, gives a visual estimation of the distribution of scheduled tribes population in India. It is observable that some regions have higher concentration of scheduled tribes as compared to other regions, for example, the

⁴ 'Scheduled Tribe Statistical Profile: At a Glance' by Ministry of Tribal Affairs, Government of India. Ministry of Tribal Affairs, Government of India website can be accessed from URL <https://tribal.nic.in/home.aspx>. Statistics webpage can be accessed from URL <https://tribal.nic.in/Statistics.aspx>. Disclaimer: It must be noted that the map may not be the correct/accurate cartographic representation of India. For the updated official Political Map of India, see Political Map of India, English 12th edition 2025 by Survey of India, Department of Science and Technology, Government of India, available at <https://surveyofindia.gov.in/webroot/UserFiles/files/Polmap-eng-2025.pdf>.

seven sister states in the north-eastern region. As regards the literacy rate (albeit in approximation), for non-tribal population it is 73% while for scheduled tribes is 59%.⁵

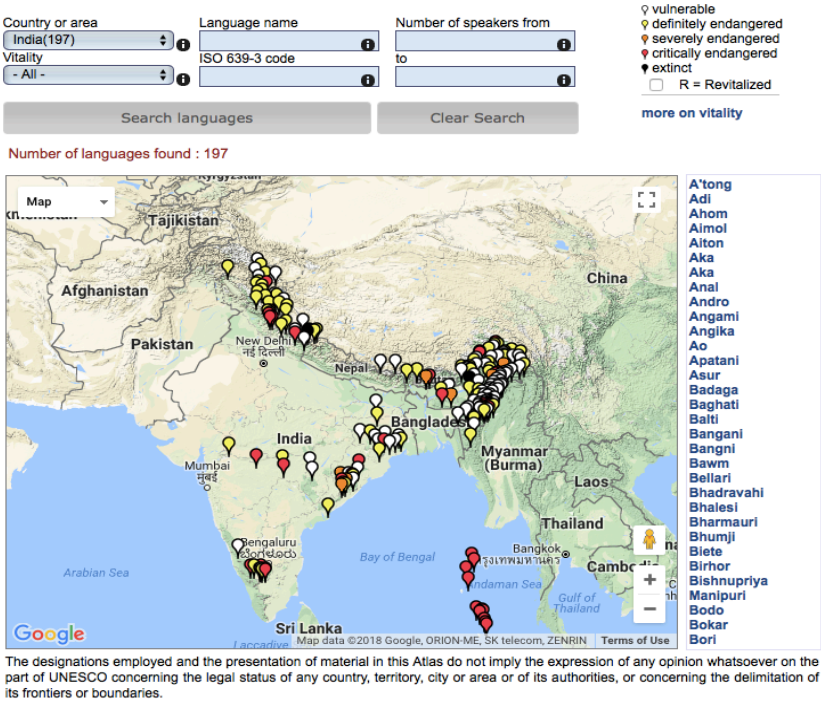


Figure 2. Distribution of Endangered Languages in India⁶ from UNESCO Report (2009)

⁵ More statistics can be accessed from statistics webpage within the Ministry of Tribal Affairs website. Ministry of Tribal Affairs, Government of India website can be accessed from URL <https://tribal.nic.in/home.aspx>. Statistics webpage can be accessed from URL <https://tribal.nic.in/Statistics.aspx>. Literacy rate memorandum is available at URL [https://tribal.nic.in/ST/ListOfScheduledTribes\(STs\)withVerylowliteracyrate.pdf](https://tribal.nic.in/ST/ListOfScheduledTribes(STs)withVerylowliteracyrate.pdf). Literacy rate can be further divided into crude literacy rate and effective literacy rate. Former takes total population as denominator while the latter takes 7 years old and above of total population as denominator.

⁶ Disclaimer: It must be noted that the map may not be the correct/accurate cartographic representation of India. For the updated official Political Map of India, see Political Map of India, English 12th edition

A quick perusal to figure 2, indicates the geographical distribution of communities in India whose languages are endangered. It is pertinent to note here that conjoint reading of the UNESCO report (2009) and the Linguistic Survey of India report (2011) by Government of India, reveals that communities facing threat of language endangerment are scheduled tribes, scheduled castes and other socially and economically backwards communities. Scheduled tribes invariably face drawbacks both on the account of economic and social disadvantaged positions in society.

Locating the Context and Perspective

Before we commence in-depth analysis of indigenous peoples education in India, it is important to bring out the context and perspective to the issue. Highlighting the importance of perspective (Žižek, 2009) shares a story which is as follows –

A worker is suspected of stealing - every evening, as he leaves the factory, the wheelbarrow he rolls in front of him is carefully inspected. The guards can find nothing. It is always empty. Finally, the penny drops: what the worker is stealing are the wheelbarrows themselves. (p. 1)

Often, bare scrutiny of the black letter of law is not sufficient to cull out/ gauge the living realities in the society (Choudhary, 2024, pp.137-138). Context and

perspective plays pivotal role in deciphering the real nature of the subject under study. In indigenous studies, it is not sufficient to study law and policy concerning them, although it is necessary. It would amount to engendering a parochial approach and giving credence to ahistorical narrative(s) concerning indigenous studies. Hence, contextualized study would warrant studying the history, 'State', its instrumentalities and others, with regards to indigenous peoples. The matter gets further complicated by the fact that even at the level of making of law, there are various forces are at play and often the dominant narrative gets crystallized. Hence, besides the politics visible at the operational level of the law, there is also inherent politics in the very process of law making. Consequently, legislative drafting demands substantial inputs, lateral thinking, brainstorming, discussions and more (Choudhary, 2022, p.87). Schrama explicates akin concepts of "*de lege lata*" & "*de lege ferenda*" indicating internal and external aspects of law (Schrama, 2011, pp.147-148). This further underlines the need for traveling beyond the traditional research methodologies and incorporating transdisciplinary research methodologies in the field of law (Choudhary, 2019, pp.61-62 and also see Choudhary, 2024, pp.137-138). The operation of law and its interaction with other factors like State, social mores, mentalités further complicates the matter (Legrand, 2003, pp.240–311). In other words, with the change in perspective, the meaning of the appreciation changes. It is like a Rubin's vase (which presents itself to two possibilities to be arrived at, depending on the perspective) but here possibilities are many.

Irrespective of the time and space, one can notice that the 'State' and its apparatus has been oriented in a particular fashion especially when it comes to indigenous peoples. It is interesting to note the ubiquity of the commonalities in the treatment, that State has meted out to its indigenous population. Institutional attitude has a marked difference when it comes to treatment of indigenous and non-indigenous population. Attitudes albeit enduring in nature are amenable to change. However, if not addressed they tends to continue unnoticed and even

crystallise. Nandy famously observed ‘colonialism may not always end with the departure of the alien rulers from the colony’ (Nandy, 2009, p.2). Hence, British colonialism though arrived with the arrival of British in India but didn’t necessarily leave with their departure. Similarly, Welch elaborates concept of “internal colonialism” and the endurance of colonial reality especially for the indigenous minority despite Australia attaining its nationhood in 1901 (Welch, 1988, pp.203-204). The treatment of indigenous population in Australia is replete with accounts of institutional bias and racism. For instance, “stolen generations” in Australia can also be seen as reflective of the larger “institutional attitude”. Pilger documents more about stolen generation including ground narratives (Pilger, 2014). A realistic depiction of this attitude of stolen generation with graphic details can be viewed from season 3 episode 4 of the television show ‘Anne with E’ wherein *Ka’kwet* an indigenous girl about the same age of Anne and her interaction with the indigenous residential school is shown. It is not surprising that Cowessess First Nation Chief informed about discovery of 751 unmarked graves of indigenous children near the former Marieval Indian Residential School in Grayson, Saskatchewan, Canada (The Hindu, 2021).

Similarly in New Zealand, apathy and the discrimination continued towards the indigenous peoples despite independence. The dominant narrative regarding “Treaty of Waitangi” as basis of the transfer of sovereignty of the North Island to the British and that in turn they were promised protection is questioned. There are counter views which suggest that the Māori version of the Treaty (*Kāwanatanga*) never adumbrated to transfer sovereignty but sought only to transfer governance. Māori were forced to sell their lands to the Europeans settlers and often their lands were confiscated. According to one estimate, “the Maori went from owning basically all of *Aotearoa* (New Zealand), to less than 5 percent today” (Lawrence, 2010).

In Norway, the Norwegian parliament (*Stortinget*) apologised for the ‘Norwegianisation Policy’ and historical injustices committed against the Indigenous Peoples’ comprising (*Samers, kvener, norskfinners og skogfinners*) Sámi people, Kvens people/Norwegian Finns people and Forest Finns people (see Bryant, 2024 and Chutel, 2024). This official apology came after the report dated 1 June 2023, was submitted to the parliament by the ‘Truth and Reconciliation Commission’ (*Sannhet og forsoning, 2023*) observing adverse impacts on the language, culture, identity, livelihoods and existence of the Indigenous Peoples’. State education guided by such policy and institutional attitudes towards the Indigenous Peoples’, will be nothing but a tool to further specific agenda of the State. One of the personal accounts/testimonies Muotka (2025) recalls “boarding schools, like those in Røros, became instruments of erasure, forbidding children from speaking Sámi and punishing them if they did”. Recent instances such as Fosen conflict⁷, again indicates the extant institutional attitude of the State and its apparatus towards the indigenous peoples’. Norwegian Government particularly after the decision from the Supreme court of Norway, issued apology for the violation of human rights of the sámi people (Press Release, Government of Norway, 2023).

In Sweden, Archbishop Antje Jackelén issued public apology to indigenous sámi people of Sweden on behalf of the national Lutheran Church of Sweden (see Gindt, 2023) –

Today we kneel before you, to acknowledge the abuses of the church of Sweden and to take an essential step on the long road of reconciliation.

⁷ The conflict pertains to violation of human rights of the sámi people particularly article 27 of the International Covenant on Civil and Political Rights by the Norwegian Ministry by permitting/licensing construction of wind turbine parks/wind farms. For more see press release titled ‘Agreement between Nord-Fosen siida and Roan Vind’ dated 06/03/2024 by the Norwegian Government, available at URL <https://www.regjeringen.no/en/aktuelt/agreement-between-nord-fosen-siida-and-roan-vind/id3028614/>. Also See, Norges Høyesterett, HR-2021-1975-S.

We apologise for the Church of Sweden's abuse
of the Sámi.(p.2)

The Government of Sweden has issued directive 2021:03⁸ announcing and establishing the National Truth Commission (*sanningskommission*) for Swedish state's abuses against the sámi people.

In India, Institutional attitude can be gleaned from statutes such as “The Criminal Tribes Act” and its successor legislations which adopted the much frowned upon Cesare Lombroso ideology that the criminal traits are hereditary (Lombroso, 2006). The central idea that Lombroso put forth was that criminality like physical defects is inherited and physiognomic scrutiny could assist in identifying and conforming atavistic individuals and savages. Implying thereby that people belonging to a particular tribe are born criminals. The National Human Rights Commission has recommended the repeal of the Habitual Offenders Act, 1952 (Press Release, National Human Rights Commission, 2024). UN's Committee on the Elimination of Racial Discrimination (UNCERD, 2007) observed and recommended -

“The committee is concerned that so called Denotified and Nomantic Tribes, which were listed for their alleged criminal tendencies under the former Criminal Tribes Act, 1871, which continue to be stigmatised under the Habitual

⁸ See, Kulturdepartementet, Kommittédirektiv Dir. 2021:03 dated 3rd November 2021 on 'Kartläggning och granskning av den politik som förts gentemot samerna och dess konsekvenser för det samiska folket'(translation - Mapping and reviewing the policies pursued towards the Sami and their consequences for the Sami people), available at <https://www.regeringen.se/rattsliga-dokument/kommittedirektiv/> and <https://www.regeringen.se/rattsliga-dokument/kommittedirektiv/2021/11/dir.-2021103/>. The report is due by 1st December 2025.

Offenders Act, 1952. The committee recommends that the state party repeal the Habitual Offenders Act and effectively rehabilitate the Denotified and Nomadic Tribes concerned.” (p. 36)

Only in recent times with the increasing awareness and greater recognition of rights of indigenous people, both at national and international arena, did we witness measures such as apology by Kevin Rudd, then Prime Minister of Australia, acknowledging the suffering of indigenous people at the hands of State and its apparatus.⁹ In 2014 National Commission for Denotified, Nomadic and Semi-Nomadic Tribes was set up and subsequent to its recommendation, Development and Welfare Board for Denotified, Nomadic and Semi-Nomadic Communities was established. Core objective of the board is to formulate and implement welfare and development programmes for Denotified, Nomadic and Semi-Nomadic communities. However, despite the increasing awareness about indigenous peoples concerns and their rights, and despite changing formal outlook of the State, still the lived experience of these communities have not changed much. The institutional attitude of bias and discrimination may have changed the form but is it not over. Hence, while earlier it might be more visible, now it is more latent. An analogy can be given of “totalitarianism” versus “benevolent dictatorship”. Žižek gives example of Bad Boss who harass versus boss who claims to be your friend

⁹ Apology to Australia's Indigenous peoples by Prime Minister Kevin Rudd dated February 13, 2008. Apology (both audio and transcript), can be accessed from Parliament of Australia website https://www.aph.gov.au/Visit_Parliament/Art/Icons/Apology_to_Australias_Indigenous_Peoples#:~:text=On%2013%20February%202008%2C%20Prime,for%20voting%20to%20the%20Chamber.

and then harasses you. In the latter the violence is invisible and much more cruel (Žižek, 2009).

In as recent as 2014 Australian case¹⁰ one see the interaction between indigenous person and the criminal justice system. It is not surprising to see that the conviction rate of indigenous peoples are high despite the fact of their population forms a small part of the national population (Shepherd, 2020).

Similarly in India, Expert group in its report in 1.18.1 and 1.18.2 notes (Report of an Expert Group to the Planning Commission, 2008) –

The development paradigm pursued since independence has aggravated the prevailing discontent among the marginalized sections of the society.... The development paradigm as conceived by policy makers has always imposed on these communities, causing irreparable damage to these sections. This paradigm has been disproportionately cornered by the dominant sections at the expense of the poor, who have borne most of the costs. Development which is insensitive to the needs of these communities has inevitably caused displacement and reduced them to a sub-human existence. In the case of tribes in particular it has ended up in destroying their social organization, cultural identity and resource

¹⁰ The State of Western Australia v Gibson, [2014] WASC 240. It discusses the interaction between the state system and Gene Gibson. Herein there was failure to provide interpretation services to the accused, which could have enabled him to understand the proceedings and make informed decisions.

base which cumulatively makes them increasingly vulnerable to exploitation. The pattern of development and its implementation has increased corrupt practices of a rent seeking bureaucracy and rapacious exploitation by the contractors, middlemen, traders and the greedy sections of the larger society intent on grabbing their resources and violating their dignity. (pp.29-30)

This has been referred to as “development aggression” (Gilbert and Doyle 2008, pp.224-230). Development should to be for all and sustainable, it is anachronistic to think that development can happen only at the cost of marginalised communities. Is it a mere coincidence of “resource curse” that the geographical distribution of these indigenous communities in India is in region which are endowed with and rich in natural resources? Interestingly, the polemic surrounding the laws and procedures relating to acquisition of land, has intensified to such an extent that amendments have been introduced. The passage of ‘Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013’, evinces the same. The Draft (Environment Impact Assessment) EIA notification 2020 provides for ex-post facto clearance, which stands out as an another example (Mazoomdaar, 2020). It proposes to bolster the government's discretionary power while limiting public engagement in safeguarding the environment. Forced displacement is still remains a reality.¹¹

¹¹ See Orissa Mining Corporation Ltd. v Ministry of Environment & Forest & Others, Writ Petition (Civil) No. 180 Of 2011, Supreme Court of India. Herein the company Sterlite Industrial sought permission to construct a bauxite ore mine on forest land in Niyamgiri Hills, in Orissa, a region inhabited by a local indigenous community called the Dongria Kondh. The Ministry of Environment and Forests granted provisional environmental clearance, to be made final subject to an assessment of the planned construction's impact on the Dongria Kondh community. Subsequent impact studies conducted by various official bodies concluded that the proposed construction would interfere with the Dongria

Another instance that can be cited is use by the State of un/under educated indigenous community's youth also known as *Salwa Judum* in tackling naxalite-maoist insurgency. In *Nandini Sundar and Ors. vs. State of Chattisgarh*, Writ Petition (Civil) No. 250 Of 2007, Supreme Court of India issued immediate cease and desist order to the State for such usage of indigenous community's youth.

Therefore, we see the context and perspective which informs the discourse pertaining to indigenous peoples' issues.

Issues with indigenous peoples' education in India

The Public education system in India *inter alia* consists of various government schools including residential schools catering exclusively to indigenous peoples. For instance, Eklavya Model Residential Schools (EMRS), Eklavya Model Day Boarding Schools (EMDBS), Ashram schools and others schools with lodging and boarding facilities. Further, there are Pre/Post matric scholarships, higher education fellowships and others to assist them. There are dedicated exclusive universities that have been established. For instance, Indira Gandhi National Tribal University, Amarkantak and Central Tribal University of Andhra Pradesh, Vizianagram with a view to provide avenues of higher education and research facilities primarily for the indigenous population of the country. There is an exclusive ministry in India known as 'Ministry of Tribal Affairs' which looks after the affairs of indigenous communities.

community's rights and should be rejected. However, the project was already embarked upon and a refinery was built by the company. The Ministry officially rejected Sterlite's application for environmental clearance, stating that the venture had displayed a blatant and shocking disregard for the rights of the concerned indigenous peoples, which are protected by the Forest Rights Act. Then, this petition whereby company sought Court to overturn the Ministry's rejection. Compare this with Fosen conflict in Norway.

Coming directly to the issue pertaining to indigenous peoples education in India. It has been noted that education system for indigenous peoples is more of a curse than blessing. Many indigenous children report that their teachers look down on them because of their identity and teach them that their culture is primitive. Where schools teach only in national or regional languages, indigenous children who have grown up using only their mother tongue are disadvantaged and often left behind academically. A quote from textbook in one of the Indian state mentions (Sundar, 2012) -

Even after independence tribal people are still backward and poor. Of course, their ignorance, illiteracy and blind faith are to be blamed for lack of progress because they still fail to realise the importance of education in life. (p.239)

Prof. Ganesh Devy (2011 UNESCO Linguapax laureate) notes, tribal children in India face several challenges in completing primary education. The dropout rate among tribal children at primary school is much more than that of non-tribal children. According to School Education statistics, “the drop-out rate amongst tribal children from classes I-X is 70.9” (Statistics of School Education 2012, p.68). While they are equally affected by poorly provisioned and ill-functioning schools as children from other communities, one key aspect that has been less explored is the language and cultural difference. “If you map the parts of India where illiteracy is highest, you will find that it matches the parts where the mother tongues of children are different from the official language” (Devy, 2006). Therefore, major issues which emerge pertaining to indigenous community children’s education are the institutional attitude, medium of instruction (lack of usage of mother tongue), lack of expertise esp. teachers in such schools,

accessibility and others. Accessibility includes both the physical dimension and other dimensions – attitude of teachers and staff towards indigenous students, environment which promotes/encourages or discourages indigenous children from coming to such schools. Though “caste discrimination/caste disability” is not under scrutiny here, however, it is pertinent to mention here that in a report titled ‘India: Hidden Apartheid of Discrimination Against Dalits’ notes the prevalence of such practices (Human Rights Watch, 2007). Hence, one can notice that such practices continues both in patent and latent forms. Chetty researching on Bondaguda Government Primary School finds that manner in which Mid-Day Meal Scheme (MDMS) at the primary school reinforces caste discrimination (Chetty, 2021). He further finds that children from an early age are moulded into perpetuating the discriminatory mindset of the caste-ridden village society Hence, we witness how education and sites of education, perpetuate and reinforce institutional attitudes such as caste-based discrimination. Scholars like Yogendra Yadav demand that reservation should be extended to the Private Higher Educational Institutions so that “historically excluded communities” including Indigenous peoples’ have access to education and employment opportunities (Yadav, 2025). Yadav further shares following statistics for making such a demand (Yadav, 2025) -

All India Survey of Higher Education data for 2021-22 shows that upper-caste Hindus (around 20 per cent of the country’s population) are well over 60 per cent of private university students. Here is the social group-wise breakdown of students in private (state private and deemed private) universities: SCs were just 6.8 per cent (current population share about 17 per cent), STs 3.6 per cent (population around 9 per cent),

OBCs 24.9 per cent (population between 45-50 percent) and Muslims 3.8 per cent (population around 15 per cent).

In *Pramati Educational and Cultural Trust vs. Union of India*, (2014) 8 SCC 1, the Constitutional Bench of the Supreme Court of India, upheld the validity of Article 15(5) of the Constitution of India. Article 15(5) of the Constitution of India reads as under -

Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

The issue of reservation, particularly in Private Higher Educational Institutions could have been addressed by the National Education Policy, 2020 (NEP). Perusal of NEP indicates that “multilingualism has been advocated including teaching in local languages/mother tongue” (National Education Policy 2020, p.13). With the extant “Three Language Formula” (followed since the

adoption of the National Policy on Education 1968, and endorsed in the National Policy on Education 1986/1992 as well as the National Curriculum Framework (2005), teaching of indigenous children in their mother tongues remains a contested issue. This concern persists in the recently published NEP, which while emphasizing the importance of mother tongue-based education, faces significant implementation challenges. These include the shortage of trained teachers, insufficient development of teaching materials, and a general lack of institutional support. Moreover, this issue is further complicated by the endangerment of many indigenous languages, which often lack standardized scripts, formalized curricula, and sustained intergenerational transmission. As younger generations increasingly shift to dominant languages, the feasibility of implementing mother tongue education diminishes, raising concerns about both educational equity and language preservation. Addressing these challenges requires a comprehensive approach that integrates language revitalization efforts with educational planning. Establishment of Indian Institute for Interpretation and Translation is proposed as a measure to address such concerns. There is also a proposal to introduce fun project / activity on ‘The Languages of India’, sometime in Grades 6-8, such as ‘Ek Bharat Shrestha Bharat’ initiative. In paragraph 6.2.3 of (NEP, 2020) mentions –

While several programmatic interventions to uplift children from tribal communities are currently in place, and will continue to be pursued, special mechanisms need to be made to ensure that children belonging to tribal communities receive the benefits of these interventions.

Further in paragraph 6.17 of (NEP, 2020) mentions –

Under the aegis of the Ministry of Defence, State

Governments may encourage opening National Cadet Corps wings in their secondary and higher secondary schools, including those located in tribal dominated areas. This will enable harnessing of the natural talent and unique potential of students, which in turn would help them to aspire to a successful career in the defence forces.

Such observations especially in a policy document, presuming and generalising indigenous children as naturally endowed with qualities fit to be fighter and their unique potential is unwarranted. They deserve to have whole spectrum of jobs/career/vocations open before them.

There is need to have teachers who can teach indigenous children using their mother tongues especially at young age, given that their mother tongue can be different from the regional language. Moreover, there is need for such teachers to also be “culturally competent” to teach them. Meaning thereby being respectful and understanding of indigenous cultures. Paragraph 15.1 (NEP, 2020)– dealing with teacher education mentions, “teachers must be grounded in Indian values, languages, knowledge, ethos, and traditions including tribal traditions, while also being well-versed in the latest advances in education and pedagogy”. What is important that this must not end up being a culturally tokenistic exercise.

In a recent judgement¹², question before Indian constitutional court was regarding checking the constitutionality of the order which provided for 100% reservation to the Scheduled Tribe candidates out of whom 33.3% (approx.) shall

¹² Cheboru leela Prasad v State of AP, decision dated 22 April 2020 by constitutional bench of the Supreme court of India, CIVIL APPEAL NO.3609 OF 2002.

be women for the post of teachers in the schools in the scheduled areas in the State of Andhra Pradesh. Court observed in paragraph 133 – “It is an obnoxious idea that tribals only should teach the tribals”. Further in paragraph 107 - “their language and their primitive way of life makes them unfit to put up with the mainstream and to be governed by the ordinary laws. They are not supposed to be seen as a human zoo and source of enjoyment of primitive culture and for dance performances”. Court seemed to be guided by the dominant narrative of assimilation. The education system must be respectful of their cultural identity and should not carry out civilizing project. In other words, indigenous peoples must be educated in such a manner whereby their cultural identity is not lost. They are not required to be assimilated into mainstream. It should be reflective of the recognition that the mainstream of Indian society has many streams that flow into it, each of them equally valid. It is pertinent to note here that “teacher absenteeism” is a real issue when it comes to teaching indigenous communities in remote/far flung areas. Hence, the context would countenance governmental order for reservation. Prof. Baxi in his seminal work observes, role of constitutional court *inter alia* as promoting constitutionalism and strengthening the democratic values viz. demosprudence (Baxi 2016, pp.167-170). Especially in such cases, constitutional court should situate the dispute in the larger context. It should consider impact of its judgment in terms of promoting constitutionalism and salient objectives as enshrined in the Indian Constitution.

In Australia, National Aboriginal and Torres Strait Islander Education Strategy i.e. NATSI Education Strategy, identifies few major pointers in context of teaching of indigenous children (NATSI 2015, p.5)–

- i. Skilled educators who are culturally competent in local context.

ii. Through curriculum, education sector which acknowledges, respects and reflects the histories, values, languages and cultures of indigenous people.

iii. Quality partnerships especially between education sector and local indigenous people. These partnerships are characterized by listening and responding, strong accountability and active engagement, collaborative information sharing and informed decision making.

iv. Address barriers to ensuring school attendance.

v. High quality, culturally inclusive early childhood education services and schools work with families and communities to set a strong foundation for early learning, including a child's transition to school.

Thus, thrust is on the creating knowledge systems which meaningfully collaborates with the indigenous peoples, while also ensuring targets such as increasing participation in early childhood education; improving school attendance; improving reading, writing and numeracy and making sure students finish school. Australian Curriculum Assessment and Reporting Authority (ACARA) uses the guidance provided by this strategy to consider Aboriginal and Torres Strait Islander perspectives. Indian indigenous peoples' education policy can provide for more collaborative approach both in education sector and curriculum design pertaining to indigenous peoples' education. National Council of Educational Research and Training in India can explore the curriculum designing in such fashion. Australian Early Development Census (AEDC) measures "developmental vulnerabilities" as a pointer to indicate the achievement and scope for further improvement. The AEDC measures children's development across five developmental domains known to be good predictors of adult health, education and social outcomes:

i. Physical health and wellbeing

ii. Social competence

- iii. Emotional maturity
- iv. Language and cognitive skills (school based)
- v. Communication skills and general knowledge

Such pointer can be used in the Indian context. There is another important thought which needs to be addressed. Scholars (see Vass, 2015; Gillborn and Youdell, 2009) have identified that “closing the gap discourse” is not appropriate way to engage with indigenous people’s issues especially education of their children. The gap talk in context of education policy would mean education disparities in the achievements and engagement (in schooling) between indigenous and non-indigenous students. Problems identified with such deficit discourse are that firstly, it renders educational issues as fixable problems of efficiency (Clarke, 2012); secondly, it is considered to be disingenuous effort to depoliticise education policy itself by making them appear to be “matters of technical efficiency” and as a corollary basing itself on sanitised version of history; thirdly, failure of such gap talk to comprehend the larger picture in other words ‘missing forest for the tree’ and as a consequence efforts are directed only to achieve in closing the hiatus without addressing the real issues. In other words, selective focus / tunnel focus on the gap and consequent overlooking of, if not more important, equally important other issues. Fourthly, possible loss of identity as a result of an expectation of social and cultural conformity with the mainstream. It is a challenge, if it means that aboriginal peoples are required to reflect socially, culturally and individually an idealised profile of the citizen (Sullivan 2011, p. 3).

Sullivan traces the trajectory in following phases, when it comes to policy pertaining to first people in Australia (Sullivan 2011, p.4) -

Protection → Assimilation → Integration → Self-Determination

→Normalisation

Normalisation is seen as the re-engagement of the state with indigenous citizens and focuses equally on a re-commitment from state and territory governments to the needs of their indigenous citizens. Thus, role of government/State and policy is to further the creation of opportunities that maximises the rights of individuals within a market economy, to strengthen the human capital. Hence, within the normalisation framework, focus is to strengthen indigenous peoples as human capital and maximise their potential in the market economy.

In context of education research and policy in Australia, race continues to operate in and through social practices in ways that reproduce racialised hierarchies and are evident in educational engagement, achievement and post-school opportunities (Vass, 2015). Vass while advocating for Australian oriented “critical race theory” notes that it can assist in better addressing the issues pertaining to education of indigenous children.

Conclusion

Any research pertaining to the indigenous peoples’ must be situated in its larger context. The same is true for research in the field of education of indigenous children. When seen in the context i.e. historicity, social realities and institutional attitude, one observes that existence or non-existence of any policy is itself reflection of the larger interests operative in the society. For instance, believers in Critical Race Theory (CRT) believe that race operates at various levels and is important factor which cannot be overlooked. So, CRT scholars would argue that policy is guided and framed by interests which have racism at its core. However, with the increasing multiculturalism owing to globalisation, we see there are many

more factors which come into play. In a multicultural nation like India, the constellation and intersectionality of such factors needs to be considered. It is interesting to note that despite the national boundaries/frontiers which exists on the world map, we see the commonalities in the treatment of indigenous population by the State and its machinery. The ubiquitousness and pervasiveness of such treatment is indicative of a larger phenomenon. It begs us to analyse the very nature and functioning of the State, irrespective of time and space. In such an environment, I bring out “institutional attitude” as one such important factor which warrants scrutiny and consideration. Institutional attitude can be studied *per se* and also as a reflection or manifestation of other underlying dynamics that often operate at latent levels, such as caste hierarchies in India or racism in other contexts. It is not surprising, as per journalistic reports (see Raj, 2022; LiveLaw, 2022 and The Wire, 2022), that a judge of High Court of Patna in India, mocked the whole schedule caste community and no action was taken against him. Coming to the indigenous peoples education in India, we see that there are various issues which needs to be addressed. Some cues can be taken from the Australian policy for example utilising indicators such as ‘developmental vulnerabilities’, more meaningful collaboration with the indigenous population – in teaching and curriculum designing; ensuring culturally competent workforce. However, is it not to suggest mindless policy borrowing. Australian policy itself requires improvement and the fact that still lived realities of indigenous people have not changed much, is itself indicative of the deficit in the policy and its implementation. Australian policy must scrutinise the forces which operate especially at the latent levels. It is argued that we need to move beyond the prevailing ‘gap talk’ and reimagine the manner in which the state engages with indigenous populations, with particular emphasis on the development of ‘human capital’—especially in the context of the current market economy. While it is important to transcend the ‘deficit discourse’, there remains a pressing need to ameliorate the lived realities of indigenous communities even on those very parameters. Hence, having culturally competent

workforce, which teaches indigenous children in their mother tongue and promote their healthy development is needed. Ensuring high enrolment rates, literacy rates, lowering the dropout rates, schemes funding indigenous children are needed. And one also needs to see how indigenous children are faring as compared to their non-indigenous counterparts. What is also important is that, the process must not be reduced to a mere culturally tokenistic exercise. At the same time, institutional attitude must also be audited and checked. These are some of the prerequisites for ensuring that indigenous children are able to realize their full potential through education and become meaningful participants in the market economy, as well as equal citizens with dignity, agency, and a sense of belonging.

References

- Baxi, Upendra. (2016). Demosprudence and Socially Responsible / Response-able Criticism: The NJAC Decision and Beyond, 9 *NUJS L. Rev.*, 9(3-4), 153-172. <http://nujslawreview.org/2017/01/09/demosprudence-and-socially-responsibleresponse-able-criticism-the-njac-decision-and-beyond/>
- Bryant, Miranda. (2024, November 12). 'Norway apologises to Sami, Forest Finns and Kvens for forced assimilation policy'. The Guardian. <https://www.theguardian.com/world/2024/nov/12/norway-apologises-to-sami-forest-finns-and-kvens-for-forced-assimilation-policy>
- Choudhary, Karan. (2019). "Techno-Legal Synergy and Implications for Legal Research." *Law 2.0: New Methods and New Laws*. 59-65. Available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj0sIPqLLjrAhUN63MBHf7sAkYQFjASegQIAhAB&url=https%3A%2F%2Fpublications.vu.lt%2Fobject%2Felaba%3A42129782%2F42129782.pdf&usg=AOvVaw0cJ0vIyQCxxFt6z20dq-Sz>.

Choudhary, Karan. (2022). Human Rights Courts in India: Key Legal Concerns. 64 *Journal of Indian Law Institute* 87.

Choudhary, Karan. (2024). Which Method Should I Select for My Legal Research – Doctrinal, Empirical, Multi-Method or Something Else? *Teise*, 132, 135-144.
<https://doi.org/10.15388/Teise.2024.132.10>

Chetty, Krushna. (2021). Discrimination and Exclusion Against Marginal Castes and Tribes in Educational Institutions: An Empirical Analysis of Bondaguda Primary School. *Contemporary Voice of Dalit*, 14(1), 25-35.
<https://doi.org/10.1177/2455328X21100>

Chutel, Lynsey. (2024, November 12). ‘Norway Apologizes for Forced Assimilation of Sami and other Minorities’. *The New York Times*.
<https://www.nytimes.com/2024/11/14/world/europe/norway-sami-kvens-forest-finns-apology.html>

Clarke, Matthew. (2012). The (absent) politics of neo-liberal education policy. *Critical Studies in Education*, 53(3), 297-310.
<https://doi.org/10.1080/17508487.2012.703139>

Devy, G. N. (2006). *A Nomad Called Thief: Reflections on Adivasi Silence*. India: Orient BlackSwan.

Gilbert, Jérémie and Doyle, Cathal. (2009). Indigenous Peoples and Globalization: From “Development Aggression” to “Self-Determined Development”. *European Yearbook of Minority Issues*, 8, 219-262.
https://www.ecmi.de/fileadmin/downloads/publications/European%20Yearbook/EYMI_Vol_8_TOC_May_2011.pdf and another source
<http://dx.doi.org/10.2139/ssrn.2552408>

Gillborn, David & Youdell, Deborah (2009). Critical Perspectives on Race and Schooling. In J. Banks (Ed.), *The Routledge International Companion to Multicultural Education* (pp. 173–185). New York, NY: Routledge.

Gindt, Dirk. (2023). The Long Road of Reconciliation: The Church of Sweden's Performative Apology to the Sámi People. *Scandinavian-Canadian Studies / Études scandinaves au Canada*, 30, 1–30. <https://doi.org/10.29173/scancan227>

Government of Australian. (2015). *National Aboriginal and Torres Strait Islander Education Strategy*, Department of Education, Skills and Employment. <https://www.education.gov.au/indigenous-education/national-aboriginal-and-torres-strait-islander-education-strategy>

Government of India. (2008). *Development Challenges in Extremists Affected Areas Report of an Expert Group to the Planning Commission*. <https://tribal.nic.in/downloads/other-important-reports/DevelopmentChallengesinExtremistAffectedAreas.pdf>. Another Source to access the Report - Development challenges in extremists affected areas report of an expert group to the Planning Commission. (2008). *Social Change*, 38(2), 292-318. <https://doi.org/10.1177/004908570803800208>.

Government of India. (2011). *Census Report 2011*, Office of Registrar General and Census Commissioner, Ministry of Home Affairs. Census data can be accessed from website of Office of Registrar General and Census Commissioner, Ministry of Home Affairs, Government of India. <https://new.census.gov.in/census.website/>

Government of India. (2011). *Linguistic Survey of India Report based on census 2011*, Language Division, Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India. <https://language.census.gov.in/map/data/showHomePage>

Government of India. (2012). *Statistics of School Education 2010-2011*, Bureau of Planning, Monitoring and Statistics, Ministry of Human Resource Development. https://www.education.gov.in/sites/upload_files/mhrd/files/statistics-new/SES-School_2010-11.pdf

Government of India. (2020). *New Education Policy*, Ministry of Education (erstwhile Ministry of Human Resource Development). https://www.education.gov.in/sites/upload_files/mhrd/files/nep/NEP_Final_English.pdf

Government of India. The Constitution (Scheduled tribes) Order, 1950. https://tribal.nic.in/downloads/CLM/CLM_1/1.pdf

Government of Norway. (2023, March 04). 'Norwegian Government apologizes to Sámi reindeer herders on the Fosen Peninsula', Press Release. <https://www.regjeringen.no/en/aktuelt/norwegian-government-apologises-to-sami-reindeer-herders-on-the-fosen-peninsula/id2965357/>

Government of Norway. (2023). *Sannhet og forsoning (translation – truth and reconciliation commission)*. Official report can be accessed from the Norwegian parliament website. <https://www.stortinget.no/globalassets/pdf/sannhets-og-forsoningskommisjonen/rapport-til-stortinget-fra-sannhets-og-forsoningskommisjonen.pdf>

Human Rights Watch. (2007, February 13) *Hidden Apartheid: Caste Discrimination against India's Untouchables*. 19 (3C). <https://www.refworld.org/docid/45eebcd2.html>

International Labour Organization. (1989). *Convention 169: Indigenous and Tribal Peoples Conventions*. 27 June 1989, 1650 U.N.T.S. 383 https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

Lawrence, Nora. (2010). Working towards Māori equality. *Cultural Survival Quarterly*. 34-2. <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/working-towards-maori-equality>

Legrand, Pierre. (2003). The Same and the Different. In Pierre Legrand and Roderick

Munday (Eds.), *Comparative Legal Studies: Traditions and Transitions*, 240–311. Cambridge: Cambridge University Press.
<https://doi.org/10.1017/CBO9780511522260.009>

Live Law. (2022, December 06). ‘You Got Job Through Reservation? Patna HC Judge Kicks Up Row With Mocking Comments’. <https://www.livelaw.in/news-updates/you-got-job-through-reservation-patna-hc-judge-kicks-up-row-with-mocking-comments-215957>

Lombroso, Cesare. (2006). *Criminal Man* (Trans. M. Gibson and N. H. Rafter). Durham, NC: Duke University Press. <https://doi.org/10.1215/9780822387800>

Mazoomdaar, Jay. (2020, August 10). Reading the draft Environment Impact Assessment norms, and finding the red flags. *The Indian Express*.
<https://indianexpress.com/article/explained/draft-environment-impact-assessment-norms-explained-6482324/>.

Muotka, S.K. (2025, January15). Reclaiming Truth – A Sámi Perspective on Norway’s Apology and the Path to Reconciliation. *Arctic Circle*.
<https://www.arcticcircle.org/journal/reclaiming-truth--a-sami-perspective-on-norways-apology-and-the-path-to-reconciliation>

Nandy, Ashish. (2009). *The Intimate Enemy: Loss and Recovery of Self Under Colonialism*. Oxford University Press.

National Human Rights Commission. (2024, January 19). 'NHRC organizes an open house discussion on the Protection of Nomadic, Semi Nomadic and De-Notified Tribes in India and forward trajectory'. Press Release.
<https://nhrc.nic.in/media/press-release/nhrc-organizes-open-house-discussion-protection-nomadic-semi-nomadic-and-de>

Pilger, John. (2014, March 21). Another Stolen Generation: How Australia still wrecks Aboriginal Families. *The Guardian*.
<https://www.theguardian.com/commentisfree/2014/mar/21/john-pilger-indigenous-australian-families>

Raj, Dev. (2022, December 10). 'Call to remove judge for caste slur'. *The Telegraph Online*. <https://www.telegraphindia.com/amp/india/call-to-remove-judge-for-caste-slur/cid/1902998>

Schrama, Wendy. (2011). How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method. *Utrecht Law Review*, 7(1), 147-162.
<https://utrechtlawreview.org/articles/152/files/submission/proof/152-1-204-1-10-20110127.pdf>

Shepherd, S.M., Spivak, B., Ashford, L.J. *et al.* (2020). Closing the (incarceration) gap: assessing the socio-economic and clinical indicators of indigenous males by lifetime incarceration status. *BMC Public Health* 20, 710.
<https://doi.org/10.1186/s12889-020-08794-3>

Sullivan, Patrick. (2011). *The policy goal of normalisation, the national indigenous reform agreement and indigenous national partnership agreements*. Alice Springs: Australian Institute of Aboriginal and Torres Strait Islander Studies.
http://www.nintione.com.au/resource/NintiOneWorkingPaper_76_PolicyGoalofNormalisation.pdf

Sundar, Nandini. (2012). Adivasi Politics and State Responses: Historical Processes and Contemporary Concerns. In Sanjukta D. Gupta and Raj S. Basu (Eds.) *Narratives from the Margins: Aspects of Adivasi History in India*, 237-254. Delhi: Primus Books.

The Hindu. (2021, June 26). ‘Canada shaken by discovery of 751 Unmarked Graves at Indigenous School’.

<https://www.thehindu.com/news/international/over-750-graves-found-at-former-canada-school/article34955692.ece>

The Wire. (2022, December 06). ‘Patna HC Judge Mocks Government Employee, Asks If He Got Job Through Reservation’.

<https://thewire.in/law/patna-high-court-sandeep-kumar-reservation>

UNESCO. (2009). *Atlas of The World Languages in Danger* (interactive online edition), 3rd edition 2010. <https://unesdoc.unesco.org/ark:/48223/pf0000187026>

United Nations General Assembly. (2007). *Report of Committee on The Elimination of Racial Discrimination*; 70th session (19 February – 9 March 2007) and 71st session (30 July -17 August 2007), A/62/18.

<https://www.refworld.org/pdfid/473424062.pdf>

United Nations General Assembly. (2015). *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, 1-35.

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf

Vass, Greg. (2012). So, what is wrong with Indigenous education? Perspective, position and power beyond a deficit discourse. *Australian Journal of Indigenous Education*, 41(2), 85–96. <https://doi.org/10.1017/jic.2012.25>

Vass, Greg. (2015). Putting critical race theory to work in Australian education research: We are with the garden hose here. *Australian Educational Researcher*, 42 (3), 371–394. <https://doi.org/10.1007/s13384-014-0160-1>

Welch, A. R. (2006). Aboriginal Education as Internal Colonialism: The Schooling of an Indigenous Minority in Australia. *Comparative Education*, 24(2), 203-215. <https://doi.org/10.1080/0305006880240205>

Yadav, Yogendra. (2025, April 08). ‘An Incomplete Social Justice’. *The Indian Express*. <https://indianexpress.com/article/opinion/columns/yogendra-yadav-writes-social-justice-for-muslims-should-not-be-about-reservations-9841512/>

Žižek, Slavoj. (2009). *Violence*. Profile Books.

“CIVIC ENGAGEMENT.” “CIVIL SOCIETY” – IN THE FOCUS OF FRANCO-GERMAN EUROPEAN SUMMER UNIVERSITIES IN LEGAL SCIENCES IN THE ENLARGED EU

Emeritus Otmar Seul

DOI: <https://doi.org/10.62140/EOS845014418>

For the *Franco-German track of the legal studies' curriculum* at the University of Paris Nanterre, the EU's Eastern enlargement since 2004 is an opportunity for the development of an intensive cooperation with partners of new Member and candidate States in the post-communist space. The (informal) network of partnerships stretches today from the Baltics to the Western Balkans.

The originality of the project inspires innovative didactic and methodological approaches in universities outside Europe (Maghreb States, sub-Saharan Africa, the Indian Ocean, India, and South America), and even beyond that: it has stimulated initiatives to promote "civic engagement" and the involvement of "civil society" in constitutional decision-making processes.

Our series of Summer Universities in Legal Studies, launched in 2004 in Vilnius, Lithuania, and now running for over 20 years, *examine the consequences and evolutions for the EU and its Member States in the enlarged European "legal area"*.

Their program is not limited to the study of the foundations and developments of Community law. Above all, they question the adaptation difficulties that the reforms and legal harmonization entail in the enlarged EU.

They require constant reflection on the identity and values of the Union. As civil society actors, universities do not only transmit knowledge and qualified training, but also do develop ethical and civic skills geared towards the "common good" and the "general interest". We grant students and young researchers the greatest possible autonomy in the treatment of subjects (presentations, transnational workshops, group work, etc.). Multinational and multilingual, our Summer Universities conceive the law as a vector of "European identity". Their contribution to shaping "civil society" is all the more welcome today as the foundations of the rule of law and liberal democracy are threatened by political polarization, not only in the countries of the post-communist area, but also in the founding States of the Union.

The Summer Universities in the Western Balkans: Reflecting on shared European values and the conditions of EU accession

Cross-border and itinerant, the Summer University proposed by Paris-Nanterre in 2012 in the Western Balkans is one of the most original projects of the *Nanterre network*, implement primarily North Macedonia, Kosovo, and Albania.

The initiative is part of a rapprochement between the States that (re)emerged in the 1990s, after the breakup of Yugoslavia, in a region marked by past antagonisms and conflicts. The participants are questioning both the identity of the Balkan countries, and the conditions and possibilities for their accession to the EU, in accordance with the Copenhagen criteria (1993). Inspired by Franco-German *reconciliation* and its impact on the process of economic and political integration in Europe, this itinerant Summer University examines the contribution

of European law to the region, which is called upon to strengthen the principles of the rule of law, liberal democracy and the social market economy.

Our initiative (a source of inspiration for other cooperation projects between French, German, and Balkan universities) received special recognition in 2015: in JOINT DECLARATIONS, the Ambassadors of France and Germany in Skopje, Pristina, and Tirana highlighted the beneficial effects of a cultural and geopolitical approach that is “perfectly aligned with the objectives set by the Western Balkans Conference” initiated in Berlin in 2014. We therefore attach great importance and recognize the strong symbolic significance of the presence of the French and German Ambassadors to the opening or closing of our Summer Universities. Although we are not a Franco-German “institution” per se, we are nevertheless a functioning informal network whose initiatives and experiences have also become a source of inspiration for ministries (programme PARCECO, *Ministère de l'Enseignement Supérieur*, Paris), Franco-German organizations such as the Franco-German Youth Office (*Office Franco-Allemand pour la Jeunesse*) or academic institutions such as the Franco-German University (*Université Franco-Allemande*). Therefore, it would be fitting to thank the many French and German diplomats who, for over 30 years, have shared the motivation for our Franco-German and European engagement and, above all, have supported our (mostly trinational) Summer Universities in law since 2004 (cf. <https://www.france-blog.info/wp-content/uploads/2020/09/Seul-O-Synthese-geopolitique-des-Universites-d-ete-dec-2020.pdf>).

At the last Western Balkans Summer University, held in September 2025 in Kosovo, an initial assessment was made 12 years after its founding. Qerim Qerimi, Professor of International Law at the University of Prishtina and member of the Venice Commission of the Council of Europe (*European Commission for Democracy through Law*), stated that our Summer Sessions are “*more than an academic meeting (...), more than a university program: they represent “a lively dialogue between cultures, legal traditions and histories, building a bridge between Western Europe and the Western Balkans*

through shared values and critical reflection””. Qerim Qerimi affirms that Kosovo, his country, not only participates in academic and political dialogue, but also “helps shape” it: “With this year's focus on European integration, the rule of law, and transitional justice, Kosovo and its academic community proudly affirm their role as co-creators and mirrors of the evolving European identity”.

I take Qerimi's reminder that our Summer University is designed to “critically examine the past and jointly shape the future” as an opportunity to point out the specific concern of my current research of depressing topicality: *“Civil Society in the Rule of Law. Reflections on European Values.”*

Civil Society in the Rule of Law: Visions and realities in times of polarization

As events around the world brutally demonstrate, civil society can be exposed to political pressure, existential threats, or even physical destruction. Based on figures from the “2024 Democracy Index” published by *The Economist* (<https://www.eiu.com/n/democracy-index-2024/>), the erosion of democracy continues, dramatically limiting the scope for “civic engagement”: while 42.5% of the population in the 167 countries surveyed currently live in a formal democracy, only 15% live in a full democracy, and almost 40% live in a dictatorship. However, only 3.5% of the population enjoys unrestricted civil freedoms. More than 72 percent of citizens live in countries with oppressed or closed societies!

Even though there are increasing references to civic engagement in our countries, it seems to us that, in the public discourse, civil society is not convincingly assessed as a complex social and political phenomenon. Therefore, it is a priority for me to focus on country-specific research of nature, function, and

development of civil society. Claims that it is an “untapped resource” that could be mobilized to revitalize liberal democracy and the rule of law misrepresent reality.

Especially in times of increasing polarization, civil society is anything but a homogeneous whole: it reflects an extreme social and political fragmentation. Wishful thinking must therefore be replaced by a serious attempt to capture, as precisely as possible, the diversity of tendencies and expressions of civic engagement at the country level, using well-founded analyses.

Attempts to identify typical Europe-wide forms of organization and expression of civic engagement do not negate the question of what role the European Union itself assigns to civil society. After all, with its "European Citizens' Initiative" project, the Union aims to mobilize civil society for the defense of the rule of law and liberal democracy in its Member States. According to the 2001 *White Paper on European Governance*, “networks and grassroots groups” should function as communication forums on European issues. Article 11 of the Treaty on European Union (TEU), in its consolidated version of 2012, advocates for permanent information and consultation, i.e., an “open, transparent, and regular dialogue” between the Union institutions and “representative associations and civil society” (paragraph 2). In December 2023, the European Commission called on Member States to improve the framework conditions and opportunities for civil society organizations and human rights defenders to exercise their influence: “They shall act as oversight bodies for violations of the rule of law and actively contribute to the promotion and protection of the values and fundamental rights of the EU”¹.

¹ Empfehlung der Kommission zur Förderung der Mitwirkung und der wirksamen Beteiligung von Bürgerinnen und Bürgern und Organisationen der Zivilgesellschaft an politischen Entscheidungsprozessen, C (2023) 8627 final vom 12. Dezember 2024; https://commission.europa.eu/document/download/27db4143-58b4-4b61-a021-a215940e19d0_de?filename=COM_2024_800_1_DE_ACT_part1_v1.pdf#page=41

Have these appeals not been heard or deliberately ignored by the Member States? The fact is that civic engagement has not yet been granted an appropriate “legal framework for action”. It seems to us that it is neither enshrined in fundamental rights nor in constitutional law. From a legal perspective, civil society is associated only with the *“practical exercise of fundamental rights”* (Matthias Rossi) - in connection with the political implementation of classic constitutional norms such as freedom of expression, freedom of assembly, or freedom of association. Any more concrete definition requires an examination of the *social context* in which civic engagement develops.

In each Member State, civil society represents a diversity of voluntary, public engagement in the “common interest”. Numerically, it is primarily a large number of associations of varying nature and, above all, of local and regional “citizens’ initiatives” with little developed structures that engage in non-profit activities, independent of party politics and economic interests. They ultimately signal – in more or less pronounced forms - citizen criticism and protest. This can be directed against the dysfunctionality of administration and politics, especially when they produce environmental damage and social inequalities under the pressure of growth constraints. There is evidence that civil society actors can shape legislation and policy, support human rights authorities, facilitate access to justice, and demand accountability and compliance with the law. Such initiatives are rightly credited with raising public awareness of rule of law issues and targeting undesirable developments such as disinformation and corruption (2).

Increasingly, external influences, especially international crises, are calling on citizens to act. Solutions require transnational initiatives and cooperation. They can be controversial not only at the intergovernmental level, but especially at the national level, fuelling political polarization. The **migration crisis demonstrates the ambivalence of civil protest**. For both supporters and opponents of immigration – to address the controversy that has most polarized Europe since

2015 – preserving “social cohesion” is in the “common interest” and serves the “common good”. However, due to their opposing ideological positions, they interpret these values very differently. The former associate “social consensus” with an *open* nation, the latter with a *closed* or *exclusive* nation that rejects any multicultural mixing. In doing so, they isolate “unpatriotic” minorities who “endanger national culture”. In the sphere of an ideology that relies on the “true people”, gender, origin, religion, or sexual identity degrade to discriminatory criteria when it comes to demands such as “equality” or “civic participation”. In short: polarization fosters a potential that is both “democratizing” and “threatening to democracy”. Times of rampant right-wing populism and extremism, as well as tendencies toward *illiberal* democratic practices and authoritarian rule, undoubtedly manifest the dwindling influence of European values. Against this background, the diverse forms of organization and action of civil society cannot be bundled into a homogeneous whole. Can it seriously be claimed that civil society in general makes an “indispensable contribution to the separation of powers” and to the preservation of the “European architecture of fundamental rights”?² This would encourage its idealization. Rather, reality-based analyses assume an increasing fragmentation of civil society – with serious consequences: citizens' trust in the constitutional order and their capacity for social consensus are dwindling.

The European Commission's Economic and Social Committee is urging Europe-wide recognition and strengthening of civil society.

Universities should be involved in empirical research on the development of civil society in EU Member States

² FRA-Bericht Europe's civil society: still under pressure – Update 2022 (Die Zivilgesellschaft Europas: nach wie vor unter Druck – Update 2022), https://commission.europa.eu/document/download/27db4143-58b4-4b61-a021-a215940e19d0_de?filename=COM_2024_800_1_DE_ACT_part1_v1.pdf#page=41

Due to the immense diversity of their organizational and action forms - often informal, sporadic, and known only to a limited public - there is a lack of reliable data for a well-founded, cross-national typological assessment of civic engagement. When I advocated for a more systematic view of this phenomenon during the last "Civil Society Week" in Brussels (March 17–20, 2025), I did so with the conviction that European strategies for the greater integration of the civil society into political decision-making processes must be based on a more systematic analysis of its developments in the Member States than has been the case so far. This would enable cross-border comparisons.

Within the limited scope of our Summer Universities, we can only focus on a few prominent civil society activities and examine their significance for the development of liberal democracy and the rule of law. *Non-governmental organizations* (NGOs) in particular, should be subjected to a more nuanced analysis than before. Their function and impact differ fundamentally depending on whether they are internationally funded organizations or non-profit initiatives at the local, regional, or national level. Subject neither to state-political control nor to economic interests, they are classified as part of the “third sector”: primarily funded by donations, they function through self-organization and self-management.

In-depth country-specific research on civil society is made difficult by the fact that its components, tendencies, demands, and activities are subject to constant change – not least under external pressure. Global crises have different impacts on government, economy, and society from country to country. They inevitably exacerbate disparities between EU Member states.

Universities should be more specifically involved in such empirical research. Let's remember that, regarding transfer of knowledge and job-specific skills, universities convey a societal vision, namely, by developing civic and citizenship skills. In this way, universities shape students and young researchers

into “social actors”. *Learning by doing*: the civil society should become a preferred topic for student work in political science, law, and social sciences. This proposal should be met with open arms in Brussels. In order to strengthen “cohesion and participation in polarized societies”, does the Economic and Social Committee not recommend that the European Commission focus more specifically than before on “education and culture” so that young people in particular are inspired to shape “a stronger and more resilient Europe”?

FIGHTING THE STIGMA: THE NEW PORTUGUESE MENTAL HEALTH LAW

Marta Monterroso Rosas¹

DOI: <https://doi.org//10.62140/MMR326766066>

Summary: 1. Introduction; 2. Mental health as a global concern: What role for the law? 3. The need for a new law in the Portuguese context and some fundamental guidelines that must be respected when legislating on mental health; 4. Some novelties introduced by the new law; 4.1. Overview; 4.2. In particular, the exercise of rights and the management of the assets of the person in need of mental health care: A dialogue with the Portuguese Civil Code; 5. Final considerations.

Abstract: In August 2023, a new Mental Health Law (Law no. 35/2023, of 21 July) came into force in the Portuguese legal system. This new law is part of several legal reforms aiming to align the Portuguese legal order with the main international principles and guidelines concerning the support of persons with disabilities, in need of additional care or facing a situation of vulnerability (*inter alia*, the principles emanating from the Convention on the Rights of Persons with Disabilities). This paper focuses on the opportunity for a new law in the Portuguese system concerning mental health policies and explores how some fundamental guidelines are reflected in the new diploma. On the other hand, after an excursus on non-discriminatory vocabulary and other novelties brought by the law, the new figure of the “person of trust” is analysed as a means of supporting the exercise of rights as well as the special management of affairs applicable when a person in need of mental health care is not benefiting from a judicial measure.

¹ Assistant Professor at Universidade Católica Portuguesa, Faculty of Law, Portugal; researcher at Católica Research Centre for the Future of Law, Portugal; Doctor in Law by Universidade Católica Portuguesa (mrosas@ucp.pt). ORCID: <https://orcid.org/0000-0002-1791-1199>. This paper is based on an oral presentation delivered during the Nanterre Network Meeting in Salzburg, 4th-5th July 2024, Paris Lodron University of Salzburg, Austria. This communication is financially supported by national funds through FCT – Foundation for Science and Technology, IP, within the Project UIDB/04859/2020.

Keywords: mental health; person-centred policy; persons in need of mental health care; means of support; exercise of rights; person of trust; asset administration.

1. Introduction

On the past 20th of August 2023, a new Mental Health Law (Law no. 35/2023, of 21 July²) came into force in the Portuguese legal system, replacing the former 1998 Act in this field (Law no. 36/98, of 24 July, which was in force for more than twenty years).

The new Mental Health Law regulates the definition, foundations (principles) and objectives of mental health policy, enshrines the rights and duties of people who are in need of mental health care (of *any person* who is in need of this type of care³) and regulates the restrictions on their rights and guarantees to protect their freedom and their autonomy (Art. 1, no. 1). The Law approaches mental health as a whole and drafts the main guidelines of mental health policy⁴. It also intends to reflect the value framework within which therapeutic approaches in this field must be currently understood, based and centred on the dignity of the human person.

When the new law came into force, attentions (namely, from the media⁵) were focused on a change that the law introduced in other related Portuguese

² Diário da República no. 141/2023, Series I of 2023-07-21, available at <https://diariodarepublica.pt/dr/detalhe/lei/35-2023-215980339>.

³ See Maria João ANTUNES, “A Nova Lei da Saúde Mental”, in DOENÇA MENTAL: da Imputabilidade à Ressocialização, CEJ, 2023, pp. 129-136, p. 130, available at https://www.stj.pt/wp-content/uploads/2024/02/ebook_dmental2023.pdf.

⁴ For developments on the scope, content and impact of the new Portuguese law, in the English language, see Ana NEVES, “The Portuguese Mental Health Act and the obligation to put in place a regulatory framework for mental illness under ECHR (3/2023)”, Osservatorio sulle fonti, available at <https://www.osservatoriosullefonti.it/rubriche/sources-of-law-in-the-european-union-member-states/portugal/4536-osf-3-2023-portogallo>.

⁵ Also noting that this matter has abundantly appeared in the media, see Fernando VIEIRA et al., “New Times, New Realities, New Laws: Continuity, Change and the Same-Old Challenges in Psychiatry and Mental Health” in Ata Médica Portuguesa, 2023 Dec:36(12): 773-775,

legislation, specifically in criminal matters (the new legal framework now prevents criminal security measures of internment with unlimited duration, since no one can be deprived of their liberty for a limitless period of time⁶). However, the innovations introduced by the law go *far beyond* this issue: it is a reform aiming to align with European and international guidelines on the field of vulnerability and that has brought some very relevant news for people with mental health issues and their families. As will be shown throughout this text, the law provides innovative regimes that must be articulated with other legal solutions in the Portuguese system (such as those in the Civil Code, concerning legal capacity) and is yet another pillar that sustains a recent legislative construction that has progressively been taking place in our country in order to empower people with diminished capacity. In fact, the new law's solutions have an influence on Private law – with regard to the exercise of rights of people with diminished capacity and to their assets – and must be analysed as part of a whole.

For this reason, and because legislating in the field of mental health is a cross-cutting concern in many countries, the next lines will be dedicated to exploring the influence of the new law on the Portuguese system, always bearing in mind principles that are undoubtedly universal in this area.

<https://doi.org/10.20344/amp.20746>, and, for the headlines, Ana NEVES, “The Portuguese Mental Health Act...”, cit.

⁶ This was a landmark step forward in the Portuguese context: before the new law, some people could be detained for potentially a lifetime, in violation of international principles. As explained by Sofia BRISSOS (“(In)imputabilidade, doença mental e desadaptação psicossocial”, in DOENÇA MENTAL: da Imputabilidade à Ressocialização, CEJ, 2023, pp. 51-78, available at https://www.stj.pt/wp-content/uploads/2024/02/ebook_dmental2023.pdf), in the case of dangerousness based on serious mental disorder, and in the event of the impossibility of treatment in an open environment, deprivation or restriction of liberty security measures could – previously – be extended successively for as long as this situation was maintained; however, this situation is no longer possible after the entry into force of the new law. In the context of the preparatory works for the law, the Proposta de Lei n.º 24/XV/1.^a highlighted that for all citizens – imputable or not – deprivation of liberty cannot be perpetual or of unlimited or indefinite duration. About this point, see also Ana NEVES, “The Portuguese Mental Health Act...”, cit.

2. Mental health as a global concern: What role for the law?

Mental health is a global concern worrying many countries, and the need to adopt better policies in this area has been reinforced by the COVID-19 pandemic and the crisis context it has triggered. According to the World Health Organization (June 2022)⁷, “[i]n 2019, 1 in every 8 people, or 970 million people around the world were living with a mental disorder, with anxiety and depressive disorders the most common. In 2020, the number of people living with anxiety and depressive disorders rose significantly because of the COVID-19 pandemic. Initial estimates show a 26% and 28% increase respectively for anxiety and major depressive disorders in just one year. While effective prevention and treatment options exist, most people with mental disorders do not have access to effective care. Many people also experience stigma, discrimination and violations of human rights”.

Effective legislative policies on this issue play a major role in addressing problems like the ones mentioned above. It is up to the law to, among other objectives: ensure that people in a more vulnerable situation have their fundamental rights respected, including when they receive medical treatment; enforce the

⁷ Factsheet “Mental disorders”, World Health Organization, available at <https://www.who.int/news-room/fact-sheets/detail/mental-disorders>. For data concerning EU citizens, see the “Flash Eurobarometer 530 Mental health” (Survey requested by the European Commission, Directorate-General for Health and Food Safety and coordinated by the Directorate-General for Communication), 2023, and the Eurobarometer, October 2023, European Commission, both available at <https://europa.eu/eurobarometer/surveys/detail/3032>. Zooming in to the Portuguese context, and according to OECD/European Observatory on Health Systems and Policies (2023) (“Portugal: Country Health Profile 2023”, State of Health in the EU, OECD Publishing, European Observatory on Health Systems and Policies, available at https://www.oecd.org/en/publications/portugal-country-health-profile-2023_069af7b1-en.html), the burden of mental ill health in Portugal is the highest in the EU and about 22% of the population had a mental health disorder in 2019 (p. 22). Moreover, “...it is now recognized that psychiatric disorders and mental health problems have become the leading cause of disability and one of the main causes of morbidity and premature death, especially in industrialized western countries. By way of example, psychiatric disorders account for 12% of the global burden of disease in Portugal, only preceded by brain/cardiovascular diseases, with a global weight of 14%” (according to Miguel XAVIER, et al., A Reforma da Saúde Mental em Portugal: três anos de transformação, Coordenação Nacional das Políticas de Saúde Mental, Ministério da Saúde, 2024, doi: 10.34619/1n9a-yb44, p. 12).

respect for the wishes and preferences of people with mental disorders, in all circumstances; regulate the way consent is given (is the person able to form their will freely and entirely or needs support when giving consent, for example, for medical acts?); in the most serious cases, provide means of support and safeguards eventually decided by a court; specially when there are no court-ordered measures, protect the person's personal and patrimonial interests through informal but effective legal solutions; prevent and react to manipulations committed by those who want to take advantage of an existing vulnerability and condemn any type of abuse (as mentioned in the preparatory works for the new Portuguese Mental Health Law – *Exposição de Motivos da Proposta de Lei n.º 24/XV/1*.⁸ – it is paramount to have a framework that acts as a shield against the greater risk these people face of being subjected to abuse and violence in mental health services); support family members to provide care; fight the stigma by using accurate vocabulary to address people in need of support for mental health reasons; etc.

3. The need for a new law in the Portuguese context and some fundamental guidelines that must be respected when legislating on mental health

In the Portuguese context, it was felt it was the moment to draw a new framework on mental health. According to the preparatory works for the new law⁹, there was a clear need to rethink the organisation of mental health care, taking into account, on the one hand, the advances made in this area at a *clinical level* and, on the other, the commitments made by Portugal within the *framework* of the World Health Organisation, the Council of Europe, the European Union and other

⁸ The preparatory works and legislative process conducting to the new law's approval are available at <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=141788>.

⁹ See the already mentioned *Exposição de Motivos da Proposta de Lei n.º 24/XV/1*.^a, p. 1.

international bodies¹⁰. This last concern leads to a cornerstone treaty that is driving many changes and shining a light on several new regimes in various countries: the Convention on the Rights of Persons with Disabilities¹¹ (CRPD).

When looking at the new law, the effort to respect the so-called “new paradigm” that the CRPD has established on a global level is very clear. Several of the new legal solutions are effectively in line with the Convention’s fundamental guidelines. Since Portugal has ratified the Convention¹², its principles and commands must be respected: in fact, the same concern has already led to other Portuguese legislation being amended, as will be mentioned below. The approval of a new Mental Health act was another opportunity to readjust domestic regulations to the international framework, contributing to a more harmonious and cohesive legal system.

Among the various principles enshrined in the CRPD, some can (and must) be highlighted, as they are somehow reflected in the body of the new law.

First of all, any law concerning mental health must be committed to respecting the autonomy and the will of the person in a situation of vulnerability: the CRPD has brought to light the need to always respect the will, wishes and preferences of the person with a disability or other cause of vulnerability/diminished capacity. All means of support and legal solutions must

¹⁰ Fernando VIEIRA et al. (“New Times...”, cit., p. 773) note that if the law did not change, compulsory in-patient care would be in danger of extinction under international law, which emphasises that all citizens are equal and have the same rights regardless of whether they suffer from mental illness.

¹¹ United Nations General Assembly, New York, 13 December 2006. The *Exposição de Motivos* explains that the new bill aims to replace the former Mental Health Act and amend related legislation, with reference, among other documents, to the United Nations Convention on the Rights of Persons with Disabilities, the Global Mental Health Action Plan approved by the World Health Organisation, the strategic action lines for Mental Health and Well-being, approved by the European Union in 2016, and the content of the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with involuntary placement and involuntary treatment within mental healthcare services (Bioethics Committee of the Council of Europe).

¹² Resolução da Assembleia da República no. 56/2009, *Diário da República*, Series 1, no. 146, 30-07-2009.

be based on this assumption, namely that the person must always be heard and make their own choices, to a maximum possible. The aim is not to find the best solution for the person's interests from a "paternalistic" perspective, but to allow them to make their own choices and express their own wishes and desires. Concerning legal capacity, Art. 12 of the Convention states that States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards and that such safeguards shall ensure that measures relating to the exercise of legal capacity respect the *rights, will and preferences of the person*¹³. This preoccupation is visible in various solutions enshrined in Law no. 35/2023: for instance, intending to be a "dignity-centred" framework, it establishes as a foundation of mental health policy "the provision of person-centred mental health care, acknowledging their individuality and subjectivity, specific needs *and level of autonomy*"¹⁴ (Art. 4). Moreover, among other rights, Art. 7 recognises that people in need of mental health care have the right to i) always make *free and informed decisions*, to the extent of their capacity, concerning the proposed health care (except in the cases provided for in the same law), to ii) have their wishes and preferences, *expressed at the time or in advance* (for instance, in the form of advance directives)¹⁵, respected, except in the cases provided for in the law, and iii) to see their empowerment and autonomy promoted in the various areas of their lives, with respect for their *wishes, preferences, independence and privacy*¹⁶. Art. 10

¹³ Andrea BRODERICK and Delia FERRI (International and European Disability Law and Policy, Cambridge, Cambridge University Press, 2019, p. 168) explain that "[w]hile the term 'will and preferences' is not defined in the CRPD itself, nor is it defined by the CRPD Committee in General Comment No. 1, Arstein-Kerslake and Flynn note that 'an individual's "will" is used to describe the person's long-term vision of what constitutes a "good life" for them. The term "preferences", on the other hand, tends to refer to likes and dislikes, or ways in which a person prioritises different options available to them'".

¹⁴ Emphasis added.

¹⁵ Expression of the will (of the person concerned) is paramount both in the present moment (the moment when treatments or decisions must take place) and as an anticipated manifestation of autonomy, in its various forms – Paula TÁVORA VÍTOR, Comment to Art. 12 in *Convenção Sobre os Direitos das Pessoas com Deficiência – Comentário*, J. CORREIA GOMES, L. NETO, P. TÁVORA VÍTOR (coord.), Imprensa Nacional-Casa da Moeda, 2020, p. 13.

¹⁶ Art. 7, 1, paragraphs. c), d) and f), emphasis added.

expressly refers to advance directives and the possibility of appointing a health care representative regarding mental health care¹⁷, thus reinforcing voluntary support measures. Even those people in need of mental health care who may be subjected to an involuntary treatment (as a last resort and several conditions being met) are recognised the right to *participate* in all procedural acts that directly concern them, as well as to contribute, to the maximum possible, to drawing and applying their care plan (Art. 8, no. 3 and no. 4).

The Convention also recognises that measures to support the exercise of legal capacity can be surrounded by certain guarantees. Indeed, the fact that the person is in a position of potential vulnerability makes it essential to ensure that there is no undue influence or abusive conduct by third parties. Thus, the same Art. 12 states that support measures to the exercise of legal capacity must be “free of conflict of interest and undue influence” and abuse must be prevented in accordance with international human rights law. It is this kind of concern that underlies the solution enshrined in Art. 13 of the new Mental Health Law, when it requires the manager of the assets to inform the Public Prosecutor’s Office (*Ministério Público*) of the assumption of management as soon as possible. The law calls for the intervention of the Public Prosecutor in order to control the management and the accounts, safeguarding the interests of the person in need of mental health care. It should be noted that the new “person of trust”, as a very informal means of support to the exercise of rights (Art. 9 of the new Mental Health Law), is not subjected to any control or kind of supervision. Although some have expressed concerns about the lack of control surrounding the appointment

¹⁷ Advance directives may express the wishes of the grantor regarding in-patient treatment, coercive measures including isolation and physical or chemical means of restraint, electroconvulsive therapy or transcranial magnetic stimulation and psychotropic medication. According to the same Art. 10, however, advance directives regarding mental health care are not observed when it is found that their observance would result in risk to personal or property rights of third parties, under the terms of the law.

of the “person of trust”¹⁸, this means of support was *expressly* intended to be informal, what may justify that no supervision is provided in the law¹⁹.

In the field of mental health care, the right of persons with disabilities to live independently and to be included in the community is also important, as enshrined in Art. 19 of the CRPD²⁰: this right calls for measures that do not involve institutionalisation. According to the Committee on the Rights of Persons with Disabilities, “[m]ental health settings where a person can be deprived of their liberty for purposes such as observation, care or treatment and/or preventive detention are a form of institutionalization”²¹. In the new Mental Health Law, involuntary

¹⁸ In its opinion on the draft law, the Conselho Superior da Magistratura highlighted that, considering the particular vulnerability of people in need of treatment, it should be defined in the law who can be appointed as a “person of trust”, and the court should scrutinise this appointment in order to prevent possible cases of manipulation. Also, opinion no. 121/CNECV/2023 (Conselho Nacional de Ética para as Ciências da Vida) notes that it is necessary to safeguard the protection of the person in need of mental health care when choosing a person of trust, providing for a legal mechanism to ascertain whether the person chosen is indeed trustworthy. With similar concerns, see the opinion of the Portuguese National Doctors’ Federation (“Análise de Proposta de Lei n.º 24/XV/1.^a”). All these opinions on the draft of law 24/XV/1 can be consulted at <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=141788>.

Fernando VIEIRA et al. (“New Times...”, cit., p. 774) also express the concern that the possibility that now exists of access to health information and to the involuntary process by the person of trust may increase the likelihood of situations of abuse and attempts to manipulate or take advantage of people in need of mental health care.

¹⁹ Comparing formal and informal means of support, Andrea BRODERICK and Delia FERRI (International and European..., cit., p. 168), quoting Arstein-Kerslake and Flynn, note that “Article 12 (4) CRPD requires that States Parties must ensure that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards, to prevent abuse. (...) Arstein-Kerslake and Flynn argue that “informal support may not have sufficient safeguarding processes built in to protect the rights, will and preferences of the individuals using the support – but has the benefit that the providers of this support are more likely to know the person well and to be in the person’s life for a long time”. On the other hand, the authors note that “formal support structures may be subject to greater safeguards and a guarantee of ‘independence’ but they run a serious risk of becoming over-professionalised, creating another intrusion in the lives of people with disabilities, and potentially creating an additional barrier for the individual to overcome before her decision-making is recognised”.

²⁰ Trying to respond to the injunction in Art. 19, the Portuguese legislator created the Independent Living Support Model, in 2017, although it is yet being fully operationalized (Decree-Law no. 129/2017, of 2017-10-09). This initiative is based on a “personal assistance” that helps people with disabilities or incapacity to perform their activities at home and/or at work.

²¹ “Guidelines on deinstitutionalization, including in emergencies”, adopted by the Committee at its twenty-seventh session, 15 August – 9 September 2022, available at <https://digitallibrary.un.org/record/3990185?v=pdf#files>.

treatment continues to be expressly enshrined²², but the law now establishes that involuntary treatment should preferably take place on an outpatient basis, provided by community mental health teams, unless hospitalisation is the only way to guarantee medically prescribed treatment.

As can easily be seen from the examples just given, the CRPD is an indispensable framework for mental health policies. In the Portuguese case, the influence of the Convention is quite visible in the efforts made by the new law to align some of its solutions with the often called “new paradigm”.

4. Some novelties introduced by the new law

4.1. Overview

Since it is not possible to address all the relevant aspects of the new law in this work, the following lines will focus mainly on the changes that intersect with the matters dealt with in the Portuguese Civil Code, in order to demonstrate how important it is to bring the two laws into dialogue and look at the system as a whole. Nonetheless, we will point out some other aspects addressed in the law, in a more general way.

The law incorporates into the legal system new *vocabulary*, aiming to be “discriminatory or stigmatisation-free”: it now addresses “people in need of mental health care” (*pessoas com necessidade de cuidados de saúde mental*). According to ANTUNES, “the option of not categorising promotes non-discrimination and non-stigmatisation of those who need this type of care, shows that there can be a need for mental health care and no mental illness, and is consistent with the terminology used in health legislation”²³. The “severe psychic disorder” (*anomalia psíquica grave*)

²² See the already mentioned Exposição de Motivos da Proposta de Lei n.º 24/XV/1.^a.

²³ Maria João ANTUNES, “A Nova Lei da Saúde Mental”, cit., p. 129 (own translation). The Author highlights this point of view also together with Miguel XAVIER, in their opinion on the draft of the law, stating that the law is aimed at people in need of mental health care and not just those who have a

has no longer a place in this legislation's vocabulary²⁴ and has been replaced by the concept of mental illness (mental illness being, according to the law, a condition characterised by a significant disorder in the cognitive, emotional or behavioural domains, included in a set of clinical entities [*entidades clínicas*] classified in accordance with the International Classification of Diseases of the World Health Organisation's diagnostics criteria²⁵). It is well known that in the context of vulnerability, words do matter: the choice of accurate vocabulary that can help to remove the stigma often associated with mental illness is crucial. Any person may, at a certain moment and for the most diverse reasons, need mental health care, and the focus should be on *how this care is provided* with quality and in respect of fundamental rights.

It was the Portuguese legislator's choice that involuntary treatment continues to be expressly recognised and possible in some hard cases, yet limited to a last resort (an exceptional interference²⁶) and surrounded by many safeguards and guaranties. Moreover, internment is seen as an *ultima ratio*²⁷ and the law states, as a guideline, “the provision of mental health care in the least restrictive environment possible, with hospitalisation [*internamento hospitalar*] as a measure of last resort” (art. 4, 1, b)). Firstly, and obviously, there is a primacy of voluntary treatment; the law now expressly states that one form of voluntary treatment is the resort to Advance directives regarding mental health care. Secondly, if certain strict conditions are met, involuntary treatment still can have place: the law defines it as

diagnosis of mental illness; the universe of people in need of mental health care does not coincide with that of those who have a diagnosis of mental illness (ANTUNES, XAVIER, “Proposta de Lei n.º 24/XV/1.ª, Discussão na especialidade: Contributo”, <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=141788>.

²⁴ The Civil Code also abandoned this expression with the reform introduced by Law no. 49/2018, 14-08.

²⁵ This definition of mental illness is provided by Art. 2 of the law.

²⁶ See Manuel RAMOS DA FONSECA, “A Nova Lei da Saúde Mental”, in DOENÇA MENTAL: da Imputabilidade à Ressocialização, CEJ, 2023, pp. 141-154, p. 142, available at https://www.stj.pt/wp-content/uploads/2024/02/ebook_dmental2023.pdf.

²⁷ Pedro SOARES DE ALBERGARIA, “A nova Lei de Saúde Mental na Proposta de Lei 24/XV/1.ª: ruptura ou evolução?”, Julgar, 2023, p. 4, and Ana NEVES, “The Portuguese Mental Health Act...”, cit.

the treatment ordered or confirmed by a judicial authority, in an outpatient or inpatient setting (art. 2, b)). Involuntary treatment must be focused on the person's full recovery, through therapeutic intervention and psychosocial rehabilitation (it has a treatment purpose and must last the minimum time necessary)²⁸. In order for this type of treatment to be decreed, it is imperious that a risk to personal or property rights exists. It can be a risk to third parties or to the person in need of treatment, but, in this last case, only when they do not have the necessary judgement to assess the meaning and scope of medical consent. Involuntary treatment is, preferably, implemented with resort to outpatient care solutions, provided by community mental health teams, unless hospitalisation is the only way to guarantee the medically prescribed treatment²⁹.

4.2. In particular, the exercise of rights and the management of the assets of the person in need of mental health care: A dialogue with the Portuguese Civil Code

As already mentioned, the new Mental Health Law has also introduced legal changes that cross Civil Law matters and which, as such, should be analysed in combination with the solutions provided for in the Portuguese Civil Code. In fact, the new law adds important new features regarding the support to the *exercise of rights* and the protection of the *assets* of those who are in a situation of need of mental health care. The progress the law has brought has been mainly in relation to *informal means of support*, to which, for some years, some authors have been drawing attention in terms of their importance and the need for regulation in the

²⁸ Cfr. Maria João ANTUNES, "A Nova Lei da Saúde Mental", cit., p. 131.

²⁹ Although the debate on involuntary treatment solutions is extremely important and sensitive, this work will focus mainly on those aspects of the new law that relate to the exercise of legal capacity and have an impact on civil law matters, which is why this point (the involuntary treatment regulation) will not be developed further on this text.

Portuguese context³⁰. In other words, some legal solutions provided by the Mental Health Law *complete* the Portuguese legislative framework in terms of means of support for vulnerable adults, this time emphasising informal solutions. Of course, the solutions in the new law only apply to people who need mental health care; therefore, its field of application is limited. Even so, a large number of situations requiring support to the exercise of rights are related to mental health, which is why it is necessary to coordinate all the legislation in the same legal system.

Concerning the support to the exercise of rights, the new law adds an informal figure or actor – the “person of trust” or “trusted person” (*pessoa de confiança*) – which is a person chosen by the person in need of mental health care to provide support in exercising their rights throughout the therapeutic process (vg., rights to make suggestions or complaints and to appeal of the involuntary treatment decision): Art. 9, no. 4, 5 and 6. The “person of trust” is allowed access to the health information and the involuntary treatment process. According to ANTUNES³¹, recognising the person of trust as a legal solution is the ultimate expression of the autonomy of the person in need of mental health care, who actually gets to choose and appoint someone to help them. The person of trust is not appointed by a court: they are indicated, informally, by the person in need of support and identified in the medical file (when there is access to health information) and/or in the involuntary treatment process (Art. 9, no. 5). This means of support is informal, without judicial intervention³². On their opinion on the preparatory works of the law, ANTUNES and XAVIER note that the indication

³⁰ For further developments, and for all, see Paula TÁVORA VÍTOR, “O Espectro do Artigo 46.º da Lei de Saúde Mental. Ainda a Gestão do Património dos Maiores não Acompanhados?”, *Anomalia Psíquica e Direito. Colóquio Comemorativo dos 20 anos da Entrada em Vigor da Lei de Saúde Mental*, Coimbra: Instituto Jurídico, 2020, pp. 193-209.

³¹ Cfr. Maria João ANTUNES, “A Nova Lei da Saúde Mental”, cit., p. 130.

³² See also our contribution ROSAS, Marta MONTERROSO, “Saúde Mental e “pessoa de confiança”- Novidade introduzida pela Lei n.º 35/2023, de 21 de julho”, in the students newspaper *Diurna*. (Jornal Nacional dos Estudantes da Universidade Católica Portuguesa), n.º 17, Janeiro 2025, pp. 73-75, available at https://jornaldiurna.com/wp-content/uploads/2025/04/D17_.pdf.

of the person of trust “only makes sense if it is not formalised”, namely if it does not depend on any judicial control, even if there should be a record of the appointment made identifying said person³³. As already mentioned, the choice and performance of the person of trust is also not under any external control, for example by intervention of the Public Prosecutor, which has led to reservations and concerns amongst those who fear situations of abuse and influence³⁴. In short, it seems that the objective of the recognition of the person of trust is to allow the informal designation of a person close to the patient (*vg.*, a family member, a friend, a close neighbour) who is trusted to help them exercise their rights during the treatment process, merely as a support and aid and not as a voluntary or legal substitute³⁵.

The “person of trust” is not to be confused with other persons able to provide support under the Portuguese law, such as the “*acompanhante*” or the person entitled by a special mandate. In fact, since the reform operated by Law No. 49/2018, of 14 August, the Portuguese Civil Code regulates a judicial measure of support for vulnerable adults called “accompaniment” (*acompanhamento de maiores*). The court may decree a judicial measure of *acompanhamento* when an adult is unable,

³³ Maria João ANTUNES, Miguel XAVIER, “Proposta de Lei n.º 24/XV/1.^a - Discussão na especialidade - Contributo”, available at <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=141788>.

³⁴ See, above, section 3 of this text.

³⁵ This is, in a certain sense, a novelty in the Portuguese system, since the Civil Code does not expressly regulate this kind of informal support regarding vulnerable adults in general (despite giving emphasis to the duties emerging from family relationships since the judicial measure is subsidiary and should only apply when these duties are not fulfilled – see Art. 140, no. 2, of the Portuguese Civil Code). The Spanish Civil Code, especially after the reform operated by Ley 8/2021, de 2 de junio, recognizes and regulates an informal support called “guarda de hecho”: about this means of support and for a jointly analysis of the Portuguese and the Spanish Civil Code reforms concerning vulnerable adults, see our MARTA MONTERROSO ROSAS, “A dialogue between the Portuguese and the Spanish recent civil law reforms concerning the support of vulnerable adults”, Book of the 26th Annual Meeting of NANTERRE NETWORK Law and Culture, O. SEUL, S. DIJOUX, F. S. VEIGA (Coord.), Instituto Iberoamericano de Estudos Jurídicos e Universidade Lusófona, Porto, 2023, pp. 45-60. About the informal means of support in the Portuguese context and referring the “guarda de hecho”, see PAULA TÁVORA VÍTOR, “O ‘mandato com vista ao acompanhamento’”, Colóquio O Novo Regime do Maior Acompanhado, A. PINTO MONTEIRO (coord.), Coimbra, FDUC, 2019, pp. 245-272, p. 246.

for reasons of health, disability or behaviour, to fully, personally and consciously exercise their rights or fulfil their duties (Art. 138 of the Civil Code). The measure is very flexible in its content (it can be a mere support or, in some severe cases, a substitutive measure), but it will always have to be decided by a court, since it represents, to a greater or lesser degree, a restriction on the beneficiary's liberty³⁶. The same reform also introduced into the Portuguese Civil Code the so-called "mandate regarding the accompaniment" ("*mandato com vista a acompanhamento*" – Art. 156 of the Civil Code), which is a voluntary measure to anticipate a situation of diminished capacity that may occur in the future. Depending on the specific situation and the court's decision to maintain the mandate, this special mandate holder may coexist with the *acompanhante*³⁷.

Therefore, it is important to understand how, in a specific situation where a person in need of mental health care requires support to exercising their rights, the actions of the person of trust must articulate with the actions of a potentially existing *acompanhante* or authorized representative. In fact, there are currently several "actors" or "persons", with different roles, that may surround the vulnerable person in order to provide them support to the exercise of rights³⁸. Art. 9 of the new Mental Health Law addresses precisely this issue. According to this article, in exercising their rights, the person who is an "accompanied adult" is supported or represented under the terms defined in the accompanying court decision³⁹. If there is no judicial accompaniment decision, the adult who does not

³⁶ See António Agostinho GUEDES, Marta MONTERROSO ROSAS, Comment on Art. 139 of the Civil Code ("Decisão judicial"), in Comentário ao Código Civil – Parte Geral, 2.^a Ed., J. BRANDÃO PROENÇA, A. AFONSO, A. TRIUNFANTE, E. VAZ DE SEQUEIRA, F. OLIVEIRA E SÁ (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 344-348, p. 346.

³⁷ See António Agostinho GUEDES, Marta MONTERROSO ROSAS, Comment on Art. 156 of the Civil Code ("Mandato com vista a acompanhamento"), Comentário ao Código Civil – Parte Geral, 2.^a Ed., J. BRANDÃO PROENÇA, A. AFONSO, A. TRIUNFANTE, E. VAZ DE SEQUEIRA, F. OLIVEIRA E SÁ (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 399-404, p. 403.

³⁸ Cfr. ROSAS, Marta MONTERROSO, "Saúde Mental...", cit.

³⁹ We are focussing our analysis on adults, but Art. 9 also refers to minors (over 16) when it establishes that, in exercising their rights, anyone over 16 without the capacity to consent is represented by the

have the capacity to consent shall be represented by a health care representative previously designated in an advance directive or supported/represented by an existing authorised representative. In other situations, a useful and informal “person of trust” can be appointed to help the person exercise their rights related to the therapeutic process (see no. 1, 2 and 4 of said Art. 9).

Concerning patrimonial issues, the new law also regulates the “management of the assets” of the person in need of mental health care in an innovative way. This regime intends to fill a legal gap⁴⁰ to which some authors have been drawing attention for several years⁴¹. According to ANTUNES⁴², the legal gap is now closed with regard to the management of the assets of an unaccompanied person or a person who has not been ordered an accompanying measure covering this area and the management of affairs regime established in the Civil Code applies, with the necessary adaptations. The new Art. 13 states that when a person, without being authorised to do so, takes over the management of the assets of someone in need of mental health care who is in the circumstances set out in article 138 of the Civil Code⁴³ but has not been ordered an accompaniment judicial measure, the

person exercising parental responsibilities, guardianship, or by the person to whom they have been entrusted (no. 3).

⁴⁰ See the preparatory works for the new Portuguese Mental Health Law – Exposição de Motivos da Proposta de Lei n.º 24/XV/1.ª, p. 5.

⁴¹ See Paula TÁVORA VÍTOR, *A administração do património das pessoas com capacidade diminuída*, Coimbra, Coimbra Editora, 2008. Before the Portuguese civil law reform that enshrined the accompanied adult regime, there were other legislative initiatives that were, in the meantime, abandoned, such as the “Resolução do Conselho de Ministros n.º 63/2015” (The Elderly Protection Strategy), adopted on August 2015, which regulated a special “management of affairs”. Also, the proposal that had been drawn up by the Centro de Direito da Família (Family Law Centre - Proposal for a Law on the Legal Condition of Adults in a Situation of Incapacity. Revision of the Civil Code, Paula TÁVORA VÍTOR and Geraldo ROCHA RIBEIRO, available at <https://www.centrodedireitodafamilia.org/relat%C3%B3rios/2017/%E2%80%9Cproposta-de-lei-sobre-condi%C3%A7%C3%A3o-jur%C3%ADdica-das-pessoas-maiores-em-situa%C3%A7%C3%A3o-de>, which preceded the reform and was not adopted, and provided for the regulation of a management of affairs.

⁴² Maria João ANTUNES, “A Nova Lei da Saúde Mental”, cit., p. 130.

⁴³ Art. 138 of the Portuguese Civil Code defines who can benefit from a measure of accompaniment. It states that an adult unable, for reasons of health, disability or their behaviour, to fully, personally and consciously exercise their rights or fulfil their duties, can benefit from the accompanying measures provided for in the Code.

negotiorum gestio regime shall apply – however, with necessary *adaptations*. Actually, the law calls for the intervention of the Public Prosecutor (*Ministério Público*) as a means of control. In Art. 13, the law states that the manager of affairs shall inform the Public Prosecutor of the assumption of management as soon as possible (no. 2), and when the Public Prosecutor is aware of the management, it may request the manager to provide information about it, as well as the state and condition of the person concerned and their assets (no. 4). The accounts and other information must be provided to the Public Prosecutor (no. 5) as well.

The aim of this solution seems to be to prevent abuses that might be committed in relation to the property of a person in need of mental health care who, despite being in a vulnerable situation, has not yet benefited from a judicial measure. According to ROBALO⁴⁴, this solution safeguards the position of the person in need of mental health care who is unable to fully, personally and consciously exercise their rights, so that the Public Prosecutor can, if necessary, consider the possible application of accompanying measures. The new regime of Art. 13 of the Mental Health Law must, therefore, be articulated with those of the Civil Code, since it dialogues with the accompanied adult regime (Arts. 138-156 of the Civil Code) and with the regulation of the management of affairs (Arts. 464-482 of the Civil Code). Regarding the assets of a person in need of mental health care, there are two possible scenarios: if a judicial measure of accompaniment exists, the person designated by the court is the administrator of the assets, according to the decision terms; if there is need for a judicial measure, but, for any reason, that measure does not yet exist and an unauthorised person takes over the management of the estate of a person in need of mental health care, the new regime of *negotiorum gestio* applies.

⁴⁴ Inês ROBALO, “A nova lei da Saúde Mental”, in DOENÇA MENTAL: da Imputabilidade à Ressocialização, CEJ, 2023, pp. 187-195 available at https://www.stj.pt/wp-content/uploads/2024/02/ebook_dmental2023.pdf, p. 194.

5. Final considerations

In the Portuguese context, the new Mental Health Law appears as another step in a legal journey aimed at empowering people in need of support. From our perspective, this law brings some novelties that must be analysed together with the civil law regime designed for “diminished capacity” situations, such as the solutions provided by the Portuguese Civil Code. In fact, unlike before, the Portuguese system now recognises and emphasises informal means of support: persons in need of mental health care can appoint a person of trust in a very informal way to help them exercise their rights during the therapeutic process and the law also provides for a special management of assets regime to prevent abuses in the absence of court-ordered measures. Although these regimes are meant to apply when a person in need of mental health care is involved, they must be articulated with the Civil Code’s accompanied adult regime, with the possible existence of a mandate and with the management of affairs civil regulation. Other matters dealt with in the law assume a natural protagonism (as in the case of involuntary treatment or internment) but these new provisions should not go unnoticed by lawyers and law enforcers.

The approval of this new law is a great opportunity to reflect upon the principles that should guide a *modern and humanistic mental health policy* able to enforce human rights at a legislative level and to promote the dignity of the human person as the centre of any legal solution. In a time of global crises at many levels, mental health is a key concern which calls for the *efforts of the entire community*.

BIBLIOGRAPHICAL REFERENCES

ALBERGARIA, Pedro SOARES DE, “A nova Lei de Saúde Mental na Proposta de Lei 24/XV/1.^a: ruptura ou evolução?”, *Julgar*, 2023.

ANTUNES, Maria João, “A Nova Lei da Saúde Mental”, in *DOENÇA MENTAL: da Imputabilidade à Ressocialização*, CEJ, 2023, pp. 129-136, available at https://www.stj.pt/wp-content/uploads/2024/02/ebook_dmental2023.pdf.

BRISSOS, Sofia, “(In)imputabilidade, doença mental e desadaptação psicossocial”, *DOENÇA MENTAL: da Imputabilidade à Ressocialização*, CEJ, 2023, pp. 51-78, available at https://www.stj.pt/wp-content/uploads/2024/02/ebook_dmental2023.pdf.

BRODERICK, Andrea, and Delia FERRI, *International and European Disability Law and Policy*, Cambridge, Cambridge University Press, 2019.

FONSECA, Manuel RAMOS DA, “A Nova Lei da Saúde Mental”, in *DOENÇA MENTAL: da Imputabilidade à Ressocialização*, CEJ, 2023, pp. 141-154, available at https://www.stj.pt/wp-content/uploads/2024/02/ebook_dmental2023.pdf.

GUEDES, António Agostinho, Marta MONTERROSO ROSAS, Comment on Art. 139 of the Civil Code (“*Decisão judicial*”), in *Comentário ao Código Civil – Parte Geral*, 2.^a Ed., J. BRANDÃO PROENÇA, A. AFONSO, A. TRIUNFANTE, E. VAZ DE SEQUEIRA, F. OLIVEIRA E SÁ (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 344-348.

_____. Comment on Art. 156 of the Civil Code (“*Mandato com vista a acompanhamento*”), *Comentário ao Código Civil – Parte Geral*, 2.^a Ed., J. BRANDÃO PROENÇA, A. AFONSO, A. TRIUNFANTE, E. VAZ DE SEQUEIRA, F. OLIVEIRA E SÁ (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 399-404.

NEVES, Ana, “The Portuguese Mental Health Act and the obligation to put in place a regulatory framework for mental illness under ECHR (3/2023)”, *Osservatorio sulle fonti*, available at <https://www.osservatoriosullefonti.it/rubriche/sources-of-law-in-the-european-union-member-states/portugal/4536-osf-3-2023-portogallo>.

ROBALO, Inês, “A nova lei da Saúde Mental”, in *DOENÇA MENTAL: da Imputabilidade à Ressocialização*, CEJ, 2023, pp. 187-195 available at https://www.stj.pt/wp-content/uploads/2024/02/ebook_dmental2023.pdf.

ROSAS, Marta MONTERROSO, “A dialogue between the Portuguese and the Spanish recent civil law reforms concerning the support of vulnerable adults”, *Book of the 26th Annual Meeting of NANTERRE NETWORK Law and Culture*, O. SEUL, S. DIJOUX, F. S. VEIGA (Coord.), Instituto Iberoamericano de Estudos Jurídicos e Universidade Lusófona, Porto, 2023.

VIEIRA, Fernando, *et al.*, “New Times, New Realities, New Laws: Continuity, Change and the Same-Old Challenges in Psychiatry and Mental Health”, *Ata Médica Portuguesa*, 2023 Dec:36(12): 773-775, <https://doi.org/10.20344/amp.20746>.

VÍTOR, Paula TÁVORA, *A administração do património das pessoas com capacidade diminuída*, Coimbra, Coimbra Editora, 2008.

____. “O ‘mandato com vista ao acompanhamento’”, *Colóquio O Novo Regime do Maior Acompanhado*, A. PINTO MONTEIRO (coord.), Coimbra, FDUC, 2019, pp. 245-272.

____. Comment to Art. 12 in *Convenção Sobre os Direitos das Pessoas com Deficiência – Comentário*, J. CORREIA GOMES, L. NETO, P. TÁVORA VÍTOR (coord.), Imprensa Nacional-Casa da Moeda, 2020.

____. “O Espectro do Artigo 46.º da Lei de Saúde Mental. Ainda a Gestão do Património dos Maiores não Acompanhados?”, *Anomalia Psíquica e Direito. Colóquio Comemorativo dos 20 anos da Entrada em Vigor da Lei de Saúde Mental*, Coimbra: Instituto Jurídico, 2020.

XAVIER, Miguel, *et al.*, *A Reforma da Saúde Mental em Portugal: três anos de transformação*, Coordenação Nacional das Políticas de Saúde Mental, Ministério da Saúde, 2024, doi: 10.34619/1n9a-yb44.

OTHER DOCUMENTS AND PUBLICATIONS

Factsheet “Mental disorders”, World Health Organization, available at <https://www.who.int/news-room/fact-sheets/detail/mental-disorders>.

“Flash Eurobarometer 530 Mental health” (Survey requested by the European Commission, Directorate-General for Health and Food Safety and coordinated by the Directorate-General for Communication), 2023, and the Eurobarometer, October 2023, European Commission, both available at <https://europa.eu/eurobarometer/surveys/detail/3032>.

“Portugal: Country Health Profile 2023”, State of Health in the EU, OECD Publishing, European Observatory on Health Systems and Policies, available at https://www.oecd.org/en/publications/portugal-country-health-profile-2023_069af7b1-en.html.

Preparatory works for the new Portuguese Mental Health Law – *Exposição de Motivos da Proposta de Lei n.º 24/XV/1.ª*, available at <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=141788>.

Opinion on the draft of law 24/XV/1, *Conselho Superior da Magistratura*, <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=141788>.

Opinion on the draft of law 24/XV/1 no. 121/CNECV/2023, *Conselho Nacional de Ética para as Ciências da Vida*, <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=141788>.

Opinion on the draft of law 24/XV/1 of the Portuguese National Doctors’ Federation (“Análise de Proposta de Lei n.º 24/XV/1.ª”), <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=141788>.

Opinion of Maria João ANTUNES e Miguel XAVIER, “Proposta de Lei n.º 24/XV/1.ª- Discussão na especialidade – Contributo”, available at <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=141788>.

“Guidelines on deinstitutionalization, including in emergencies”, adopted by the Committee on the Rights of Persons with Disabilities at its twenty-seventh

session, 15 August – 9 September 2022, available at <https://digitallibrary.un.org/record/3990185?v=pdf#files>.

ROSAS, Marta MONTERROSO, “Saúde Mental e “pessoa de confiança”- Novidade introduzida pela Lei n.º 35/2023, de 21 de julho”, *Diurna. (Jornal Nacional dos Estudantes da Universidade -Católica Portuguesa / students newspaper)*, n.º 17, Janeiro 2025, pp. 73-75, available at https://jornaldiurna.com/wp-content/uploads/2025/04/D17_.pdf.

THE IMPACT OF POLITICAL CONFLICT ON THE PROGRESSION OF LEGISLATION IN UKRAINE: A STUDY OF THE RELATIONSHIP BETWEEN POLITICAL INSTABILITY AND THE PASSAGE OF LAWS IN THE UKRAINIAN PARLIAMENT

Anatoliy Kostruba¹

DOI: <https://doi.org/10.62140/AK296443616>

The commencement of Russia's military intervention in Ukraine has precipitated substantial shifts in the socio-economic landscape, not only in Ukraine itself, but also throughout Europe. The events of February 2022 represent the most significant geopolitical conflict on the European continent since the conclusion of World War II. The war between Ukraine and Russia has resulted in a humanitarian crisis and brought the country to the brink of collapse. The war has led to the displacement of over six million people within Ukraine, with a tragic death toll exceeding 100,000. Furthermore, approximately 20% of Ukrainian territory is now under the control of the aggressor, while the deficit of the State Budget of Ukraine stands at 45%. The destruction of the energy infrastructure has also been a significant consequence of the ongoing crisis.

These processes have had a significant impact not only on the development of civil society, but also on the legal system of the country. It is evident that tragic changes in the socio-political life require appropriate legal regulation, implying that the national legal doctrine undergoes changes under the influence of such factors as war.

¹ Professor of Civil Law in Ukraine, Contractual researcher University Paris 1 Panthéon Sorbonne, Paris, France

Both positive and negative aspects can be traced in this. On the one hand, any changes in society are a form of its development. Conversely, such changes can also result in the disruption of the usual way of life of society, leading to its destabilisation. The war, for instance, has had a significant impact on the national legal doctrine, particularly in the sphere of private law.

One notable consequence is the emergence of new types of torts in Ukraine, including military torts, which are absent in the legal systems of the world. In the field of labour law, Ukraine has witnessed the emergence of novel categories of employment contracts, allowing for the "freezing" of labour relations during military periods. This constitutes a novel development within the legal doctrine. The occupation of Ukrainian territory has precipitated a transformation in the system of court administration, marked by a shift from the doctrinal principle of territoriality to a utilitarian approach. This shift enables the right to appeal to be exercised not at the location of the defendant, but at the place most convenient for the plaintiff, thus creating an unconventional approach generated by the existing military conflict.

The fluctuations in the doctrine of private law of Ukraine require appropriate legislative registration, which is unfeasible without the requisite scientific support, and it is crucial to acknowledge the interdisciplinary nature of the study. Effectively reforming legislation necessitates an analysis of the causes and conditions of changes in the doctrine of private law as a consequence of the war in the European space. The identification of these causes necessitates the study of this problem from the perspective of not only jurisprudence, but also from the perspective of economic geography, social geography, psychology and sociology, as well as the analysis of macroeconomic indicators.

The findings from research in sociology, social geography, economics and other sciences allow for the recognition of regularities in the shifts to the doctrine

of private law in Ukraine and the identification of the direction of reform to the legislation of Ukraine during wartime.

Moving from theory to practice, it is evident that the war has had a significant impact on the deformation of national legislation. It is evident that the war has led to a deformation of legislation in both public and private law. A substantial body of sociological research has demonstrated that military actions have resulted in significant demographic changes, with over 7 million Ukrainians having been compelled to leave their place of residence in order to escape the war. It is evident that this circumstance has had a profound impact on the economy. In situations of critical need, individuals are compelled to choose between law-abiding behaviour and possible deviant behaviour, due to the survival instinct.

The involuntary displacement caused by the war resulted in a pervasive infringement of legal obligations in the daily lives of citizens, prompting a fundamental shift in their life perspectives. This transition led to a predicament where individuals were compelled to decide between fulfilling their loan obligations or allocating financial resources to more pressing needs. This decision was not a solitary one, as a significant proportion of the population ceased loan payments, endangering the stability of the nation's financial sector. Confronted with this challenge, the government was compelled to devise a response.

In other words, the war necessitated a shift in legislation, allowing for extraordinary measures that would not be possible under normal circumstances, as they would contravene the economic laws of societal development. In practice, the Verkhovna Rada of Ukraine adopted the Law No. 2120 of 15 March 2022, which establishes an exemption from liability for citizens for breach of contract during martial law.

Furthermore, amendments were made to the Law on Mortgage, which restricts the right of the bank to take property from citizens who left during martial law. Secondly, the judicial system was subject to change, due to the occupation of Ukrainian territory resulting in the Ukrainian government being deprived of the possibility of governing a part of the country. Consequently, the mechanism of interaction between the government and the citizens residing in the occupied territory has become considerably more complex.

It is important to acknowledge that acclimatising to a potentially hostile social environment in a different city or country can be psychologically challenging, with cultural, intellectual and age differences contributing to this. Many individuals who remained in the occupied territory continue to maintain legal ties with Ukraine, having relatives in other cities and even immovable property.

In light of these circumstances, the Government of Ukraine has opted to alter the mechanism of registration of legal facts. Previously, the registration of the fact of birth of a child was conducted at the place of its birth; however, the advent of war has prompted a shift in this conventional practice. Henceforth, all legal facts shall be registered at the earliest available point in time for the applicant.

The domain of family law is particularly susceptible to the impact of these changes. The Civil Code of Ukraine (Articles 43-48) contains a provision pertaining to the recognition of a citizen as either dead or missing. In the absence of information about a citizen in the place of their residence for a period exceeding one year, grounds are established for recognizing them as missing, which gives rise to the right to establish guardianship over the person's property. The procedure in question requires judicial support. Conversely, should information regarding an individual fail to be available for a period exceeding three years, this may result in their recognition as deceased. This procedure is also carried out in court.

The recognition of a citizen as deceased provides the opportunity to register an inheritance. It is important to note that Article 46 of the Civil Code contains a reservation regarding the shortened period for recognizing a citizen as dead. In the case of a natural person who has gone missing in a military conflict, recognition as dead may occur within two years after the end of the war. However, current practice indicates that this condition is inadequate. Firstly, it should be noted that no official declaration of war has been made between Ukraine and Russia. In Russia, the term 'aggression' is used to describe the ongoing conflict, whereas in Ukraine, it is referred to as 'military aggression' and 'genocide'.

The duration of the conflict is uncertain, which complicates the protection of the rights of those affected. Consequently, the Ukrainian legislation "On the Legal Status of Persons Missing in Special Circumstances", enacted on 14 April 2022, modifies the pertinent procedure.

The legislation establishes an administrative procedure for the recognition of the new status of a citizen from the moment the information is entered into the Unified Register, thus considerably facilitating the protection of a person's property rights. Since the establishment of the Register in 2022, a total of 5,475 individuals have been registered.

A comprehensive and sustained analysis of this phenomenon is warranted, given the apparent susceptibility of almost every aspect of human life to deformation, a phenomenon that is reflected in the legislation. In order to adapt to the prevailing societal changes, it is imperative to modify the legislation. It should be noted that the present analysis is only a partial one. I believe that my research in this area will be of interest to you in the future.

THE THEORY OF LEGAL PERSONS IN CONTEMPORARY LAW: A UKRAINIAN PERSPECTIVE

Anatoliy Kostruba¹

DOI: <https://doi.org/10.62140/AK555225121>

Abstract: The legal construction of the legal person has a long history. The development of this construct was precipitated by the process of capital concentration, which occurred in the context of the transition from a subsistence economy to a market economy.

In the contemporary context, there has been a discernible distortion of this fundamental concept, precipitated by the gradual expansion of cases in which individuals can be held liable for the outcomes of the activities of legal persons. Concurrently, there has been a corresponding weakening of the autonomy of legal persons. Consequently, the fiction of the legal person is acquiring signs of realism, which are the result of the intertwining of interests between the natural person and the legal person. This theory posited that the rights and obligations of a legal person actually belong to the individuals who use and benefit from the common property.

From the perspective of the integrative theory of the legal person, the latter is the support for the practical activity and knowledge of the subject as an aggregate unit of will, interest and capital of natural persons, aimed at achieving a certain objective of activity, and whose activity is interpolated by the signs of organizational unity, isolation of property and limited legal liability.

Keywords: *legal entity, company, subjects of civil law, Personification theory, public limited company*

¹ Professor of Civil Law in Ukraine, Contractual researcher University Paris 1 Panthéon Sorbonne, Paris, France

To provide an introduction to this subject, it is appropriate to cite the words of Raymond Saleilles, a renowned French jurist, who stated that "there is nothing easier in this world than to refuse to accept the ideas of others. However, such refusal is frequently rendered futile. The issue at hand is not merely the creation of a personal theory, which may hold interest only for amateurs, but rather the pursuit of a comprehensive theoretical framework, encompassing the selection and generalization of ideas that are responsive to contemporary demands and reveal the essence of specific phenomena."²

In accordance with this notion, the objective has been set for the scientific community to direct their attention once more to the nature of the construction of the legal personality, to demonstrate its social essence and to ascertain its characteristic features. A thorough examination of the genesis of the notion of legal personality indicates the pre-eminence of the concept of fiction. Nevertheless, it appears that this conception is ill-suited to the contemporary social environment. A historical review of the conceptual variations of legal personality (I) will highlight the need to transform the concept of legal personality in the modern social environment (II).

I. Conceptual variations in legal persons: a historical overview

A historical analysis of the concept of legal personality is therefore recommended in order to facilitate a more complete understanding of its modern conception. The theoretical underpinnings of this conceptual framework extend

² R. Beudant, H. Capitant, Ambroise Colin, J. Charmont, M. Deslandres, P. Fournier, E. Gaudemet... Etc. L'Oeuvre Juridique de Raymond Saleilles. Avant-Propos de M. É. Thaller,... (1914)

from Rome to the contributions of R. Von Ihering (A). This notion is reflected in the contemporary pre-eminence of the theory of fiction (B).

A. From Rome to Ihering: the beginnings of the modern concept of the legal person

The legal construction of the legal person has undergone a protracted development. Despite the Roman origin of the concept of legal personality, it appears that the modern conception of legal personality is not significantly inspired by Roman law. Despite the flourishing of the Roman economy, legal persons played a negligible role, as there was no requirement for robust and enduring associations of individual proprietors. However, Roman law did not include a term with an equivalent meaning to that of the modern concept of a "legal person". Nevertheless, it is crucial to acknowledge the clarity with which the fundamental concept of a legal person as a legal mechanism for circulating a multitude of autonomous assets was articulated in that legislation.

The transition from a subsistence economy to a market economy appears to have precipitated a process of capital concentration. This transition is concomitant with the development of productive forces and the formation of new economic production relations. This shift in perspective gave rise to a novel conception of legal persons, both from an economic and a legal standpoint. The notion of the legal entity as a collective, a living group of persons, gave rise to the construction of *municipes*, *solidates*, or *fabrorum*. These constructions are property relationships formed according to the principle of co-ownership and are characteristic of the Roman era.

The evolution of capitalism, consequent to the Industrial Revolution in the late 18th century, gave rise to a marked decline in the prevalence of joint ownership systems, which nevertheless did not fully disappear. Indeed, joint ownership was the preferred regime for organizing family legal relationships and also remained the characteristic form of property ownership for the organization of small-scale commercial activities.

The increase in trade resulted in the necessity to develop new methods of managing commercial risks, which consequently led to the emergence of original concepts of legal personality. The purpose of these concepts was to adapt legal personality to the specific economic needs of the Industrial Revolution.

Firstly, the transfer of assets by the founding partners to a legal entity provides said entity with financial autonomy in terms of management.

Secondly, the separation of the legal entity's ownership from that of its partners serves to minimize their liability for the legal entity's obligations.

Thirdly, the consolidation of capital "in the same hands" facilitates the minimization of costs for the founding partners of a legal entity.

Moreover, the establishment of a legal entity facilitates the attraction of 'free' financing sources, characterized by the distribution of results from the organization's activities. It is evident that participation in commercial activities on its own behalf serves to unify the management decision-making process.

The implementation of these novel management methodologies resulted in the establishment of a new legal entity that, by amalgamating the aforementioned characteristics, became the personification of the collective will of a group of individuals. Despite the fact that the existence of this entity is brought about by the

act of will of several individuals, it is granted subjective rights and obligations independent of them. This results in the entity acquiring legal personhood.

Nevertheless, it was not until a considerable period had elapsed following the fall of the Roman Empire that the classic controversy over the nature of legal personality, pitting proponents of the fiction theory against those of the reality theory, laid the foundations for its modern conception³. The concept of a legal person as a fiction created to satisfy the interests of its founders and reflect their will can be traced back to the work of F. Von Savigny⁴. This was a significant step forward, as it represented the first instance of legal capacity being granted to an artificially created non-human entity. The fiction of legal personality was a means of legitimizing these entities, thereby conferring upon them the possibility of enjoying their own rights, in particular the right to property. Despite the theoretical challenges posed by this approach, it ultimately fosters interactions between economic entities.

However, in the second half of the 19th century, this theory was subject to some criticism, initially from German-speaking jurists (*K. Beseler, I. Blunckli*). Following a thorough examination of German legislation, it was determined that a corporation could not be considered a fictitious person⁵. This is due to the fact that a corporation is considered a legitimate, extant and living entity, rather than an artificial conceptualization. Furthermore, proponents of this thesis believed that it was impossible to arbitrarily confine the existence of a company to the sphere of private law alone, as certain types of companies can participate in public life. Subsequent to the aforementioned authors, a further array of scholars have

³ For further reading on this subject, see Ph. Malaurie, 'Nature juridique de la personnalité morale' (The legal nature of legal personality), Defrénois 1990, p. 1068: 'one of the most fascinating controversies in the history of law, which raised fundamental questions'.

⁴ Savigny F, *Traité de Droit Romain* (2018)

⁵ Beseler G, *System des Gemeinen Deutschen Privatrechts, Volume 1...* (Creative Media Partners, LLC 2022)

emerged to oppose the personification theory. The fundamental premise from which they operated was that the capacity of fiction to engender a person who does not correspond to reality was inherently limited. According to H. Demelius, fiction is merely a tool of legal terminology⁶. The purpose of legal fiction is not to create an existence where none previously existed, but rather to assert the occurrence of an event that has not actually transpired, and vice versa.

The predominant alternative to the fiction theory is derived from the seminal contributions of R. Von Ihering, who conceptualized the criterion for legal personality not as a matter of volition, but rather as being contingent upon the interests of the partners. This rejection of the concept of a fictional person was underpinned by the assertion that the existence of rights is contingent upon the existence of a subject, and that the subject of these rights must be a real person. A central opposition therefore emerges between the conception of the legal person as a legal fiction and as a legal person equivalent in principle to a group or a human being. A considerable number of subsequent theories of legal personality appear to be a refinement of the ideas of F. Von Savigny (*G. Jellinek*⁷, *P. Laband*, *M. Ryumelin*) and R. Ihering (*Y. Binder*, *O. Gierke*⁸), with the possible exception of Planiol, for whom the fictitious person is merely a device intended to simplify the management of collective property⁹.

⁶ Mayer O, *Le Droit Administratif Allemand, 2...* (Wentworth Press 2018)

⁷ Conrad J and others, *Handwörterbuch Der Staatswissenschaften* (1893)

⁸ Gierke O, "La personnalité et les droits subjectifs de l'Etat". (1911) *Revue générale d'administration* 271.

⁹ Michoud L, Trotabas L., "La théorie de la personnalité morale et son application au droit Français" (1932) 63.

B. The primacy of fiction in the modern conception of the legal person

Contemporary theories of the legal person are predicated on this dichotomy between fiction and reality. Professor F. Zrodlovsky's definition of the legal person is notable for its rejection of the notion of a fictional legal person. Instead, he defined the legal person in a negative sense, as a person devoid of human individuality. Furthermore, the author provides a positive definition, derived from personal experience. For the aforementioned individual, there exist vital forces, goals and phenomena of such significance that they transcend the individual. It is evident that all of these forces are interconnected and form part of a larger entity, which can be designated as a 'corporation'¹⁰. In a similar vein, prof. M. Suvorov's position is that the utilization of fiction for the purpose of creating a person would constitute a retrograde step¹¹. Accordint to Soviet scientist S. Bratus, a representative of the Soviet School, legal persons are defined as collective assets owned by associations of more or less numerous persons¹². The prevailing notion of the individual must be superseded by a positive definition, which can only be achieved through collective ownership. In essence, a legal person can be defined as a form of collective ownership of either a single asset or a group of assets. It is noteworthy that authors who do not subscribe to F. Von Savigny's theory of legal fiction invariably recognize, to varying extents, in their arguments that a legal person is not a wholly authentic legal entity.

Conversely, the fiction theory has been supported in Eastern Europe by O. Gulyaev, D. Meyer and G. Shershenevich, among others. The latter, however, regarded legal fictions not as imaginary concepts, but as scientific techniques of

¹⁰ Tanimov O, "The Theory of Legal Fictions". (2016) 81.

¹¹ Suvorov M, "On Legal Persons in Roman Law" (2000) 72.

¹² Bratys S, "Legal Entities in Soviet Civil Law: Concept and Type" (1947) 84–86.

cognition'¹³. A legal person may be defined as 'an artificial subject, created to achieve a certain objective'. On this subject, D. Meyer wrote: 'However unnatural the recognition of a legal person may seem, a legal person is only a subject of law by exception and therefore always needs to be recognized by the public authorities'¹⁴.

During the Soviet era, there was a certain degree of distortion of both F. Von Savigny's theory of fiction and R. Von Ihering's theory of interest. The Soviet Marxist conception of the legal person can be regarded as a managerial and economic form of realizing the legal personality of the state. However, it is also important to acknowledge the persistence of pre-revolutionary ideas in the views of Soviet jurists. Indeed, the numerous socialist theories developed in the 20th century in the USSR are an ideological distortion of pre-revolutionary theories, without any fundamental change.

The Soviet doctrine deviates from the notion of legal personality as a fiction, instead considering it to be a human substrate, with its fundamental activity serving as the primary criterion of legal personality. The present approach is identified in A. Venediktov's 'theory of collectivity'. The present study will examine Venediktov's 'theory of collectivity'¹⁵. In order to elucidate the essence of a legal person as a specific legal form of social relations, it is necessary to demonstrate the living persons who constitute this collective and the form of relations in which such a legal person exists. This author posits that the Soviet people, in their capacity as a collective of workers, civil servants, and leaders, are the foundation of each of the organs of the state. In the absence of the establishment of a legal entity by the people, the collective may be considered a legal entity in itself. The concept proposed by A. Venediktov underwent development by Yu. The following essay

¹³ Chershevitch G, "Handbook of Russian Civil Law". Vol. 1. (2005) 157.

¹⁴ Meyer D, "Russian Civil Law": in 2 parts. (2000) 139/

¹⁵ Venediktov A, "Socialist State Property": Selected Works on Civil Law: in 2 volumes, Vol. II. (2004) 381.

will explore the concept of 'director theory' as proposed by Tolstoy. The fundamental premise of the theory posits that the leader functions as the legal entity that constitutes the company¹⁶.

Professor O. Krasavchikov's definition of the legal essence of a legal entity is predicated on a complex system of social relations between individuals. For him, 'the essence of any organization does not lie in the individuals themselves, but in the connections and relationships in which they [their social groups, the state] relate to each other, uniting to achieve the established goals...'. Furthermore, the following three points are proposed as constituting characteristics of any given organization: The presence of a system of meaningful social relations, through which people unite into a single entity, is the primary factor in question. In addition, the existence of a defined purpose of creation and operation is also a key element. Finally, the presence of internal structural functional differentiation...' is of significance¹⁷.

B. Cherepakhin, a proponent of F. Von Savigny's fiction theory, held divergent views on the matter. In accordance with the standpoint espoused by F. Von Savigny, B. Cherepakhin contended that, in a manner analogous to that of natural persons, no entity was attributed with the role of representing legal persons, who were designated as the exclusive possessors of rights and obligations. The present author's position is that the rights of a legal person are possessed by the entity itself, rather than by the individuals who constitute its human substrate. It is evident that the collective of living persons is intrinsic to the legal person, rather than being extrinsic to it. The absence of persons renders the concept of legal persons invalid, and consequently, the possibility of legal person activity becomes

¹⁶ Tolstoy Yu, "On the Development of the Theory of Moral Personality". Problems of Modern Civil Law. (2000) 106.

¹⁷ Krasavchikov O, "The essence of a legal entity. Categories of civil law science" Selected works: in 2 volumes, Vol. 2. (2005) 249.

non-existent. Conversely, it is impossible to identify the legal entity with its existing human composition, just as it is impossible to identify a river with the mass of water that fills its bed at that moment. The water undergoes constant change (flows, evaporates, etc., filling with new water), while the river remains constant in its movement, maintaining a state of unity...". As posited by B. Cherepakhin, the primary rationale for the establishment of a legal entity is to establish a subject of rights and obligations that exists and functions independently of changes in its human substrate. It is evident that the extent to which personal and patrimonial separation between the legal entity and its members is advanced directly correlates with the perfection of the legal entity, and the stability of its ability to meet the objectives it has set for itself¹⁸.

It appears that a significant number of contemporary authors are reviving the concept of fiction, a notion that transcends Soviet doctrine. Simon Dicken is a notable example in this regard, and Jensen and Meckling also underscore the fictional character of the corporation¹⁹. From a legal standpoint, the company would prioritize the concept of union of capital over the characteristics of the individual who established it. This notion is similarly articulated by Indonesian legal professionals²⁰, thereby offering a valuable opportunity to observe the impact of colonialism on the evolution of legal frameworks in Southeast Asian nations. In addition, the notion that the legal person is an artificial concept is supported by the work of Julia Froude and Karel Williams, who argue that the development of a

¹⁸ Cherepakhin B, "Formation of volume and will of the legal entity". Civil law procedure. (2001) 299–300.

¹⁹ Deakin S, "Tony Lawson's Theory of the Corporation: Towards a Social Ontology of Law" (2017) 41 Cambridge Journal of Economics 1505; Deakin S, "'Capacitas': Contract Law and the Institutional Preconditions of a Market Economy" (2006) 2 European Review of Contract Law; Jensen MC and Meckling WH, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 Journal of Financial Economics 305.

²⁰ Rasyidi AF, "Private Limited Company in Indonesian Positive Law: Elaborating The Basic Concept of Corporate Law, Comparison to Other Countries and Its Development" (2022) 22 Jurnal Penelitian Hukum De Jure 465.

business model based on outsourcing, driven by the financial sector, is indicative of this²¹.

In view of this renewed interest in fiction, an alternative to the institution of a legal person could be considered, namely a mechanism of collective mandate conferred on a natural person responsible for the common interest of a number of persons. However, this does not achieve the objective for which such a person is created, both because of the family ties to which the agent is bound, which relativize his or her financial independence, and because of the organizational limitations of the natural person. Moreover, the duplication of assets held by the individual acting as agent could result in potential conflicts of interest and difficulties in determining the personal and professional responsibilities of that individual.

This historical overview of the legal nature of legal persons demonstrates that, in both Western and Eastern Europe, the concept of fiction appears to predominate, enabling the separation of the natural person from the purpose they pursue. Despite endeavors to deviate from this legal construct, doctrine perpetually reverts to it in various forms, akin to a boomerang. The concept of fiction enables the individual volition of a natural person to be articulated through the collective will, consolidated within a legal entity. In light of this observation, it is essential to engage in a thorough reflection on the necessity to transform the concept of legal person within the context of the contemporary social environment.

²¹ Froud J and others, *Financialization and Strategy* (Routledge 2006) <<https://doi.org/10.4324/9780203414941>> accessed June 8, 2025.

II. The necessity to redefine the notion of legal personhood in the contemporary social context

The pre-eminence of the fiction theory does not appear to be aligned with contemporary requirements. Indeed, it is evident that the theoretical foundations of fiction theory (A) are being observed, with the necessity to consider the reality of the 'human substrate' of the legal person being emphasized (B).

A. The weakening of the theoretical foundations of the fiction of legal personality

The primary methodological challenge confronting contemporary theorization of legal entities pertains to its dissociation from extant general and sectoral theoretical discourses on the nature of legal personhood. On the one hand, the traditional conception of the legal person is difficult to adapt to current needs due to the impossibility of identifying its shortcomings. Conversely, contemporary studies underscore the inefficacy of prevailing legal frameworks, thereby resulting in the distortion of economic realities by the legal system. These shortcomings have hindered the ability of the concept of legal personality to keep pace with modern economic developments.

In his theory of fiction, F. Von Savigny places at the center of legal personality the idea of the concentration of property in the hands of an autonomous legal entity. Furthermore, he posits the limitation of the civil liability of its founders for the results of its activities. Consequently, conventional civil law theory identifies organizational unity, the separation of assets and autonomous liability as the primary characteristics of legal personality. Nevertheless, it is possible to observe the necessary distortion of these traditional characteristics for a variety

of reasons. On the one hand, the liability of partners for the debts of the company is gradually expanding due to their potential interference in the latter's activities. Conversely, the economic autonomy of the legal person is diminished as contractual mechanisms emerge, thereby ensuring the economic interests of its partners.

This weakening of the traditional concept of the legal person can be observed in practical examples. For instance, partners have the opportunity, through guarantees, to enhance the company by assuming the credit risk. Furthermore, it is possible to establish statutory and contractual restrictions on the conclusion of contracts between the company and some of its directors, particularly through regulated agreements. Furthermore, specific corporate structures empower corporate creditors to pursue joint action against partners in the event of the company's default. It is now widely accepted that the involvement of another person in the management of a legal entity may relativize its legal autonomy. It is imperative to acknowledge the diminution of the 'purity' of F. Von Savigny's Personifications theory. In the context of the relationship between a legal entity and its members, the limitation of its legal capacity by the will of its members is indisputable.

This confusion is reflected in a gradual change in the concept of legal personality, which has been prompted by the risk of abuse by management bodies. The legal personality is embodied in these bodies. However, when members of management bodies interact with individuals outside the corporate framework, conflicts of interest may arise if objectives contrary to those of the company are pursued. In circumstances where the level of transparency is not exhaustive, as is evidenced in the context of a public limited company, potential risks may emerge. This risk for the shareholders cannot be covered by the company itself, due to the separation of its assets from those of its shareholders. However, the conventional

approach to resolving corporate disputes appears to be ineffective, primarily due to the inadequacy of conventional legal instruments. Consequently, the Ukrainian Supreme Court has undergone a gradual shift in its conception of legal personality:

In a Grand Chamber judgment dated 22 October 2019 (No. 911/2129/17), the Supreme Court established *that natural persons representing legal entities are obligated to act within the limits of their powers, in good faith, and reasonably* (point 6.21)²².

Moreover, the pertinent legal relationship is of a fiduciary nature between the company and its agent. The agent's unlawful conduct consists of the improper and dishonest performance of certain actions, without respecting the limits of normal economic risk or by abusing his official functions in his own interest. *The act of an agent making decisions that are manifestly imprudent, unnecessary and knowingly self-serving* (point 6.22) *constitutes misconduct*²³.

The Court of Appeal, in its adjudication of the case, partially upheld the claims of the parties involved. It was observed that the agent was bound by a duty of reasonable care in the management of the company's affairs. Furthermore, it was determined that the agent was required to utilize the requisite professional skills and exercise his powers with the requisite diligence²⁴.

It is therefore evident that the financial autonomy of a legal entity in relation to its members can result in abuse. While the individuals operating behind the veil of anonymity are legally insulated from the consequences of their actions,

²² “Resolution of the Grand Chamber of the Supreme Court of 22 October 2019 in Case No. 911/2129/17” <<https://reyestr.court.gov.ua/Review/85743713>> accessed June 8, 2025.

²³ “Resolution of the Grand Chamber of the Supreme Court of 08 October 2019 in Case №916/2084/17” <<http://www.reyestr.court.gov.ua/Review/84911545>> accessed June 8, 2025.

²⁴ “Supreme Court Ruling in the Commercial Division of the Court of Cassation Dated 24 June 2020 in Case No. 922/2187/16” <<https://reyestr.court.gov.ua/Review/90057586>> accessed June 8, 2025

they nevertheless exercise caution. The autonomy of a legal entity's will is therefore inherently limited, since it depends on that of the individuals who give priority to their own interests.

The protection of the interests of the partners may then be achieved indirectly through legal action brought in the interests of the legal entity. This is referred to as 'indirect claim' in the Anglo-Saxon legal system. Consequently, the partners assume a pivotal role in the prevention and punishment of abuses by the management bodies, albeit indirectly, through the pursuit of their own interests. In a resolution dated 24 February 2021, the Ukrainian Supreme Court provides an example of this role of corporate action against management bodies.

The company known as Agrocenter-Ukraine LLC, which is acting on behalf of another company, Agricultural Enterprise "Agrostar" LLC, has submitted an appeal to the Commercial Court of the Dnipropetrovsk Region. The appeal is against the former director, and the claim is for damages amounting to UAH 1,406,689.28. The grounds for the appeal are as follows: It is evident that Agrocenter-Ukraine LLC holds a controlling interest in the authorised capital of Agricultural Enterprise Agrostar LLC, amounting to 99.9%. During the period spanning from December 2016 to August 2017, the defendant, who occupied the position of director at Agrostar LLC, engaged in the unauthorized utilization of the company's financial resources for the settlement of his personal tax obligations.

The Supreme Court reversed the decision of the Court of Appeal and amended the decision of the court of first instance. The decision was partially upheld, with 140,668 UAH being collected from the director (point 43)²⁵.

Consequently, the notion of fiction appears to be increasingly ill-suited to the realm of managing legal entities, a domain in which the potential for conflicts of interest escalates in tandem with the augmentation of social activity. This has resulted in an increased emphasis on the necessity to consider the reality of the 'human substrate' of the legal person.

B. The significance of acknowledging the reality of the 'human substrate' of legal persons is crucial for the development of an integrative theory of legal persons.

The objective of this study is to extend the existing framework of F. Von Savigny's fiction theory by incorporating R. Von Ihering's theory of interest. According to this theory, the rights and obligations of a legal entity are attributed to the individuals who possess the company. A legal person may be defined as a form of personification and mediation (*Erscheinungs und Vermittlungsform*) of the legal relationships of its members. Consequently, drawing upon S. Bratus's successful analysis of R. Ihering's theory of interest, it can be concluded that the only legitimate subjects of rights are the natural persons who are members of the company.

²⁵ “Supreme Court Ruling in the Commercial Court of Cassation Dated 24 February 2021 in Case No. 904/982/19.” <<https://reyestr.court.gov.ua/Review/90057586>> accessed June 8, 2025

In his 2014 publication, Tony Lawson asserted that 'the legal person is a "community" in this particular sense: *it is also a totality or a structure derived from human interaction* [...]'²⁶. The author puts forward the notion of a gradual distortion of the fiction theory in European societies. The author opposes F. Von Savigny's theory, emphasising that 'society acquires its form from cumulative and repeated actions between legal persons (*shareholders, directors, employees and others*), their rights and obligations, which together form a certain legal "structure" resulting from this interaction. The existence of a society is predicated on human behaviour.' Tony Lawson asserts that the act of registering a company can only be said to hold significance in the context of a pre-existing entity (*or, in the case of a prospective entity, an entity in the process of being created*)²⁷. This is predicated on the existence of assets. This notion is prevalent in the majority of Western legal systems, which appear to deviate from the concept of legal persons as a mere fiction by systematically incorporating elements of 'reality' into them.

The primary objective is to prevent abuse by management bodies in determining the will of the legal person, in particular by holding them accountable when their actions exceed the scope of their functions. In common law countries, this phenomenon has become widespread and is reflected in the doctrine of 'piercing the corporate veil'. It is possible to hold members of the company who hide behind the legal personality of the company liable for management decisions that are detrimental to third parties.

In the Ukrainian legal system, this approach has already been enshrined in banking law. According to Article 58 of the Ukrainian Law 'On Banks and Banking', a person connected with a bank who has caused damage through their

²⁶Lawson T, "The Nature of the Firm and Peculiarities of the Corporation * †," *The Nature of Social Reality* (Routledge 2019) <<https://doi.org/10.4324/9780429199035-3>> accessed June 8, 2025

²⁷ Lawson T, "Comparing Conceptions of Social Ontology: Emergent Social Entities and/or Institutional Facts?" (2016) 46 *Journal for the Theory of Social Behaviour* 359.

actions or inaction, whether deliberate or otherwise, is personally liable for any resulting losses, and this liability is enforceable against their personal assets²⁸. In a similar fashion, Article 61 of the Bankruptcy Code establishes that in the event of the bankruptcy of the debtor being attributable to the fault of its shareholders or directors, said individuals may be held subsidiarily liable for the obligations of the bankrupt company²⁹.

Nevertheless, the influence exerted on the will of the legal entity by other actors, in particular employees through their participation in management, must also be taken into account. According to Article L. 225-27 of the French Commercial Code, the articles of association may stipulate that the board of directors shall comprise, in addition to the directors whose number and method of appointment are delineated in Articles L. 225-17 and L. 225-18, the directors elected by the employees of the company or by the employees of the company and the employees of its direct or indirect subsidiaries whose registered office is situated in France³⁰.

The institution of employee participation in management is becoming an important factor in the development of the social partnership system. In the contemporary business environment, the involvement of employees in the activities of the company's management bodies is facilitated by the following mechanisms: The following directives are relevant in this context:

Directive 94/45/EU of 22 September 1994 on the establishment of organisations within undertakings and groups of undertakings operating in large

²⁸ — ‘Про банки і банківську діяльність’ (Офіційний вебпортал парламенту України) <<https://zakon.rada.gov.ua/laws/show/2121-14#Text>> accessed 8 June 2025

²⁹ — ‘Кодекс України з процедур банкрутства’ (Офіційний вебпортал парламенту України) <<https://zakon.rada.gov.ua/laws/show/2597-19#Text>> accessed 8 June 2025

³⁰ “Article L.225-17 - Code de Commerce” (Légifrance) <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000023519840> accessed June 8, 2025

communities, the European Works Council or procedures for informing or consulting employees³¹;

Directive 2002/14/EU of the European Parliament and of the Council of 11 March 2002 laying down general provisions on informing and consulting employees in the European Community³².

Thirdly, *Directive 2001/86/EU of 8 October 2001* provides for the involvement of employees in management with regard to the Statute for a European Company³³.

Fourthly, *Directive 2003/72/EU of 22 July 2003* provides for the involvement of employees in management with regard to the Statute for a European Cooperative Society³⁴.

The legal entity, as an abstract unit, absorbs the community behind it. This community is a legal entity distinct from the individuals who comprise it. Concurrently, the legal entity cannot be wholly disassociated from natural persons or from the relationships it has with them. This complete dissociation represents the fundamental defect in F. Von Savigny's Personifications theory. Consequently, it can be posited that F. Von Savigny's fiction theory should be augmented by R. Von Ihering's interest theory, thereby incorporating the reality of a human substrate into the fiction of the legal person. The issue at hand concerns the

³¹ “Directive - 94/45 - EN - EUR-Lex” <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31994L0045>> accessed June 8, 2025

³² “Directive - 2002/14 - EN - ‘EUR-Lex - 32002L0014 - EN’ (EUR-Lex — Access to European Union law — choose your language) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002L0014&from=SL>> accessed 8 June 2025

³³ “Directive - 2001/86 - EN - EUR-Lex” <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32001L0086>> accessed June 8, 2025

³⁴ “Directive - 2003/72 - EN - EUR-Lex” <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003L0072>> accessed June 8, 2025

synthesis of the establishment of a legal entity of a fictitious nature with the recognition that the activities of said entity are subject to the influence of the natural persons responsible for its formation and administration. This combination is expressed, on the one hand, by the extension of the limits of the liability of directors and partners in the context of the legal person's activity and, on the other hand, by the increasing involvement of third parties in the management of the company. The active legal behaviour of partners and directors with regard to the distribution of profits, as well as the possibility that their interests may coincide with those of the legal entity, suggests that reality takes precedence over fiction in the conception of the legal entity, which justifies the regulation of the liability of these actors.

It is imperative to note that the following text constitutes a direct quotation, which has been reproduced exactly as it appears in the original source.

In conclusion, the history of the concept of legal persons reveals the pre-eminence of the fiction theory. However, the integration of R. Von Ihering's interest theory into F. Von Savigny's theory gives rise to a single theory: the integrative theory of legal persons. The legal person is defined as an objective reality that possesses its own 'body' and materiality. The legal person, being incapable of physical manifestation, is a fiction that simulates a human being. This fiction is necessary in order, on the one hand, to unite the collective will and capital of the partners and, on the other hand, to separate the legal interests of the legal person from those of the natural persons who constitute and manage it. The conferral of a single spirit, legal personality upon this capitalist and intellectual union enables the establishment of an independent legal entity.

Nevertheless, it is not possible to consider that the latter's autonomy is absolute from the moment of its formation, due to the inevitable involvement of a

natural person in the existence of a legal entity. The interests of the natural person are inextricably intertwined with the governance of the legal entity. The nature of its activities, the legal motivation behind its decisions, the legal and factual consequences of those decisions, and the distribution of profits are of interest to the natural person. Conversely, the interests of the legal entity cannot be reduced to the sole interests of the natural persons who constitute it. In addition to the interests of the partners, there are also the interests of the stakeholders in the company's activities, primarily the employees, insofar as they are involved in achieving the results, which may be beneficial to them through their participation in the capital.

It is therefore evident that a legal entity may be defined as a social organization that brings together individual interests and intentions in a collective endeavor. The structuring of such a concentration is facilitated by the inherent characteristics of the law, which engenders authentic independence of the legal entity in legal terms³⁵. The social nature of this structure is revealed through the active behavior of the human substrate that composes it. It is imperative for the legal entity to achieve the purpose for which it was established, and is therefore essential to its existence. Moreover, the concept of a legal entity, as the embodiment of the collective will of a defined group of people, implies coordination of individual wills within it. This coordination is evident from its formation to its dissolution and binds all parties involved in its activities. This process of individualization is a fundamental aspect of the legal entity's identity.

³⁵ Kostruba A, "Корпорація: досвід феноменологічного дослідження" (2021).

FROM SDG 14 TO THE EUROPEAN OCEAN PACT: A PERSPECTIVE FROM THE FISHING SECTOR

Giorgio Gallizioli

DOI: <https://doi.org/10.62140/GG131848199>

The UNOC3

Among the objectives listed in the United Nations General Assembly Resolution of 25 September 2015, "Transforming our world: the 2030 Agenda for Sustainable Development Goal," the number 14, "Conserve and sustainably use the oceans, seas, and marine resources for sustainable development," also known as "Life below water," is certainly the timeliest. The Nice Conference, held from June 9 to 13, 2025, marked the anniversary of the first decade and provided another opportunity to highlight the extraordinary importance of the oceans and the resources they contain for the planet and its inhabitants. This is why 60 Heads of State and hundreds of delegations, at the invitation of France and Costa Rica, gathered in the city on the French Riviera to assess the progress made toward the goals that should have already been achieved by 2020 or, for some of them, that should be achieved by 2030 at the latest.

The oceans' significance is evident in hard figures: they cover 71% of the Earth's surface, comprise 90% of the biosphere, provide food security for over three billion people, facilitate the transportation of more than 80% of global goods, and host sea cables carrying approximately 98% of international internet traffic.

Today, they are also valued for their role in absorbing carbon dioxide and thus in regulating global temperatures. Furthermore, ocean-related activities are

increasingly contributing to wealth creation. All of this makes it necessary to regulate economic activities to prevent further degradation of the oceans and, conversely, to restore them to a healthy state.

The risks facing humanity, ongoing initiatives, and other undertakings were discussed in detail at the conference in Nice, although the Conference's conclusions are not binding. Binding measures could, however, be adopted at the conclusion of the first Conference of the Parties (COP), which the participants have committed to convene in the near future.

Focus on the oceans

While the importance of seas and oceans had already been considered in the United Nations Convention on the Law of the Sea (UNCLOS)¹, it was during the 1992 UN Conference on Environment and Development, namely on Chapter 17 of Agenda 21,² that conservation and sustainable exploitation of marine living resources came to the forefront. However, it was not until 2012, with the release of the document "The Future We Want," that the States first showed special interest in the ocean. SDG 14 is therefore the culmination of a process of awareness among States of the essential role played by the oceans.

SDG 14 is divided into seven main targets and three associated targets, accompanied by ten indicators, quantitative or qualitative measures used to track the Parties' progress towards achieving the goal. The indicators were introduced to

¹ UNCLOS was adopted in 1982, but it did not enter into force until 1994. Some important States such as the USA, Turkey, and Israel have never ratified it. The European Union (then the European Community) ratified it in 1998, joining a declaration whereby it also assumed exclusive competence for the conservation of living marine resources, a competence also enshrined in Art. 3 of the 2009 Treaty on the Functioning of the European Union (TFEU).

² See par.158.

address shortcomings observed in the implementation of the Millennium Development Goals, which preceded the SDGs by 15 years.

Some of these targets are essentially measures that directly affect fishing activity, such as the commitment to effectively regulate harvesting and end overfishing, as well as counter illegal, unreported, and unregulated fishing (IUU fishing) or any other destructive fishing practices.

Likewise, the ban on certain forms of fisheries subsidies, which contribute to overcapacity and overfishing, aims to prevent the overexploitation of fish stocks³.

Other targets focus on environmental aspects, aiming to sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including strengthening their resilience and restoring them to achieve healthy and productive oceans. Reference is also made to social aspects when aiming to ensure access for small-scale artisanal fishers to marine resources and markets, as well as the importance of scientific research.

In this paper, however, our focus is specifically on target 14.c: Enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in UNCLOS, an area in which the European Union intends to play a leading role.

Our aim is to underline how the EU has already legislated extensively in the field of oceans through, on the one hand, the well-established Common Fisheries Policy (CFP) and, on the other, a more recent policy, defined as international ocean governance. This motion led to the presentation of an initiative at the Nice Conference, which is the subject of this paper: the European Ocean Pact.

³ The WTO reached an agreement on fisheries subsidies at its 12th Ministerial Conference held on 17 June 2022.

The rising importance of the oceans for the EU

While the CFP was established in 1983, the maritime policy encompassing all economic sectors related to the seas and oceans emerged in 2006 with the publication of the Communication "Towards a future Maritime Policy for the Union: A European Vision for the Oceans and Seas."⁴ It was during the Portuguese Presidency of the EU⁵, a State with a long maritime tradition and a very large EEZ, that the communication "An Integrated Maritime Policy for the European Union"⁶ was adopted. This was the first in a series of communications and action plans that, by highlighting the interconnection of the various activities related to the seas and oceans, their economic potential, but also environmental problems and the risks of conflict in the occupation of maritime spaces, would give rise to some legislative texts that are still in force though in need of revision to make them more effective, as the Commission itself has acknowledged.

It is not necessary here to retrace in detail the evolution of this new European policy⁷, which also entailed administrative adjustments, both at the European Commission level with the creation of the Directorate-General for Maritime Affairs and at the national level. Suffice it to mention here the European Commission's communications on Blue Growth⁸, later renamed the Blue

⁴ EUROPEAN COMMISSION, COM(2006)275.

⁵ Lisbon has therefore been the venue for several high-level conferences focused on the oceans. The second Ocean Conference entitled "Scaling up ocean action based on science and innovation for the implementation of Goal 14: stocktaking, partnerships and solutions" was held there from 27 June to 1 July 2022 as well as the 11th annual World Ocean Summit (11-13 March 2024).

⁶ EUROPEAN COMMISSION, COM(2007)575.

⁷ It is a full fledged policy, as recently restated: 'maritime policy' means the Union policy that aims to foster integrated and coherent decision making to maximize the sustainable development, economic growth and social cohesion of the Union, particularly of the coastal and insular areas and of the outermost regions, and of the sustainable blue economy sectors, through coherent maritime-related policies and relevant international cooperation", see Reg 2021/1139 establishing the European Maritime, Fisheries and Aquaculture Fund and amending Regulation (EU) 2017/1004, art.2.2(9).

⁸ EUROPEAN COMMISSION, *Blue Growth. Opportunities for marine and maritime sustainable growth*, COM(2012)494.

Economy⁹ so as not to link economic growth to the use of natural resources, given that in the meantime the Von der Leyen I Commission had adopted "The European Green Deal,"¹⁰ in which the protection of the natural environment had assumed the utmost importance.

The Blue Economy, as defined by the European Commission, encompasses a range of activities that take place at sea or are connected to the sea. Some are traditional, while others are recent and based on advancements in technical and scientific development.

To underscore the importance of this sector for the EU, it is sufficient to read the latest Blue Economy Report (2025), which provides a comprehensive overview of the scale and breadth of the EU Blue Economy. It is a growing set of dynamic and competitive industries that contribute around EUR 250 billion to the EU economy and employ nearly 5 million people.

It is also appropriate to list the main components of the Blue Economy to realise how the diverse activities may interact and create conflict in the use of maritime space. This is particularly evident in activities concerning marine living resources (fisheries and aquaculture), the marine extractive industry (oil and gas, and deep-sea mining), the marine renewable energy sector (offshore wind farms), and maritime transport.

With a view to promoting a well-organised utilisation of maritime space by different sea users, the European Commission, already in 2008, published the "Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU". It took a long time before a proposal for a directive establishing a framework for maritime spatial planning (MSP) and integrated coastal management was

⁹ EUROPEAN COMMISSION, *On a new approach for a sustainable blue economy in the EU. Transforming the EU's Blue Economy for a Sustainable Future*, COM(2021)240.

¹⁰ EUROPEAN COMMISSION, COM(2019)640. This initiative was followed by the *European Climate Law* (Reg 2021/1119); the *Action Plan: Protecting and restoring marine ecosystems for sustainable and resilient fisheries* (COM(2023)102 and the *Nature Restoration Law* (Reg 2024/1991).

presented in 2013,¹¹ which was adopted the following year.¹²

We are indulging in the MSP because the ten-year implementation of the mechanism devised to support the sustainable development of seas and oceans and to allow coordinated, coherent and transparent decision-making has performed less efficiently as expected and some users, notably those with less powerful tools at their disposal, are discontent on the way the authorities have dealt with their legitimate expectations, which is why a revision of the measure is deemed necessary.

The international Ocean Governance

The EU has, over the years, taken measures implementing the different targets under SDG 14. In 2016, the EU became the first organisation to adopt an international ocean governance initiative, and since then, it has been the world leader in this area. This is an aspect worth delving into.

First, we must consider that the EU has been able to play a prominent role in protecting the oceans and their resources, as it can participate in international bodies and be a party to international agreements through its exclusive competence in the conservation of marine biological resources¹³. This is a consequence of the need to regulate the activities of the EU Member States' fishing fleets to prevent the overexploitation of fish stocks, wherever they operate, which would lead to their collapse and have detrimental effects on all stakeholders and communities that depend on the sector. This is why catch limitation and other conservation measures are adopted at the EU level.

¹¹ EUROPEAN COMMISSION, COM(2013)133.

¹² Dir 2014/89.

¹³ Art.3.1,d, Treaty on the functioning of the European Union (TFEU).

This prerogative enables the EU, represented by the European Commission, to be an active member in 18 regional fisheries management organisations (RFMOs), which regulate fisheries in areas outside national jurisdiction¹⁴ and comprise almost the entire high seas. The EU is also a contracting party to three Regional Sea Conventions covering EU marine waters. In addition, through the 17 sustainable fisheries partnership agreements (SFPAs) with third countries, the EU can promote sustainable fishing within those countries' EEZs.

Building on this competence, the EU participates in various international conferences on the oceans, where it tables initiatives aimed at ensuring a fair distribution of resources while protecting the environment. The EU also generously supports infrastructure development in third countries and encourages research on ocean-related topics.

The EU has been pivotal in the negotiations that made it possible to adopt, in June 2023, the international agreement on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ Agreement)¹⁵, and was a driving force during other important international agreements as the Kunming-Montreal Global Biodiversity Framework (2022), which states, *i.a.*, that the Parties to the Framework shall ensure that by 2030 at least 30 per cent of marine and coastal areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measure.

¹⁴ Save exceptions, such as the International Commission for the Conservation of Atlantic Tunas (ICCAT).

¹⁵ The European Union approved the Agreement on 28 May 2025. It entered into force on 19 January 2026.

The impact of EU commitments on the fishing industry

There is no doubt that climate change poses a danger to the planet and its inhabitants, and every effort should be made to counter and mitigate its effects. However, one of the critical points in convincing everyone to buy into the necessary measures is their fairness, transparency, and adoption in a participatory mode.

Unfortunately, this is not always the case when industries with powerful resources have priority over activities that, although traditional and essential, lack the means to counter measures that favour those enterprises.

Although fishing activity is the lever that enables the EU to participate and play a decisive role in the Conferences of the Parties to various international conventions dealing with the oceans and their resources, this same activity is the least protected when commitments undertaken require the imposition of limitations on fishing enterprises. This is apparent in the use of maritime space, as EU legislation stipulates that the “planning, construction and operation of plants for the production of energy from renewable sources, their connection to the grid and the related grid itself, and storage assets shall be presumed to be in the overriding public interest” Only when duly justified, a Member State may be exempted from this imperative.¹⁶

The practical implementation of this rule spurred demonstrations along the European coasts by fishers who are being excluded from fishing grounds and see their spaces continuously shrinking to accommodate the installation of wind farms, solar panel platforms, and submarine cables. Due to these drawbacks, the mechanism for maritime space planning has proven to be flawed in its conception, if not in its implementation.

¹⁶ Art.6, Reg 2024/1991 on nature restoration and amending Regulation (EU) 2022/869.

While everyone is aware of the need to sustainably manage natural resources and recognise that the fishing sector must also contribute to this collective effort, it is impossible to ignore that “green” decisions are sometimes largely dictated by financial interests, given the huge amounts of public and private money involved in this business.

The Pact with fishers

The European fishing industry not only has to deal with the depletion of biological resources due to overfishing, climate change, pollution from land-based sources, as well as unfair competition from other fleets, the lack of renewal of fishing fleets, and the ageing of fishermen themselves, but it has also suffered for the reduction of marine spaces to make room for the industry of renewable energy and for the expansion of protected areas where the activity is partially or totally prohibited. As a result, many businesses, especially micro-businesses, have ceased all activity, although the internal supply of fish protein accounts for less than 30% of the EU's needs.

Unsurprisingly, the fishing industry welcomed the choice made by candidate-President Ursula Von der Leyen, who, unlike in the previous term, presented the political outlines of the next European Commission without overlooking the importance of fisheries activities and assured that a Commissioner for Fisheries and Oceans would be appointed. As we know, Cypriot Costas Kadis is the new Commissioner for Fisheries and Oceans, in charge of steering the Directorate-General for Maritime Affairs and Fisheries (DG MARE) solely. He has already shown that he does not intend to ignore the fishers’ current difficulties.

Actually, it was his predecessor who, a few months before leaving office, proposed a “Fisheries and Oceans Pact towards sustainable, science-based,

innovative and inclusive fisheries management” when presenting an evaluation of the CFP.¹⁷

In this document, besides highlighting the importance of recognising fishers and aquaculture producers for the professionalism and service they provide, so that they deserve to be appreciated as genuine ‘stewards of the sea’, some of the grievances of the fisheries sector were mentioned. Among these concerns, we can list the call for simplifying rules, effective involvement in decision-making procedures, a level playing field with competing fleets, innovation in tools, modernisation of vessels, research, and efforts to promote generational renewal. It is, in fact, not a remote possibility that by 2040¹⁸ or 2050, the dates foreseen by the European Green Deal for the completion of the transition, there will be a scant number of European fishermen on board European vessels. The “Fishers of the future” is thus a pressing concern.¹⁹ For this reason, the European Commission deemed it necessary to propose a package of measures grouped in a “pact”.

It has not escaped anyone’s notice that the European Commission likes creating catchy terms: we have, in fact, numerous examples, from agenda, strategy, action plan, roadmap, deal, and now pact, the common denominator being that all these initiatives do not produce a binding text. In this way, any confrontation with the lawmakers at the European level is prudently avoided. However, without revising some existing provisions, it would be hard to meet the fishers' demands.

¹⁷ EUROPEAN COMMISSION, *The common fisheries policy today and tomorrow: a Fisheries and Oceans Pact towards sustainable, science-based, innovative and inclusive fisheries management*, COM(2023)103.

¹⁸ The Commissioner will prepare a vision for the fisheries sector with a 2040 perspective to ensure its long-term competitiveness and sustainability. He will work to ensure job creation and address pressing issues affecting the fishing community (see the mission letter to Mr Kadis).

¹⁹ GALLIZIOLI, LAUDISA, *How can the EU best support the future of EU fishers?*, Europe Jacques Delors, Discussion paper, June 2025.

This point has been taken up by the European Commission, as we will see in the next paragraph. But we must first determine what this "pact" entails, as it is only mentioned twice in the Commission document, and then only to indicate that this agreement (pact) should involve the Member States, stakeholders, the scientific community, and, of course, the Commission. However, it is the Commission itself that denies that it constitutes an agreement, stating that the pact is a call to work together to make the necessary improvements to the implementation of the CFP in the short term and to initiate a new phase of discussion among all fisheries stakeholders. This approach is more akin to a standard consultation than a proper arrangement. It is doubtful whether it can reassure the stakeholders.

The European Ocean Pact

The term "pact" is in fashion today,²⁰ given that the President of the Commission herself, overlooking the 2023 communication, has launched the idea of a "European Ocean Pact," where fishers are no longer the category to be prioritised²¹. This new pact is depicted as a comprehensive strategy to better protect the ocean, promote a thriving blue economy and support the well-being of people living in coastal areas. The European Ocean Pact (EOP) was adopted by the Commission on June 5, just in time to be presented in Nice as another contribution from the EU to SDG 14²².

²⁰ See the *Pact on Migration and Asylum*, COM(2020)609, and the forthcoming *Pact for Social Dialogue and Pact for the Mediterranean*. The term "Compass" also appears to be a trend: see *A Strategic Compass for Security and Defence* (2022) and *A Competitiveness Compass*, (COM(2025)30).

²¹ "The European Oceans Pact will focus on boosting the blue economy and ensuring the good governance and sustainability of our oceans in all of their dimensions", VON DER LEYEN, *Political guidelines for the next European Commission 2024–2029*, 2024, p.21.

²² COM(2025)281.

The EOP pursues six priority objectives, none of which is either new or lacking a legislative framework. They are: 1. Protecting and restoring ocean health; 2. Boosting sustainable competitiveness of the Blue Economy; 3. Supporting coastal, island communities and outermost regions; 4. Advancing ocean research, knowledge, skills and innovation; 5. Enhancing maritime security and defence as a prerequisite; 6. Strengthening EU ocean diplomacy and international rules-based governance.

As the communication itself underlines, the EOP builds on existing legislation and initiatives, introducing a “single reference framework” that promotes coordination, simplifies reporting obligations, and provides a strategy for implementing existing rules and achieving policy goals more coherently across sectors.

The EOP is essentially an action plan to achieve the targets that the EU has already set regarding climate neutrality, the sustainable management of marine living resources, nature restoration, and the good environmental status of marine waters, among other key objectives, as well as boosting the Blue Economy, which ranks high in the priorities.

Three instruments are foreseen to reach the objectives and monitor the process: an Ocean Act, *i.e.*, a binding text (scheduled for 2027) that will amend, notably, the Maritime Spatial Planning Directive (MSPD); a high-level Ocean Board, bringing together representatives from various ocean-related sectors and the EU Ocean Pact dashboard, a platform to track progress towards the EOP’s objectives. The Ocean Board and the dashboard are clearly inspired by a similar move taken regarding the agriculture sector.²³

Compared to the 2023 “Fishers and Ocean Pact”, the EOP that replaces it does nothing but reduce the importance of fishers in the EU policies, which was

²³ EUROPEAN COMMISSION, *A Vision for Agriculture and Food. Shaping together an attractive farming and agri-food sector for future generations*, COM(2025)75.

already minor, since it aims at a “holistic approach and collaboration across Member States, regions, and with relevant stakeholders, including fishers”,²⁴ where blue economy professionals, innovators, scientists, and investors will play the major role.

This perspective confirms that marine space is gradually shifting away from being simply an area to be protected from exploitation and restored when degraded, towards a field of investment opportunities. From environmental objectives, the preservation of the socio-economic fabric of coastal communities, and attention to the seafood shortage, the EU is persistently focusing more on pursuing industrial competitiveness.²⁵

If this analysis is correct, the proposed “pact” could hardly be accepted by the fisheries sector, and the terminology would simply be a deception. This conclusion is supported by the publication on 16 July 2025 of a set of proposals relating to the next MFF 2028-2034, whereby the special Fund to sustain fishers and the fishing industry, created in 1993, is merged in a global “European Fund for Economic, Territorial, Social Cohesion, Agriculture and Rural, Fisheries and Maritime Prosperity and Security”²⁶ which will lead to a significant reduction in EU financial support for the sector.²⁷

8. The disappointment and critical reaction of the fishing industry should not be surprising: after praising fishermen for providing a healthy supply of food to local and national markets, thereby contributing to food security, as well as for their role as the lifeblood of our coastal communities and economies,²⁸ the first

²⁴ Emphasis added.

²⁵ EUROPEAN COMMISSION, *A Competitiveness Compass for the EU*, cit..

²⁶ EUROPEAN COMMISSION, COM(2025)565.

²⁷ Tentatively estimates predict a reduction from 6.1 billion to 2 billion.

²⁸ VON DER LEYEN, *Political guidelines*, loc.ult.cit..

measure consists in reducing the financial support allocated for the programming period ending in 2027.

Why praise fishermen the title of “stewards” of the sea,²⁹ just to make political choices showing that the real interest is mainly in developing and scaling up a competitive and sustainable blue economy, where offshore and ocean energy will play a major role, likely to the detriment of fishing activities?

How can one reasonably imagine a future for fishermen if they are being expelled from their traditional fishing grounds to favour the development of the renewable energy industry?³⁰ How can a generational change be successful if the fishing activity encounters constraints and provisions that have a negative impact on the company's balance sheet?³¹

Fisheries, like all economic sectors, must contribute to the fight against climate change and to the restoration and protection of the marine environment. However, the largely outdated fleet shall undergo substantial renewal to meet the decarbonization targets, ensuring it is cost-efficient, welcoming, comfortable, and safe to work on board. If one truly seeks to achieve these results, an increase in financial support is badly needed, not a decrease.

The Fisheries Fund, together with the credits allocated from the EU budget for authorising fishing in the EEZs of third countries under the Sustainable

²⁹ EUROPEAN COMMISSION, *The common fisheries policy today and tomorrow*, cit., p.20.

³⁰ “The Renewable Energy Directive III has set the target to expand the EU’s offshore wind energy capacity to 60 GW by 2030. This will require the expansion of offshore wind energy installations, with potential consequences for biodiversity and ecosystems. At the same time, the Nature Restoration Regulation sets out objectives to protect 20% of European seas and restore degraded marine ecosystems. Due to the possibility for exemptions from biodiversity-related policies in order to accelerate offshore wind energy development, there is a risk that offshore wind energy is driven forward at the expense of biodiversity protection and ecosystem restoration”, PLATJOUW et al., *Handbook on Policy Coherence. An easy guide to assess and understand policy coherence*, 2025, p.5. How would it be possible to sustain the fishing sector and foster seafood production if fishing grounds are banned to the vessels?

³¹ An often-cited example is the ban on discarding unwanted catches into the sea: “Balancing sustainability goals with maintaining the economic viability of fisheries has been flagged as a widespread issue across all EU fisheries. Compliance with the landing obligation can incur significant costs to fishers”, EUROPEAN COMMISSION, *Study supporting the evaluation of the landing obligation*, 2025.

Partnership Fisheries Agreements, justifies the establishment of an administrative department responsible for managing fishing activities (the Directorate-General for Maritime Affairs and Fisheries, DG MARE). Will the disappearance of the Fisheries Fund entail the suppression of this administrative structure?

In short, the European Pact for the Ocean does not appear to yield any clear benefits for fishers. Conversely, it will likely confirm the preference for the Blue Economy's major operators, given the emphasis on a “competitive Europe”.

The fishing industry would be advised to refer to the Treaty rather than attempting to protect its expectations through a “pact,” as a negotiation would not be fair given the different bargaining power of the parties.³²

³² The Blue Economy is a promising sector for investments. According to the report, *A Sustainable Ocean Economy for 2050: Approximating Its Benefits and Costs*, commissioned by the High-Level Panel for a Sustainable Ocean Economy (Ocean Panel), every \$1 invested in sustainable ocean solutions yields at least \$5 in return.

PROTECTING CHILDREN IN CONFLICT: ACHIEVING SDG 16.2 AMID GLOBAL CRISES – THE CASES OF UKRAINE AND GAZA¹

Elisabete Ferreira*

DOI: <https://doi.org/10.62140/EF668973497>

Abstract: The ongoing conflicts in Ukraine and Gaza have exacerbated the vulnerabilities of children, severely undermining efforts to achieve Sustainable Development Goal (SDG) 16.2, which seeks to end all forms of violence, abuse, exploitation, and trafficking of children. This article provides a comprehensive examination of the risks children face in these war zones, including sexual violence, exploitation, recruitment by armed groups, forced displacement, family separation, starvation, physical injuries, psychological trauma, and death. Drawing upon recent quantitative data, it highlights the scale of these violations and underscores the urgency of robust legal, humanitarian, and policy interventions.

The article further analyses international legal frameworks, including the United Nations Convention on the Rights of the Child (CRC) and the Geneva Conventions, alongside humanitarian strategies such as child-friendly spaces, psychosocial support, and family reunification programs. By integrating child protection into peacebuilding, monitoring, and community-based initiatives, this study argues for a multifaceted and legally grounded approach to safeguarding children in conflict zones and advancing the realization of SDG 16.2.

Introduction

Sustainable Development Goal 16.2 seeks to end abuse, exploitation, trafficking, and all forms of violence against children². The ongoing armed conflicts in Ukraine and Gaza present profound challenges to the realization of this goal.

¹ The present paper consists of the written and polished version of the oral presentation delivered by the author in 29th May 2025, in the University of Cagliari, Italy, at the 29th Annual Meeting of the NANTERRE NETWORK.

* Associate Professor from Universidade Católica Portuguesa, Faculty of Law, Oporto Law School. Researcher from CEID – Católica Research Centre for the Future of Law.

² United Nations. (n.d.). Goal 16: Peace, justice and strong institutions. (<https://www.un.org/sustainabledevelopment/peace-justice/>)

Children in these regions are disproportionately affected due to widespread displacement, the breakdown of governance structures, and the erosion of protective systems. This article examines the types, scale, and impacts of violations against children, reviews relevant legal frameworks, and proposes strategies to achieve SDG 16.2 in these contexts.

1.Understanding the Risks for Children in Conflict Zones

Children in conflict zones face a multitude of threats that endanger their physical, psychological, and social well-being: sexual violence and exploitation (vulnerable children, especially girls and those separated from families, face heightened risks of sexual abuse); recruitment by armed groups (children may be forcibly recruited to serve as combatants or used as human shields); forced displacement (many children are uprooted from their homes, leading to family separation and vulnerability to trafficking); loss or separation from parents (family networks, which often provide protection, are disrupted); starvation and malnutrition (conflict-induced food insecurity disproportionately affects children); physical injuries and death, consequent to exposure to bombardments, crossfire, and accidents resulting in high rates of injury and mortality; psychological trauma – the exposure to violence, displacement, and loss leads to lasting emotional and mental health issues with lifelong impact.

2. Quantitative Assessment of Child Protection Violations in Ukraine and Gaza

The scale of these risks can be measured through several indicators mentioned above. Considering sexual violence and exploitation, a 50% increase in sexual violence against children has been documented in Ukraine, since the onset

of the conflict, particularly affecting displaced girls³. In Gaza, the incidents of sexual exploitation have also increased especially among displaced children⁴.

As to the risk of recruitment by armed groups, according to the New York Post, over 35.000 Ukrainian children have reportedly been taken to Russian-controlled facilities, subjected to re-education and potential militarization Ukraine⁵ Although exact figures are unavailable, in Gaza, children also face risks of recruitment and use as human shields.

In Ukraine over five million individuals have been forcibly displaced, with thousands of children separated from their families⁶. In Gaza, nearly one million people have been displaced internally, with widespread separation of children from caregivers.

Contemplating starvation and physical injuries, according to UNICEF (2024), food supply disruptions have sharply increased child malnutrition, while over 2.600 schools were damaged or destroyed.⁷ This scenario is even more disturbing in Gaza, where approximately 91% of the population faces acute food insecurity, with children being the most affected, many starving to death. “The number of malnourished children in the Gaza Strip is rising at an alarming rate, with 5,119 children between 6 months and 5 years of age admitted for treatment for acute malnutrition in May alone. According to data received from the UNICEF-supported nutrition centres across the Gaza Strip, this represents a nearly 50 per cent increase from the 3,444 children admitted in April 2025 and a 150 per

³ <https://www.savethechildren.net/news/sexual-violence-against-children-conflict-surges-50-5-years-worst-level-ever> (22.10.25).

⁴ <https://www.pbs.org/newshour/world/women-in-gaza-say-they-were-exploited-by-men-promising-food-money-in-exchange-for-sex> (22.10.25).

⁵ <https://nypost.com/2025/09/16/world-news/kidnapped-ukrainian-children-taken-to-more-than-200-russian-facilities-for-re-education-study> (22.10.25).

⁶ https://www.unhcr.org/ua/sites/ua/files/legacy-pdf/ukraine_protection_analysis_update_-_july_2024-compressed.pdf (22.10.25).

⁷ https://www.unicef.org/ukraine/en/media/49211/file/UNICEF_SitAn_Summary_2024_ENG.pdf (22.10.25)

cent increase from February when a ceasefire was in effect and aid was entering the Gaza Strip in significant quantities. Of the 5,119 children admitted in May, 636 children have severe acute malnutrition (SAM), the most lethal form of malnutrition.”⁸

Last, but not the least, as to psychological trauma and death, we may state that in Ukraine, children experience severe psychological distress and casualties among children are significant.⁹ In Gaza, over 13,000 children were killed and many more suffer severe trauma.¹⁰

3. Legal and Policy Frameworks for Protection

International law provides a normative framework for child protection, the first of which is the United Nations Convention on the Rights of the Child (CRC). This document states in its article 19 that “1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” In other words, it affirms the right of children to be protected from all forms of abuse and exploitation.

Worthy of mention are also the Optional Protocols on Children in Armed Conflict – Optional Protocol on the Involvement of Children in Armed Conflict (2000) prohibits recruitment and use of children in hostilities¹¹–, and the Geneva

⁸ <https://www.unicef.org/press-releases/more-5000-children-diagnosed-malnutrition-gaza-strip-may> (22.10.25)

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https://www.unicef.org/ukraine/en/media/49211/file/UNICEF_SitAn_Summary_2024_ENG.pdf (22.10.25)

¹⁰ AP News. (2025). Over 13,000 children killed in Gaza. <https://apnews.com/article/a271b1724a7fef890ff912ce66e4668b> (22.10.25)

¹¹ Article 1 of the Protocol: “States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.”. Also article 2 prohibits compulsory recruitment of anyone under 18 into national armed forces and

Conventions and International Humanitarian Law. These last documents mandate the protection of civilians, including children, during armed conflicts.

In fact, The Geneva Conventions of 1949 and their Additional Protocols of 1977 together form the main legal framework that protects civilians (including children) in wartime. Geneva Convention IV (Relative to the Protection of Civilian Persons in Time of War, 1949), in article 3 (common to all four Geneva Conventions), prohibits violence to life and person, taking of hostages, humiliating treatment, and unfair trials of people not taking active part in hostilities; article 16 mandates that the wounded, sick, infirm, and expectant mothers be the object of particular protection and respect; article 24 provides that children under 15 who are orphaned or separated from their families must be cared for and protected; article 50 states that the Occupying Power must facilitate the proper working of institutions for the care and education of children, and finally article 132 requires that interned children be released first when hostilities cease.

The Additional Protocol I (1977) (International Armed Conflicts)'s article 48 establishes the principle of distinction – parties must always distinguish between civilians and combatants; article 51 provides general protection of the civilian population, prohibiting attacks on civilians and indiscriminate attacks, and article 77 provides special protection for children, stating that:

“Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require.” The Additional Protocol II (1977) (Non-International Armed Conflicts) provides specific protection to children, including: “Children shall be provided with the care and aid they require,” and prohibits their recruitment or participation in hostilities if under 15, in article 4(3).

article 4 prohibits non-state armed groups from recruiting or using children under 18 “under any circumstances.”

Unfortunately, we are compelled to recognize that this legal framework faces remarkable challenges in enforcement due to the ongoing hostilities, weak governance, and limited access for monitoring bodies.

At this point, we are drawn to the one-million-dollar question on this subject: what means are within the reach of the international community to promote the safeguard of these children? The answer could emerge from different areas, as we will now demonstrate.

4. Challenges to Achieving SDG 16.2 in Ukraine and Gaza

In theory, to achieve child protection in conflict zones, there are several key strategies to be implemented, including: child-friendly spaces (safe areas providing psychosocial support, education, and recreational activities); medical and nutritional assistance, consisting of treatment for injuries, mental health support, and food aid to counter malnutrition; family reunification programs; and community-based protection, which enhances the role of the local communities in monitoring, reporting, and safeguarding children. All these measures depend on the good-will of the parties in conflict, notably, Israel and Russia. It is common knowledge that humanitarian aid is denied, particularly in the Gaza strip. In Gaza, humanitarian access is frequently restricted, directly impeding delivery of protection services and thereby undermining the realization of SDG 16.2.

Furthermore, real-time monitoring systems remain inadequate. Effective implementation would require well-trained educators, healthcare workers, and social service providers capable of identifying and responding to child rights violations promptly.

Finally, integrating child protection into peacebuilding is essential. Sustainable protection must ensure that children's rights are embedded in peace negotiations, reconstruction efforts, and education reforms, restoring the education systems, rebuilding schools and curricula which were disrupted by the conflict, to provide stability, skill development and long-term resilience for war-

affected children. It is mandatory to promote these children's psychosocial rehabilitation.

Conclusion and Recommendations

The conflicts in Ukraine and Gaza demonstrate the complexity and scale of violations against children. Achieving SDG 16.2 is extremely difficult without the cooperation of the parties involved, due to the lack of enforcement of international law. It is compelling for the future to obtain a robust enforcement of international law to hold perpetrators accountable. This accountability will work as a means of prevention of future conflicts. It is also necessary to work on the expansion of humanitarian and protection measures to address immediate and long-term needs, the Integration of child protection in peacebuilding and reconstruction initiatives, and, last but not least, increase international cooperation and community engagement to safeguard children comprehensively.

Only through a multi-layered, data-informed, and legally grounded approach can the international community effectively protect children in conflict zones and progress toward SDG 16.2. Ultimately, the protection of children in conflict zones is not merely a humanitarian imperative but a legal obligation under international law and the true test of global commitment to sustainable peace.

References

AP News. (2025, February 15). *Over 13,000 children killed in Gaza as conflict intensifies*. Associated Press. <https://apnews.com/article/a271b1724a7fef890ff912ce66e4668b>

International Rescue Committee (IRC). (2025, April 20). *How war is affecting children in Gaza*. <https://www.rescue.org/article/how-war-affecting-children-gaza>

New York Post. (2025, September 16). *Kidnapped Ukrainian children taken to more than 200 Russian facilities for “re-education”*. <https://nypost.com/2025/09/16/world->

[news/kidnapped-ukrainian-children-taken-to-more-than-200-russian-facilities-for-re-education-study](#)

PBS News. (2025, March 3). *Women in Gaza say they were exploited by men promising food and money in exchange for sex*. <https://www.pbs.org/newshour/world/women-in-gaza-say-they-were-exploited-by-men-promising-food-money-in-exchange-for-sex>

ReliefWeb. (2025, January 27). *Almost one million people displaced within Gaza: IRC finds women and children at risk of violence, exploitation and abuse*. <https://reliefweb.int/report/occupied-palestinian-territory/almost-one-million-people-displaced-within-gaza-last-three-weeks-irc-finds-women-and-children-risk-violence-exploitation-and-abuse>

Save the Children. (2025, February 8). *Sexual violence against children in conflict surges 50% in five years—worst level ever recorded*. <https://www.savethechildren.net/news/sexual-violence-against-children-conflict-surges-50-5-years-worst-level-ever>

UNHCR. (2024, July). *Ukraine: Protection analysis update*. United Nations High Commissioner for Refugees. https://www.unhcr.org/ua/sites/ua/files/legacy-pdf/ukraine_protection_analysis_update_-_july_2024-compressed.pdf

UNICEF. (2024, November). *Ukraine situation analysis summary report 2024*. United Nations Children's Fund. https://www.unicef.org/ukraine/en/media/49211/file/UNICEF_SitAn_Summary_2024_ENG.pdf.pdf

UNICEF. (2025, May 30). *Deadly risks for over 450,000 children in Gaza City as attacks increase*. United Nations Children's Fund. <https://www.unicef.org/mena/press-releases/deadly-risks-450000-children-gaza-city-attacks-increase>

U.S. Department of Labor. (2025). *2024 Findings on the worst forms of child labor: West Bank and Gaza Strip*. Bureau of International Labor Affairs. <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/west-bank-and-gaza-strip>

United Nations. (n.d.). *Goal 16: Peace, justice and strong institutions*. Sustainable Development Goals Knowledge Platform. <https://www.un.org/sustainabledevelopment/peace-justice/>

DECIDING IN ADVANCE IN THE EVENT OF DIMINISHED CAPACITY: NOTES ON THE M.T.S. ET M.J.S.C. PORTUGAL CASE

Marta Monterroso Rosas^{1/2}

DOI: <https://doi.org//10.62140/MMR514410337>

Summary: 1. Introduction; 2. Main principles: recalling the essential; 3. The *M.T.S. et M.J.S. c. PORTUGAL* case (39848/19); 3.1. The case; 3.2. Right to respect for private life; 4. The current Portuguese regime in brief words: getting to choose (with safeguards); 5. Concerns related to advance decisions: very brief reflections; 6. Conclusion

Abstract: This paper focuses on the need to respect the wishes and desires of those who find themselves in a situation of diminished capacity, in accordance with the international and European fundamental principles that currently apply to this matter. Following an ECHR judgment that condemned the Portuguese State for violating the right to respect for private life, this work reflects on aspects such as the possibility of choosing in advance who will provide support in the future in a vulnerability scenario. More precisely, the referred judgment recalls and highlights the importance of the procedural guarantees that must exist in the context of judicial proceedings aimed at ordering measures of support concerning vulnerable adults, addressing two specific topics: i) the need for the court to directly hear the adult concerned, enabling a perception of the person's situation and trying to perceive their real preferences; ii) the consideration of anticipated manifestations of the person's will, as a privileged way of honoring the

¹ Assistant Professor at Universidade Católica Portuguesa, Faculty of Law, Portugal; researcher at Católica Research Centre for the Future of Law, Portugal; Doctor in Law by Universidade Católica Portuguesa (mrosas@ucp.pt). ORCID: <https://orcid.org/0000-0002-1791-1199>.

² This paper is based on the oral presentation delivered during the Nanterre Network Meeting of 2025 which took place from 28th to 30th May at the University Cagliari, Sardegna, Italie. The Meeting addressed as a main topic the "Challenges to achieving the sustainable development goals (SGD) in times of global conflicts and climate related emergencies".

primacy of autonomy when the court must appoint a person to fulfil said task. After a brief excursus on the current Portuguese Civil Code regime on this matter and the answers it provides for these issues (such as the imperious direct hearing of the beneficiary and a special mandate foreseeing a future need for support), the text ends with some reflections on the convenience of combining these legal guarantees with safeguards and means of control that enable the prevention of abuse or harmful influences.

Keywords: capacity; ageing; vulnerability; private life; autonomy; safeguards.

1. Introduction

In times of global conflicts and sociopolitical instability, the most vulnerable often find their rights endangered³. On the other hand, conflicts raise natural concerns about mental and physical health, with usual implications in the future. At these times one must keep on the horizon the importance of continuing on a path of empowerment for people with disabilities or some kind of diminished capacity (due, for example, to elderly age); a path which is still transforming legal systems with significant law reforms in various European legislations. In recent times, legislators' attention towards means of support for people in vulnerable situations has grown steadily, in part because of the impulse given by the fundamental principles recognised in the Convention on the Rights of Persons with Disabilities (CRPD) and in other supranational legal instruments. It is worth reflecting on the support legal mechanisms that already exist in the law and on what can still be done, namely, to fulfil all the CRPD's guidelines.

This paper, however, focus on a very specific aspect of the said path, which has to do with the growing awareness of the need to ensure that people will

³ As said in the European Parliament briefing “Understanding EU policies for people with disabilities” (Marie LECERF, European Parliamentary Research Service, 2024, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698811/EPRS_BRI\(2021\)698811_E_N.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698811/EPRS_BRI(2021)698811_E_N.pdf)), “[d]uring armed conflicts, the needs and vulnerabilities of people with disabilities are amplified, as is the risk of discrimination towards them”.

have their will and preferences respected at the most possible level in the event of diminished capacity. Zooming in and more precisely – starting by briefly analysing a decision of the European Court of Human Rights and focusing on the profound legislative change that has recently occurred in the Portuguese legal system – this work addresses the possibility of choosing in advance who will provide support in the future in a vulnerability scenario and the guarantees that must exist in the context of judicial proceedings aimed at ordering such support.

2. Main principles: recalling the essential

As mentioned, it is the current understanding of the rights of people who (from birth or over time) find themselves in a situation of vulnerability that requires the existence of guarantees and mechanisms to ensure that their wishes (possibly expressed in advance) are respected. On this point, we would like to refer to other works in which we have addressed the principles applicable in this area and already highlighted that “[i]f the person anticipated the need for support in the past, establishing guidelines for the future and choosing the person entrusted to provide support, the first solution to be attended is the one based on said directives”⁴. In brief words, at present, one must keep in mind – *inter alia* – the following guidelines: i) the need to respect to a maximum level possible the will of the person concerned, that including the beneficiary of a judicial support measure; ii) in order to fulfill the first objective, those in need of support must be considered and listened during the process leading to any decision related to their lives; iii) the aim of a support

⁴ Marta MONTERROSO ROSAS, “A dialogue between the portuguese and the spanish recent civil law reforms concerning the support of vulnerable adults”, Book of 26rd Annual Meeting of NANTERRE NETWORK Law and Culture, O. SEUL, S. DIJOUX, F. S. VEIGA (Coord.), Instituto Iberoamericano de Estudos Jurídicos e Universidade Lusófona, Porto, 2023, pp. 45-60, p. 55. See, also, our previous paper “Fighting the stigma: the new Portuguese Mental Health Law”, related to the Nanterre Network Meeting in Salzburg, 2024.

measure is to help those who need it to exercise their rights and protect their interests, but favoring a maximum potential of the person's capacity.

3. The *M.T.S. et M.J.S. c. PORTUGAL* case (39848/19)

3.1. The case

Recently, in the *M.T.S. et M.J.S. c. PORTUGAL* case (39848/19)⁵, the European Court of Human Rights (ECHR) condemned the Portuguese State for violating the right to respect for private and family life. The case concerned national court decisions regarding an elderly person in a context of diminishing capacity. More precisely, the terms of the case are as follows⁶.

In 2012, a woman (A), widow and mother of four, granted her youngest daughter (B) powers of attorney to manage her bank accounts and represent her before any public or private entity, by notarial deed drawn up at a hospital in Lisbon and in the presence of two doctors. On the same day and by another notarial deed, the women also declared that she was able to live alone independently and that, if she were to lose autonomy or decision-making capacity in the future, she did not want one of her children to move in with her and wanted B to decide on any possible medical treatment and to take care of the management of her personal affairs and bank accounts. Later, in 2015, the youngest daughter, B, initiated a legal action of “*interdição*” (the former “protective” measure for incapable adults in the

⁵ European Court of Human Rights, 10/12/2024, ECLI:CE:ECHR:2024:1210JUD003984819. Available at [https://hudoc.echr.coe.int/#{%22itemid%22:\[%22001-238323%22\]}](https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-238323%22]}). For a summary in Portuguese language, see the communication of the Agent of the Portuguese State before the ECHR, available at https://portal.oa.pt/media/148244/o2025216_oa_q39848-19_mts_e_mjs_cportugal_comunicacaodecisaotedh.pdf.

⁶ The facts are described in this article in accordance with the content of the ECHR decision under analysis, in a very shortened version.

Portuguese legal system, which was in force at the time⁷) before a court in Lisbon. B asked the court to appoint her as her mother's guardian and stated, among other things, that, at the time, her mother was 93 years old and had been experiencing memory loss. In 2017, the court decreed the “*interdição*” and, among other aspects, appointed the eldest of the siblings as legal guardian, in accordance with article 143, 1, d) of the Civil Code (in force at the time)⁸. The daughter (B) appealed this decision, contesting, in short, the appointment of her brother as guardian and arguing that the court had failed to consider the wishes expressed by her mother in this regard in the two mentioned notarised deeds. She also criticised the authorities for not having personally heard her mother during the proceedings⁹. The appeal did not proceed¹⁰ and B tried to appeal to the Portuguese Supreme Court, with no

⁷ “*Interdição*” and “*inabilitação*” were the measures provided for in the Portuguese Civil Code prior to the reform of the code by Law 49/2018 (which, on the one hand, abolished the old measures and, on the other, replaced them with the accompanied adult regime). The amendment to the Portuguese Civil Code was not very different from those that have taken place in other legal systems regarding adults' legal capacity: the aim was to bring national legislation more into line with today's prevailing social convictions regarding vulnerability and with international and European laws and treaties binding on the Portuguese State. “*Interdição*” was a “rigid” measure that did not take on proper account the particular nuances of the case, in addition to leading to a general incapacity of the adult concerned. In fact, “[t]he person declared *interditada*” was legally treated as a minor and could not celebrate contracts or any legal transactions on their own (personally and spontaneously) without a legal representative replacing them in that task. The measures decreed by the court were mostly “all or nothing” measures” (Marta MONTERROSO ROSAS, “Planning the Future of a Disabled Person: Civil Law Solutions?”, *Teisé*, 114, pp. 132–143, DOI:10.15388/Teise.2020.114.9, p. 135. For a detailed explanation of the foundations of the reform, see António MENEZES CORDEIRO, “Da situação jurídica do maior acompanhado. Estudo de política legislativa relativo a um novo regime das denominadas incapacidades dos maiores”, *Revista de Direito Civil*, III, 3, 2018, pp. 473–554.

⁸ According to this rule (which has since been revoked) guardianship was to be granted to the adult children of the individual in question, with preference given to the eldest (unless the court, after hearing the family council, considered that one of the others offered greater guarantees of good performance of the role, what the court found not to arise from the proceedings in this specific case). B was appointed as protutora, as better explained in the decision under examination.

⁹ For further details regarding the arguments presented in the judgment and in the appeal, see the ECHR judgment identified in the footnote 5. As it is not possible to include all the arguments and details of the case in this paper, only an informative summary is presented.

¹⁰ The court found that the applicant (B) had not demonstrated that her brother was unable to assume the role of guardian, and that the application of Art. 143, 1, d) of the CC could not therefore be ruled out. It acknowledged that the wishes of the person subject to the proceeding had to be taken into account but considered that the statement made by the person concerned on January 2012 did not expressly indicate that she wished her youngest daughter (B) to be appointed guardian.

success¹¹. Shortly afterwards, the “*acompanhamento de maiores*” (“accompanied adult”) new regime came into force (Law no. 49/2018 of 14 August 2018), altering the Portuguese Civil Code, as will be further developed below¹².

B appealed to the ECHR on her behalf and on behalf of her mother A, raising issues under Articles 6(1) and 8 of the Convention and claiming that the proceedings leading to the appointment of A’s guardian had not been fair and had violated her right to respect for private and family life. Under Article 14 of the Convention, she considered that the said appointment constituted discriminatory treatment on the grounds of age¹³. Among other arguments and in short terms, B complained that the national courts did not hear her mother in person during the proceedings and that they also failed to take into account the choice she made, by notarial deed, regarding her future guardian. She criticized the domestic courts for not having considered the wishes expressed in that declaration, arguing that the document had not been contested by any of the parties involved in the proceedings¹⁴.

The ECHR considered that the allegations made by B on behalf of A should be examined only from the point of view of Art. 8 of the Convention, in its

¹¹ The ECHR decision refers two appeals to the Supreme Court of Justice, which, however, were not admitted (for further developments, see the decision under analysis).

¹² Following the entry into force of the new law, B filed a new request to be appointed as her mother’s “*acompanhante*”, which was again dismissed (see pag. 7 of the ECHR decision). There were also other actions taken by B before the Portuguese Court, which are described in more detail in the ECHR judgment under consideration. According to said decision, the Portuguese Court later delivered a ruling in order to formally adjust the measure regarding A to Law No. 49/18 of 14 August 2018, stating that the eldest sibling was to be considered her “*acompanhante*” with general powers of representation and, taking into account an agreement reached by the family council, B should continue to be responsible for A’s health and well-being and for managing her current account, while B’s sibling should continue to manage the other accounts.

¹³ See the Introduction of the judgment under analysis, pag. 1.

¹⁴ See the legal framing of the ruling (“*En droit*”). The Portuguese Government, for its part and among other things, argued that the granting of custody to the eldest son was in accordance with domestic law at the time and that the national courts had taken into account the different points of view and the different evidence presented to them and that B had also failed to demonstrate that the exercise of her role as guardian was more advantageous to her mother.

substantive and procedural aspects. The Court started by recalling that deprivation of legal capacity may constitute an interference with the private life of the person concerned and that such interference violates Art. 8 if it is not prescribed by law, does not pursue any of the legitimate purposes referred in paragraph 2 of the same article, or is not necessary in a democratic society (proportionate to the objectives pursued). The Court also recalled that limiting a person's capacity is a very serious measure, although a margin for discretion should be left to the national authorities. Plus, the decision-making process relating to measures able to limit legal capacity must be fair and adequately respect the interests under protection¹⁵.

The measures applied (at a first moment a measure of *interdição* and later *acompanhamento*) were not under discussion in this case; therefore, the Court focused its examination on the decision-making process that led to the decreed of such measures, including the appointment of the guardian. It should be noted, however, that the Court emphasised that said measures were aimed at legitimate objectives, namely the protection of the person concerned regarding the deterioration of her mental health.

The Court first noted that, in the context of the proceedings that led to the adoption of the measure, the person concerned (A) could not receive service of process (because it was considered that she was not capable of understanding that act) and that, in accordance with the version of the law in force at the time, a provisional curator was appointed: however, he did not present a defence and does not appear to have intervened in the proceedings. The Court thus noted that A did not intervene personally in the process, nor was she heard during it (there was no

¹⁵ See pp. 28 and 29 of the ECHR judgment. The Court highlighted the increasing importance given by international legal instruments to granting maximum legal autonomy to persons with mental disorders. It referred to the United Nations CRPD and Recommendation No. R (99)4 of the Committee of Ministers of the Council of Europe. These instruments recommend the establishment of adequate procedural safeguards.

direct contact between the national court and her). In fact, at the time, the previous wording of Art. 896 of the Code of Civil Procedure¹⁶ (*Código de Processo Civil*) was in force, requiring the audition of the person concerned, as a rule, only when a defence (*contestação*) was presented: which did not occur in the case¹⁷. In conclusion, the ECHR stated that “[e]ven assuming that the second applicant [A] was no longer capable of expressing her point of view regarding the measure of *interdição* and the person she desired to be appointed as her guardian, *the Court recalls that it is up to the court to form its own opinion as regarding the mental capacity of the person concerned, after direct contact with the person in question*”¹⁸. In other words, A should have been directly heard by the national court so that it was possible to make a judgment on her capacity and her preferences regarding the person of the guardian.

In addition to the above, the judgment under analysis also stressed that “(...) the Court considers that the domestic courts should have examined in greater detail the declaration made by the second applicant [A] in a notarised deed (...)”¹⁹. From the point of view of the Court, since in that declaration A indicated that she wished her youngest daughter to take care of her and administer her property, that in substance corresponded to choosing her as guardian. On the other hand, it was understood that “the lack of in-depth analysis of the content of the document in

¹⁶ The previous wording stated that “[i]n cases of interdiction (*interdição*) or inabilitation (*inabilitação*) not based on mere prodigality, once the pleadings have been filed, an expert examination of the defendant shall be conducted and, if there has been a defence, the defendant shall be questioned” (emphasis added).

¹⁷ The Court also noted that current Article 897 of the Code of Civil Procedure now provides “in all cases” for the person concerned to be heard by the judge. Therefore, “the gap in the former procedural framework thus appears to have been resolved” (own translation). This new regime will be better explained below.

¹⁸ Emphasis added. The original wording of the judgment goes as follows: “En admettant même que la deuxième requérante n’était plus en capacité d’exprimer son point de vue concernant la mesure d’interdiction et la personne qu’elle souhaitait voir désigner comme tuteur, la Cour rappelle que c’est au tribunal de former sa propre opinion quant aux capacités mentales de la personne concernée, après un contact direct avec l’intéressée”.

¹⁹ “(...) la Cour estime que les juridictions internes auraient dû se pencher de façon plus approfondie sur la déclaration que la deuxième requérante avait formulée par acte notarié le 30 janvier 2012”. In its reasoning, the ECHR relied on Art. 12 § 4 of the CRPD and on Principle 9 of the Recommendation No. R(99)4 of the Committee of Ministers of the Council of Europe.

question is even the more surprising (...)”²⁰ considering that a reform on the legal capacity regime was about to take place (the already mentioned reform that enshrined the accompanied adult regime and modified the Portuguese Civil Code in this matter), including the possibility for the beneficiary to choose his/her own *acompanhante*. The Court opinion was that it would have been appropriate to hear at least the notary who drew up the deed in question and the doctors who were present at the time, in order to determine the circumstances surrounding said declaration.

Considering the reasons briefly outlined above, the Court concluded that the decision-making process that resulted in the decree of the measures applied to A and the appointment of the guardian *did not meet the requirements of the Convention* and was not accompanied by “sufficient safeguards” in order to guarantee a protection of the beneficiary’s interests; for its turn, the subsequent procedure intended to adjust the measure to the new regime did not remedy the referred deficiencies. It was found, hence, to have been a violation of Art. 8 of the Convention (concerning A)²¹.

3.2. Right to respect for private life

As has just been mentioned, the Court framed the relevant facts of the case within the scope of Art. 8 of the Convention, concluding that there had been a violation of the right to respect for private life because the necessary guarantees to safeguard the interests of the person concerned by the measure leading to a

²⁰ “L’absence d’analyse approfondie du contenu du document en question est d’autant plus surprenante...”.

²¹ The complaints presented by B in her own behalf have been declared inadmissible by the Court.

limitation of legal capacity and also to prevent abuse had not been adequately ensured.

The said Art. 8 (“Right to respect for private and family life”) stands that:
“1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

The Court understands “private life” as a “broad term”²²: it is related with autonomy and one’s personality, yet it has been noted that it is “(...) not susceptible to precise or exhaustive definition”²³. According to the Court, the notion of “private life” includes a person’s right to develop relationships with third parties²⁴.

As explained in the “Guide on Article 8 of the European Convention on Human Rights”²⁵, “[i]n cases where legal incapacity is imposed on mentally ill individuals, the Court has articulated *procedural requirements* necessary to protect Article 8 rights”. For instance, “...in A.A.K. v. Türkiye (2023) the Court found no violation of Article 8. Emphasising the need for the domestic authorities to strike a *balance* between respect for the dignity and self-determination of the individual

²² William A. SCHABAS, *The European Convention on Human Rights – A Commentary*, Oxford University Press, 2015, p. 369. See, also, Teresa COELHO MOREIRA, “Direito ao respeito pela vida privada no âmbito das relações laborais I”, *Comentário da Convenção Europeia dos Direitos Humanos e dos Protocolos Adicionais*, Vol. II, Paulo PINTO DE ALBUQUERQUE (org.), Universidade Católica Portuguesa, pp. 1473-1492, p. p. 1475.

²³ *Ibidem*.

²⁴ Teresa COELHO MOREIRA, “Direito ao respeito...”, *cit.*, p. 1477.

²⁵ “Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life”, European Court of Human Rights, 2025, p. 45, available at <https://ks.echr.coe.int/web/echr-ks/article-8>.

and the need to protect and safeguard the interests of vulnerable individuals, on the facts it considered that a fair balance had been struck”. In that case, according to the Court, there were *effective safeguards* in the domestic procedure and “(...) the applicant was *involved at all stages of the proceedings*, was *heard in person* and was able to present her arguments”²⁶. Since, in the *M.T.S. et M.J.S. c. PORTUGAL* case, the Court found issues related to the involvement of the beneficiary during the process, including the fact that she was not heard in person, the conclusion was that, in light of this understanding of Art. 8, the right to respect for private life had been jeopardized.

4. The current Portuguese regime in brief words: getting to choose (with safeguards)

It follows from the analysis of the judgment under consideration that the sentencing of the Portuguese State for violation of Art. 8 of the Convention arose, in this specific case, essentially from some procedural deficiencies which have undermined the safeguards required in a process that potentially leads to limitation of legal capacity. It is, therefore, a judgment important and useful to highlight some of the current requirements that such a procedure must comply with: the international and European instruments on this matter (like the CRPD) have established clear guidelines and guarantees that must be respected by the States. On the other hand, this ECHR’s judgment demonstrates that even judicial measures to support vulnerable adults should be seen as an opportunity to implement the so-called “new paradigm”: judicial support measures are sometimes

²⁶ Emphasis (italics) added.

necessary, but the path leading to their implementation must respect a certain number of guarantees and safeguards.

More specifically, in the case in question, the Court based its finding on a violation of Art. 8 on two major aspects:

i) on the one hand, *the non-bearing of the beneficiary* of the measure by the national court; the person concerned did not participate in person in the proceedings, nor did the court make direct contact with her to form its opinion.

ii) on the other hand, insufficient consideration of an act (resulting from private autonomy) where, prior to the “interdiction” proceedings, the person who later lost her autonomy *expressed her preferences for the future* with regard to the person entitled to manage her assets and provide personal care.

Meanwhile, as it already results from the summary of the terms of the case made above, a major reform took place in the Portuguese Civil Code: eliminating the former “incapacities” of vulnerable adults, the entry into force of Law no. 49/2018, 14th august, gave place to the current “accompanied adult regime”, based on the principles of minimum intervention and subsidiarity²⁷. Some very relevant progresses have been made towards the implementation of the CRPD guidelines (it is worth notice, however, that the ECHR judgment states that the “subsequent procedure conducted for the purpose of formally adjusting to the new system” of the accompanied adult did not remedy the deficiencies identified)²⁸.

²⁷ For additional details on the principle of subsidiarity (which, in fact, was not directly at issue in the judgment analyzed above), see António Agostinho GUEDES, Marta MONTERROSO ROSAS, Comment on Art. 140 of the Civil Code (“Objetivo e supletividade”), in Comentário ao Código Civil – Parte Geral, 2.^a Ed., J. BRANDÃO PROENÇA, A. AFONSO, A. TRIUNFANTE, E. VAZ DE SEQUEIRA, F. OLIVEIRA E SÁ (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 348-351.

²⁸ See p. 32 of the judgment.

Hence, how are the two aspects mentioned above – namely the personal hearing of the beneficiary and the consideration of their wishes, even if previously expressed – currently regulated under Portuguese law?

The current Art. 139, 1, of the Portuguese Civil Code states that “the accompaniment measure is decided by the court, *after hearing the beneficiary in person* and considering the evidence”²⁹. Article 897.º, 2, of the Portuguese Code of Civil Procedure adds that the judge must always hear the beneficiary in person and directly and, if necessary, the judge must even go to the place where the beneficiary is located to fulfil this imposition³⁰. The purposes of the beneficiary's hearing are to enable the judge to understand the beneficiary's specific situation, to assess the most appropriate measures fitting the case and – precisely – to allow the judge to understand the beneficiary's wishes regarding the person who should perform the role of “*acompanhante*”, when this preference still can be expressed (A. GUEDES / M. ROSAS³¹). As explained by M. I. COSTA³², “[o]ne of the main novelties of the new regime for accompanied adults concerns precisely the hearing of the

²⁹ Emphasis added. “O acompanhamento é decidido pelo tribunal, após audição pessoal e direta do beneficiário, e ponderadas as provas”.

³⁰ “The beneficiary of the measure must always be personally heard by the court: a personal and direct hearing of the adult concerned is necessary (if needed, the judge must even move to the place where the beneficiary is)” (“Planning the Future...”, cit., p. 136).

³¹ António Agostinho GUEDES, Marta MONTERROSO ROSAS, Comment on Art. 139 of the Civil Code (“Decisão judicial”), in *Comentário ao Código Civil – Parte Geral*, 2.ª Ed., J. BRANDÃO PROENÇA, A. AFONSO, A. TRIUNFANTE, E. VAZ DE SEQUEIRA, F. OLIVEIRA E SÁ (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 345-348, p. 347.

³² Maria Inês COSTA, “A audição do beneficiário no regime jurídico do maior acompanhado: notas e perspectivas”, *Julgare Online*, July 2020, p. 4, available at [20200716-JULGAR-A-audição-do-beneficiário-no-regime-jurídico-do-maior-acompanhado-notas-e-perspectivas-Maria-Inês-Costa.pdf](#); translation, of our responsibility.

beneficiary [...] which provides for the reintroduction of the personal and direct hearing of the beneficiary [...] with a long tradition in our legal system”³³ ³⁴.

Concerning the need to respect the wishes and preferences of the beneficiary of the judicial measure, including in relation with the person who must be appointed as “guardian”³⁵, it can be said that these concerns are noticeable in various aspects of the current regime. In fact, the current wording of art. 143 of the Portuguese Civil Code states that the person entitled to perform the role of “*acompanhante*” is chosen by the beneficiary himself/herself³⁶. In the absence of choice³⁷, the accompanying function shall be deferred to the person whose appointment best safeguards the beneficiary's imperious interest, and the law provides a non-exhaustive list of possible individuals³⁸. Among them, the mentioned rule directly refers to the agent (“*mandatário*”) to whom the beneficiary has granted powers of representation (art. 143, 2, h))³⁹. At present, therefore, the primacy of the beneficiary's personal choice is directly enshrined, in line with international guidelines and reinforcing the centrality of the person in need of support. It will be up to the beneficiary of the measure to choose, in the first place, who they want to act as their support person in order to help exercise the rights to

³³ “The provision introduced by the 2013 Code of Civil Procedure, which allowed for the declaration of interdiction/inabilitation [«interdição»/«inabilitação»] without the interrogation of the person concerned, in the absence of a defence [«contestação»], has been removed and, now, the hearing of the beneficiary by the judge is provided for as a mandatory means of proof in any proceedings concerning adults (...)” – *ibidem*.

³⁴ For further developments on the personal and direct hearing of the beneficiary in the perspective of procedural law, see Miguel TEIXEIRA DE SOUSA, “O regime do acompanhamento de maiores: alguns aspetos processuais”, Colóquio O Novo Regime do Maior Acompanhado, António PINTO MONTEIRO (coord.), Instituto Jurídico Faculdade de Direito da Universidade de Coimbra, 2019, pp. 57-86, p. 63.

³⁵ As already highlighted, the correct designation for the support giver appointed by the court, at the light of the current Portuguese accompanied adult regime, is “*acompanhante*” (accompanying person) and not “guardian”. The term is used in the text for simplification purposes.

³⁶ It is true, however, that it is up to the court to make the final appointment (see below).

³⁷ See, also, Mafalda MIRANDA BARBOSA, *Maiores Acompanhados – a disciplina da lei n.º 49/2018*, de 14 de agosto, 2.ª ed., Gestlegal, 2021, p. 52.

³⁸ This includes, for example, spouses, unmarried partners, parents, persons designated by parents in a will or authentic or certified document, adult children, etc.

³⁹ About the special mandate presently enshrined in art. 156 of the Portuguese Civil Code, see *infra*.

which is required such assistance. On the other hand, the express reference to the agent to whom the beneficiary has entrusted powers of representation shows the importance of this advance indication when the time comes to choose the support giver. It is also worth noting that two or more individuals may be indicated (with different roles and responsibilities or “each acting in a different domain”⁴⁰) since the accompanying measure itself now allows for the designation of multiple “*acompanhantes*”⁴¹.

The “Manual of Good Practices” of the Portuguese Public Prosecutor's Office regarding accompanied adults⁴² highlights that the new intervention model states that the adult beneficiary is no longer a mere subject of the decision, but rather a participant, as active as possible, in accordance with the provisions of art. 12 of the CRPD; accordingly, preference should be given to the wishes of the adult and their dignity should be safeguarded⁴³. An important way to ensure that the wishes and preferences of the person benefiting from any support measure in the exercise of their capacity are respected is to provide them with mechanisms that *allow to choose in advance who will provide support in the future*⁴⁴. Whenever the person experiences a reduction in their capacity - and when the time comes to choose the support provider - the court may resort to the choice previously made; this choice

⁴⁰ Elsa VAZ DE SEQUEIRA, Teoria Geral do Direito Civil, 3.^a Ed., Lisboa, Universidade Católica Editora, 2024, p. 416.

⁴¹ Art. 143, 3.

⁴² Available at https://www.ministeriopublico.pt/sites/default/files/2024-12/manual_de_boas_praticas_rjma_03_05_2023_final.pdf.

⁴³ See p. 6 of the said Manual of Good Practices. About the personal hearing of the beneficiary, see also p. 11.

⁴⁴ According to the report of the European Association of Service providers for Persons with Disabilities “Legal Capacity and Supported Decision Making” (F. SCARANO, I. BERTANA, K. LEVENTI), 2023 “[s]upport must always give priority to a person’s will and preferences, respect human rights, and with intensity tailored to individual needs. Support can include: - an individual choosing one or more trusted person; [...] support with advance planning stating the will and preferences of an individual, which can be used at times when they may not be in a position to communicate their wishes to others; (...)” (available at https://easpd.eu/fileadmin/user_upload/Publications/Legal_Capacity_and_Supported_Decision-Making.pdf)

indicates someone trusted by the beneficiary and who, according to a prior judgment, best guarantees the management of the person's interests in accordance with their preferences. Since the reform, Portugal has expressly enshrined a “special” mandate directly designed for situations of diminished capacity⁴⁵. This instrument may indicate, among other issues, who is intended to perform the role of “*acompanhante*” in the future should this become necessary⁴⁶, which directly impacts the court's decision (art. 143, 2, h)). Actually, the will of the beneficiary does not have to be expressed necessarily during the judicial process: it must be considered when expressed in a living will, in a health care procuration⁴⁷, in a mandate with powers of representation in accordance with paragraph h) of number 2 of article 146, or in any other form, with the court being in last instance responsible for assessing whether that choice safeguards the interests that must be protected (A. GUEDES / M. ROSAS⁴⁸)⁴⁹.

5. Concerns related to advance decisions: very brief reflections

⁴⁵ About this mandate, see António Agostinho GUEDES, Marta MONTERROSO ROSAS, comment on Art. 156 of the Civil Code (“Mandato com vista a acompanhamento”), *Comentário ao Código Civil – Parte Geral*, 2.^a Ed., J. BRANDÃO PROENÇA, A. AFONSO, A. TRIUNFANTE, E. VAZ DE SEQUEIRA, F. OLIVEIRA E SÁ (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 399-404.

⁴⁶ *Ibidem*, p. 403.

⁴⁷ From many years now (2012) there is also the possibility, in the Portuguese scenario (as in many other jurisdictions), to make advance directives of will in healthcare matters, namely in the form of a living will, in which a person expresses in advance their will regarding healthcare treatments they wish to receive or not to receive if, for whatever reason, they are unable to express their will personally and autonomously (Law No. 25/2012, of 16 July).

⁴⁸ António Agostinho GUEDES, Marta MONTERROSO ROSAS, Comment on Art. 143 of the Civil Code (“Acompanhante”), in *Comentário ao Código Civil – Parte Geral*, 2.^a Ed., J. BRANDÃO PROENÇA, A. AFONSO, A. TRIUNFANTE, E. VAZ DE SEQUEIRA, F. OLIVEIRA E SÁ (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 356-359, p. 358.

⁴⁹ Some Portuguese Doctrine notes that, given the primacy of the will of the person concerned, this mandate is the instrument that should take priority in the system of safeguarding adults: Paula TÁVORA VITOR, Comment on Art. 156 of the Civil Code in *Código Civil Anotado*, Vol. I, Ana PRATA (Coord.), 2nd ed., 2019, pp. 204-208, p. 204.

“For many persons with disabilities, the ability to plan in advance is an important form of support, whereby they can state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others”⁵⁰. As explained, and following the ECHR judgment under analysis, this work focusses specifically on a very small part of advance planning possibilities: the choice of the person who is intended to provide support in the future, namely in a court-ordered scenario. However, thinking a bit more broadly, there are obvious “benefits” that can resort from this kind of anticipated directives. Naming only a few: indicating a person of trust to whom specific roles are to be entrusted in case of need: this early choice can prevent, for instance, people who are more concerned about (their) own interest from being appointed; deciding in advance which medical treatments to receive; dictate precise guidelines so that the estate or some assets are managed in the future according to the person's needs and preferences; how to pay for treatment and house support so as to avoid being institutionalized; planning for the welfare of other dependents, such as disabled children or spouses; *inter alia* (some of these concerns intercept the field of “succession planning”, as analyzed, in the Portuguese context, by R. LOBO XAVIER⁵¹).

That said, however, it does not seem possible to exclude *serious and cautious control procedures* from advanced decisions. Natural concerns arise in this regard and some of the following thoughts appear to be common: «what if I change my mind?»; «what if I change my mind but I'm no longer able to express my present will?»; «if I was aware of subsequent circumstances, would I continue to make the

⁵⁰ Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014), Article 12, paragraph 3, available at <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1>. See, also, Inclusion Europe, “The Right to make decisions”, available at <https://www.inclusion-europe.eu/wp-content/uploads/2018/10/Legal-capacity-and-empowerment.pdf>.

⁵¹ See Rita LOBO XAVIER, *Planeamento sucessório e transmissão do património à margem do Direito das Sucessões*, Universidade Católica Editora, 2016.

same decision?»; what if the mandate was extorted by the agent who exercised his influence at a stage when the person was already vulnerable?; etc. Returning to the topic of choosing someone to assume the role of support giver, the referred concerns may justify safeguards and means of control that make it possible to truly respect the autonomy of the beneficiary in a prudent and beneficial way. The new Portuguese Civil Code regime seems to be aware of these concerns, and various solutions appear to address them. For instance, the special mandate “regarding accompaniment” (“*Mandato com vista a acompanhamento*”, art. 156 of the Portuguese Civil Code) is freely revocable by the principal (see no. 2, *in fine*): provided that the principal continues to have the capacity to decide⁵² to change his/her previous instructions, it is permitted to do so at any time. On the other hand, the court may end the mandate when it is reasonable to presume that the principal would have wished to revoke it (Art. 156, no. 4): the intention is to control abuses and influences to which the principal may have been subjected, a concern that was expressed during the preparatory works leading up to the reform of the Civil Code⁵³. Actually, it is imperious to separate situations of abuse from those where the will was freely formed. Evidently, these safeguards are intended to act only in extreme cases: the will previously expressed has primacy, has already said. In what concerns the designation of the “*acompanhante*”, and even though this choice is primarily made by the adult concerned, the court, again in extreme situations, may conclude that the beneficiary's imperative interest is not safeguarded by the choice made⁵⁴.

⁵² See Paula TÁVORA VITOR, Comment on Art. 156..., cit., p. 207.

⁵³ See António Agostinho GUEDES, Marta MONTERROSO ROSAS, comment on Art. 156 of..., cit., p. 404.

⁵⁴ See António Agostinho GUEDES, Marta MONTERROSO ROSAS, comment on Art. 143..., cit., p. 358). António MENEZES CORDEIRO refers that the law begins by guaranteeing the beneficiary's autonomy, as required, but imposes appointment by the court to prevent abuse and to defend the person concerned (Comment on Art. 143 of the Civil Code, Código Civil Comentado – I – Parte Geral, António MENEZES CORDEIRO (cCoord.), CIDP, Coimbra, Almedina, 2020, p. 401.

6. Conclusion

Nowadays and in accordance to international and European fundamental principles, the aim is to guarantee the utmost respect for the will and wishes of adults in need of support, including recognizing and regulating ways of anticipating the expression of those wishes. However, the law can not ignore that control measures are sometimes needed and justified. The challenge will always be finding the right balance between autonomy and “protection” from undue influences. Nonetheless, paradigm implementation is on course: above all, the court must start to consider the person’s choices; must hear the beneficiary of the potential measure; must try to understand what the person prefers and desires, so that the situation of vulnerability does not erase the person’s identity and uniqueness.

BIBLIOGRAPHICAL REFERENCES

Barbosa, Mafalda Miranda, *Maiores Acompanhados – a disciplina da lei n.º 49/2018*, de 14 de agosto, 2.ª ed., Gestlegal, 2021

Cordeiro, António Menezes, “Da situação jurídica do maior acompanhado. Estudo de política legislativa relativo a um novo regime das denominadas incapacidades dos maiores”, *Revista de Direito Civil*, III, 3, 2018, pp. 473-554.

Costa, Maria Inês, “A audição do beneficiário no regime jurídico do maior acompanhado: notas e perspectivas”, *Julgar Online*, july 2020, p. 4, available at [20200716-JULGAR-A-audição-do-beneficiário-no-regime-jurídico-do-maior-acompanhado-notas-e-perspectivas-Maria-Inês-Costa.pdf](https://www.julgar.pt/20200716-JULGAR-A-audição-do-beneficiário-no-regime-jurídico-do-maior-acompanhado-notas-e-perspectivas-Maria-Inês-Costa.pdf)

Guedes, António Agostinho, Marta Monterroso Rosas, Comment on Art. 140 of the Civil Code (“Objetivo e supletividade”), in *Comentário ao Código Civil – Parte*

Geral, 2.^a Ed., J. Brandão Proença, A. Afonso, A. Triunfante, E. Vaz de Sequeira, F. Oliveira e Sá (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 348-351.

____. Comment on Art. 139 of the Civil Code (“Decisão judicial”), in Comentário ao Código Civil – Parte Geral, 2.^a Ed., J. Brandão Proença, A. Afonso, A. Triunfante, E. Vaz de Sequeira, F. Oliveira e Sá (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 345-348.

____. Comment on Art. 156 of the Civil Code (“Mandato com vista a acompanhamento”), Comentário ao Código Civil – Parte Geral, 2.^a Ed., J. Brandão Proença, A. Afonso, A. Triunfante, E. Vaz de Sequeira, F. Oliveira e Sá (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 399-404.

____. Comment on Art. 143 of the Civil Code (“Acompanhante”), in Comentário ao Código Civil – Parte Geral, 2.^a Ed., J. Brandão Proença, A. Afonso, A. Triunfante, E. Vaz de Sequeira, F. Oliveira e Sá (ed.), Universidade Católica Editora, Lisboa, 2023, pp. 356-359.

Moreira, Teresa Coelho, “Direito ao respeito pela vida privada no âmbito das relações laborais I”, Comentário da Convenção Europeia dos Direitos Humanos e dos Protocolos Adicionais, Vol. II, Paulo Pinto de Albuquerque (org.), Universidade Católica Portuguesa, pp. 1473-1492.

Rosas, Marta Monterroso, “Planning the Future of a Disabled Person: Civil Law Solutions?”, *Teise*, 114, 2020, pp. 132–143, DOI:[10.15388/Teise.2020.114.9](https://doi.org/10.15388/Teise.2020.114.9)

____. “A dialogue between the portuguese and the spanish recent civil law reforms concerning the support of vulnerable adults”, Book of 26rd Annual Meeting of NANTERRE NETWORK Law and Culture, O. Seul, S. Dijoux, F. S. Veiga (Coord.), Instituto Iberoamericano de Estudos Jurídicos e Universidade Lusófona, Porto, 2023, pp. 45-60.

Schabas, William A., *The European Convention on Human Rights – A Commentary*, Oxford University Press, 2015.

Sequeira, Elsa Vaz de, *Teoria Geral do Direito Civil*, 3.^a Ed., Lisboa, Universidade Católica Editora, 2024.

Sousa, Miguel Teixeira de, “O regime do acompanhamento de maiores: alguns aspetos processuais”, Colóquio O Novo Regime do Maior Acompanhado, António Pinto Monteiro (coord.), Instituto Jurídico Faculdade de Direito da Universidade de Coimbra, 2019, pp. 57-86.

Vitor, Paula Távora, Comment on Art. 156 of the Civil Code in Código Civil Anotado, Vol. I, Ana Prata (Coord.), 2nd ed., 2019, pp. 204-208.

Xavier, Rita Lobo, Planeamento sucessório e transmissão do património à margem do Direito das Sucessões, Universidade Católica Editora, 2016.

OTHER SOURCES

European Parliament, briefing “Understanding EU policies for people with disabilities”, Marie Lecerf, European Parliamentary Research Service, 2024, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698811/EPRS_BRI\(2021\)698811_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698811/EPRS_BRI(2021)698811_EN.pdf)

Communication of the Agent of the Portuguese State before the ECHR, available at https://portal.oa.pt/media/148244/o2025216_oa_q39848-19_mts_e_mjs_cportugal_comunicacaodecisaotedh.pdf

European Court of Human Rights, “Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life”, 2025, p. 45, available at <https://ks.echr.coe.int/web/echr-ks/article-8>.

Portuguese Public Prosecutor's Office, “Manual of Good Practices” of the Portuguese Public Prosecutor's Office regarding accompanied adults, Available at https://www.ministeriopublico.pt/sites/default/files/2024-12/manual_de_boas_praticas_rjma_03_05_2023_final.pdf.

Report of the European Association of Service providers for Persons with Disabilities “Legal Capacity and Supported Decision Making” (F. Scarano, I.

Bertana, K. Leventi), 2023, available at [https://easpd.eu/fileadmin/user_upload/Publications/Legal Capacity and Supported Decision-Making.pdf](https://easpd.eu/fileadmin/user_upload/Publications/Legal_Capacity_and_Supported_Decision-Making.pdf).

Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014), Article 12, paragraph 3, available at <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1>.

Inclusion Europe, “The Right to make decisions”, available at <https://www.inclusion-europe.eu/wp-content/uploads/2018/10/Legal-capacity-and-empowerment.pdf>.

COMMON OR DIVERGENT? A COMPARATIVE ANALYSIS OF SUSTAINABLE DEVELOPMENT POLICIES IN THE EUROPEAN UNION AND THE UNITED KINGDOM

Christian Rossi¹

DOI: <https://doi.org/10.62140/CR530933322>

Summary: 1. Introduction; 2. Historical Background (1950s – 1990s); 3. The European Union’s Sustainable Development Policy Framework; 4. The United Kingdom’s Sustainable Development Policy Framework; 5. A comparative Analysis; 6. Challenges and Critiques; 7. Conclusions.

Abstract: Sustainable development policies in the United Kingdom (UK) and in the European Union (EU) have been part of selected policies that for almost fifty years have overlapped. This paper tries to trace their paths from the 1950s post-integration to recent post-Brexit policy developments. It examines major policy milestones in the European Union environmental and sustainability policies and pivotal UK instruments such as the 2005 Sustainable Development Strategy, the Climate Change Act 2008, and the Environment Act 2021. Through comparative evaluation, this article highlights similarities and differences in ambition, sustainability institutions, execution, and EU–UK cooperation on shared sustainability challenges.

Key words: Sustainable Development; United Kingdom; European Union

1. INTRODUCTION

¹ Professor of History of International Relations at the University of Cagliari. Email: chrossi@unica.it. Link ORCID: <https://orcid.org/0000-0002-6510-5941>.

Since the 1950s Europe has moved from post-war reconstruction to a more demanding governance framework able to balance economic growth, environmental protection, and sustainability. The concept itself of sustainable development, even if formally conceptualized in the late 1980s, has deep ideological roots dating back to the 1950s creation of the European Economic Community (EEC). The emerging idea of environmental consciousness between the 1960s and 1970s, polarized by oil crises, industrial pollution, and global initiatives such as the 1972 United Nations Conference on the Human Environment², and the Club of Rome's report "The Limits to Growth"³, gradually introduced environmental and sustainability concerns into the European policy agenda. The Brundtland Report (1987)⁴ further crystallized the idea of sustainable development as an integrated framework for balancing human and environmental needs, while movements like The Natural Step (1989)⁵ helped embed systems thinking into European policymaking. This paper examines how these historical foundations shaped both the EU's and the UK's approaches to sustainability, two approaches that from 1972 until 2016 went on together, leading to diverging trajectories after Brexit. It argues that while institutional contexts differ, both entities remain bound by shared ecological interdependence and global sustainability imperatives.

2. HISTORICAL BACKGROUND (1950S – 1990S)

² United Nations, Declaration of the United Nations Conference on the Human Environment, 1972, <https://www.un.org/en/conferences/environment/stockholm1972>

³ Donella H. Meadows, Dennis L. Meadows, Jorgen Randers, William W. Behrens, *The Limits to Growth. A Report from the Club of Rome's Project on the Predicament of Mankind*, Universe Books, New York, 1972

⁴ World Commission on Environment and Development (Brundtland Report), *Our Common Future*, 1987, <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

⁵ The Natural Step Foundation, *The Natural Step Framework*, 1989, <https://thenaturalstep.org/approach/>

Looking back at the origins of European integration in the 1950s we see that its creation was primarily economic and political, aimed at ensuring peace through cooperation, while rebuilding postwar Europe. The treaties that created the European Coal and Steel Community and the European Economic Community, paved the way to the common market. Protection of the environment, not to mention sustainability, was not a target, and the treaties institutionalized inter-governmental instruments that would later house a sustainability concept. Public concern about industrial pollution and resource depletion increased over the years, particularly in the mid-1960s, and began to urge EEC decision-making. Although formal sustainability and environmental policies were still far from emerging, discussions about pollution control and resource exploitation signaled an early awareness of cross-border environmental issues⁶. The turning point occurred in the 1970s. The 1972 United Nations Conference on the Human Environment in Stockholm highlighted that “the natural environment and human development are closely linked together”, thus inspiring the first European Environmental Action Programme (1973–1977). That year, the Club of Rome also published “The Limits to Growth”, a report that warned about the consequences of unchecked economic expansion on environment and sustainability⁷. The subsequent year oil crisis further underscored the resource dependency fragility, encouraging initiatives such as energy diversification and environmental regulation. These progresses inspired the principle that “pollution has no borders”, which became a funding concept of the European environmental law⁸. The sustainability policy historical evolution from the 1960s onwards established introductory differences in governance attitude in shaping today’s EU–UK divergence.

⁶ Paolo Graziano, The politics of the EU eco-social policies, in “European Political Science”, vol. 23, 2024, pp. 27-38.

⁷ Donella H. Meadows, Dennis L. Meadows, Jorgen Randers, William W. Behrens, cit.

⁸ https://environment.ec.europa.eu/strategy/zero-pollution-action-plan_en

By the late 1970s and 1980s, environmental protection became a formal EEC competence, reinforced by Articles 130R–130T of the Single European Act (1986). The European Court of Justice (ECJ) played a vital role in balancing environmental objectives with market freedoms. The 1986 “Danish Bottle Case” (Case 302/86) confirmed that environmental protection could justify certain restrictions on the free movement of goods, setting a key precedent for integrating ecological and economic governance⁹.

At the global level, the 1987 Brundtland Report, named “Our Common Future”, introduced the concept of sustainability: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. This concept became a guiding principle for European and UK policy frameworks alike. Around the same time, The Natural Step, founded in Sweden in 1989, promoted a science-based systems framework for sustainability that influenced Nordic and EU-level policies¹⁰. In 1990, the establishment of the European Environment Agency (EEA) institutionalized environmental monitoring and policy evaluation within the European framework, marking a critical step toward evidence-based environmental governance¹¹.

The United Kingdom’s relationship with European institutions evolved more slowly: after initial post-war ambivalence, the UK joined the EEC in 1973¹². As said, environment gained a voice in politics and decision-making process between 1970s and 1980s in the EEC Member States, thus also UK, following

⁹ Judgment of the Court of 20 September 1988 - Commission of the European Communities v Kingdom of Denmark - Free movement of goods - Containers for beer and soft drinks - Case 302/86, European Court Reports 1988 Page 04607.

¹⁰ The Natural Step Foundation, cfr. <https://thenaturalstep.org/>

¹¹ European Environment Agency, Sustainability transitions: now for the long term, Publication Office of the European Union, Luxembourg, 2016.

¹² David Hannay (Edited by), Britain Entry into the European Community. Report by Sir Con O'Neill on the Negotiations of 1970-1972, Routledge, London, 2000; Stephen Wall, The Official History of Britain and the European Community, vol. II, From Rejection to Referendum, 1963-1975, Routledge, London, 2013.

industrial pollution concerns, and after the development of an international environmental diplomacy¹³. The 1992 Rio Earth Summit helped in focusing policies on sustainability and environment and the concept of sustainable development started to become a pivotal topic¹⁴.

As previously stated, the early adoption by the European Community of shared principles on environment - exemplified by the post-Stockholm Action Programmes, the legal precedent of the *Danish Bottle Case*, and the creation of the European Environment Agency – urged an inter-governmental approach towards a sustainability rooted within a rules-based system. The UK, although active in these frameworks, historically preferred more flexibility and nation-level rules with respect to rules imposed externally. Brexit confirmed the UK’s rules as their rules. The EU approved the European Green Deal in an attempt of deeper integration, whilst the UK acted alone in autonomy through a domestic legal framework, thus approving the Environment Act 2021¹⁵. Yet the shared intellectual heritage of the Brundtland Report and global sustainability discourse means that both actors remain aligned on core objectives such as climate neutrality and biodiversity protection. The contrast, therefore, is less about ambition than about governance philosophy—between a multi-level system seeking harmonization and a sovereign system prioritizing national discretion. This divergence presents both risks of fragmentation and opportunities for innovative cooperation across borders.

All these historical developments collectively laid the foundation for the EU’s subsequent sustainability strategies and the UK’s domestic frameworks.

¹³ Sobhan Tayebi, Seyed Fazlollah Moosavi, Seyed Abbas Poorhashemi, *Environmental Diplomacy: A Framework for Growth of International Interaction and Cooperation for Achievement of Global Peace*, in “Journal of Politics and Law”, vol. 9, n. 9, 2016, pp. 150-154.

¹⁴ Jean-Frederic Morin, Jen Allan, Sikina Jinnah, *The Survival of the Weakest: The Echo of the Rio Summit Principles in Environmental Treaties*, in “Environmental Politics”, vol. 33, 2024, Issue 3, pp. 486-503.

¹⁵ Environment Act 2021, <https://www.legislation.gov.uk/ukpga/2021/30/contents>

3. THE EUROPEAN UNION'S SUSTAINABLE DEVELOPMENT POLICY FRAMEWORK

Over the past three decades the EU developed an increasingly ambitious sustainability architecture. The Lisbon Strategy (2000) recast competitiveness alongside social and environmental renewal as central goals¹⁶, and Europe 2020 (2010) followed with measurable targets for climate and energy, employment, research, and social inclusion¹⁷. The European Green Deal (2019) marked a decisive step toward system-level transformation, setting the goal of a climate-neutral EU by 2050 and integrating circular economy, biodiversity, and just transition measures into a single political strategy¹⁸.

Institutional mechanisms underpinning EU sustainability policy include the European Commission's policy proposals, the European Parliament's legislative and budgetary role, and the Council of the EU representing member states. Policy instruments combine regulatory measures (directives and regulations), market instruments (emissions trading), funding mechanisms (Cohesion Policy, Just Transition Fund) and strategic frameworks (multiannual financial frameworks aligned with climate goals). The EU's supranational law-making capacity gives it a comparative advantage in setting transboundary regulatory standards and creating common-market incentives for green investments.

4. THE UNITED KINGDOM'S SUSTAINABLE DEVELOPMENT POLICY FRAMEWORK

¹⁶ Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.htm; Maria Joao Rodrigues (Edited by), *Europe, Globalization and the Lisbon Agenda*, Edward Elgar Publishing Ltd, Cheltenham, 2009.

¹⁷ European Council, Conclusions, 17 June 2010, EUCO 13/10.

¹⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan. For a cleaner and more competitive Europe, 11 March 2020, COM(2020) 98 final.

The United Kingdom domestically codified sustainability commitments through successive strategies and legal instruments. The 2005 UK Sustainable Development Strategy “Securing the Future” articulated core principles—living within environmental limits, ensuring a strong healthy and just society, achieving a sustainable economy, and promoting good governance—and attempted to mainstream sustainability across departmental policies¹⁹. The Climate Change Act 2008 established a legally binding emissions’ reduction target and carbon budgeting processes, institutionalizing the Committee on Climate Change as an independent adviser²⁰.

Post-2016 and especially after Brexit, the UK’s policy architecture underwent recalibration. The Environment Act 2021 established domestic governance arrangements to replace EU-level environmental oversight, introduced legally binding environmental targets, and created the Office for Environmental Protection (OEP)²¹. While the UK retained many high-level commitments—such as the net-zero by 2050 target enshrined in law in 2019—political shifts and regulatory divergence risks have raised questions about continuity, capacity, and the durability of long-term policy commitments.

5. A COMPARATIVE ANALYSIS

Given the historical framework, it is possible to compare EU and UK across four analytical dimensions: legal-institutional frameworks, policy ambition and targets, implementation and enforcement, and political economy constraints. As for the legal-institutional frameworks, the EU’s supranational competency and *acquis communautaire* provide centralized rulemaking and enforcement mechanisms

¹⁹ HM Government, Securing the Future. Delivering UK Sustainable Development Strategy, Presented to Parliament by the Secretary of State for Environment, Food and Rural Affairs by Command of Her Majesty March 2005, CM 6467.

²⁰ Climate Change Act 2008, <https://www.legislation.gov.uk/ukpga/2008/27/contents>

²¹ Environment Act 2021, <https://www.legislation.gov.uk/ukpga/2021/30/contents>

that produce uniform standards across member states. The UK, by contrast, has historically relied on a mix of EU-driven obligations and domestic legislation; in the post-Brexit it must reconcile sovereignty with the practicalities of cross-border environmental externalities and market alignment; Policy Ambition and climate targets of both the EU and the UK are ambitious - most notably the EU's commitment to climate neutrality by 2050 and the UK's net-zero by 2050 - yet the EU's 2019 Green Deal represented a broader systems approach linking industry, agriculture, energy, transport, and finance. The UK's targets are legally binding domestically and supported by carbon budgets, yet political contestation over the speed and distribution of transition costs has introduced volatility. The implementation and enforcement policies are in some ways different as the EU's combination of directives, regulations, and the European Court of Justice produces enforcement pressure and transnational compliance incentives, whilst UK's domestic enforcement institutions (e.g., OEP) are newer and face resource and mandate constraints. Moreover, the loss of ECJ oversight changes the enforcement dynamic and may reduce supranational dispute resolution mechanisms. If we analyze the Political Economy Constraints, we have to underline that both actors contend with industrial lobbying, regional inequalities, and concerns about competitiveness. The EU balances a large and diverse membership, generating internal negotiation costs but also broad legitimacy for collective action. The UK faces concentrated political debates, electoral cycles, and recent partisan shifts that complicate consistent long-term policymaking.

6. CHALLENGES AND CRITIQUES

Key critiques of both EU and UK approaches include implementation gaps between ambition and delivery, uneven distributional impacts, and the political economy of transition. Difficulty in deciding a clear political line throughout a process can be the result of the governance system of the European Union. This leads to policy division and difficult implementation of the policies

decided at the apex within the member states. On the other hand, the regulatory divergence of the United Kingdom can cause trade clashes and can give to the environmental protection less effectualness. Moreover, institutional independence of the regulatory system, its funding and a clear accountability, is paramount for long-term commitment.

Even after Brexit process there are anyway common challenges that can be turned into an advantage for UK-EU cooperation such as climate change, loss in biodiversity and lack of resources, not to mention the supply-chain constraints. Cooperation might include mutual recognition or regulatory alignment, cross-border green infrastructures, and cooperation in research and development. Also, the third sector, civil society and local institutions may guide environmental policies with the creation of networks and shared projects.

7. CONCLUSIONS

As we have seen the path followed by the European Union and by the United Kingdom on sustainable development policies have been sometimes interconnected but mostly separate. Despite an early convergence a lot of political decisions were taken at internal level and after Brexit the separation increased. In any case, as we have already seen, pollution does not follow territorial boundaries, therefore cooperation is needed to counteract. To do this, both the European Union and the United Kingdom need to act together, aligning standards of action and investing in joint and disjointed innovation so that the both of them can achieve the targets they have set for themselves in the not-so-distant future.

This article, which provides a comparative analysis of the environmental sustainability policies implemented by the United Kingdom and the European Union, demonstrates that although many of the rules approved on both sides of the Channel are the same or similar, the rationale behind their implementation has been quite different. The different system of rules is mainly due to the fact that

while on the one hand the European Economic Community, despite the belated awakening of an environmentalist conscience, has begun to apply, or at least attempt to apply, shared, coordinated rules that are valid beyond state borders and at a European level, the same has not been done by the United Kingdom. The latter, in fact, preferred to continue applying state-level rules, even after joining the EU, in order to have greater discretion and flexibility. After UK's departure from the European Union, this divergence has become more evident in spite of the shared commitment to 2050 goals for sustainability.

Divergence between the rule's application emerges if we look at the practice. In the British Parliament, in fact, there were long discussions among members of Parliament during the approval of the Environment Act 2021, when most of them highlighted the possibility that the UK should use its post-Brexit freedom to set sustainability targets that would be seen as an example for the world²². Both Houses of Parliament scrutinized extensively the bill, and they truly acted as a forum for accountability, demanding clearer legal bases, stronger independent control (such as the role of the Office for Environmental Protection), and sharper implementation passages. The result has often been an overlapping of rules between the UK and the European Union²³. It is thus possible to draw several conclusions. The first aspect concerns the credibility of the European Union as a supranational entity capable of creating superior legislation, the power of intervention of the Court of Justice of the European Union, and not least the EU environmental acquis valid in the whole of the European member states. The United Kingdom in comparison to the European Union should act in the same way within its border and with the same binding capacity. Parliamentary discussions in Westminster show awareness and concern about this possibility and about the future. Moreover,

²² Hansard, The Official Record of Parliamentary Debates (House of Lords, d'ora in poi: HL; House of Commons, d'ora in poi: HC), 2021, <https://hansard.parliament.uk/>, HL, 7 June 2021, vol. 812.

²³ Hansard, HC, 20 October 2021, vol. 701.

the European Union, as well as the United Kingdom share a similar path towards the climate neutrality by 2050, about biodiversity and sustainability. Ambition, unfortunately, does not guarantee success. British MPs have been very clear on this point, because a distant goal without intermediate steps risks failing to deliver the desired result. The European Union faces similar problems because, for the United Kingdom, the intermediate steps within Europe are the member states, who must in turn apply the rules. Ambition, therefore, it does not seem the problem whilst monitoring and enforcement are.

Another aspect to underline is that European control over British rules, which ceased after Brexit, has caused and will cause even greater divergence in the future. Or a greater innovation. Governments and parliamentarians in Hansard acknowledge that freedom to diverge must be matched by safeguards to prevent regulatory weakening (for example, on imports produced under lower standards). The EU, meanwhile, continues to rely on harmonised standards and internal market leverage. The key question is whether the UK will choose divergence in order to outperform (regulatory competition) or to drift (regulatory dilution). For sustainability, neither outcome is automatically preferable: divergence may drive innovation, but misaligned standards raise risks for cross-border environmental externalities. On the other hand, despite institutional divergence, the ecological realities remain shared. The principle that “pollution knows no borders”, which informed early EU environmental law, remains valid for the UK in a post-Brexit context: air and water pollution cross boundaries, supply chains interlink, and climate change is global and transnational. It means that the UK emphasises international responsibilities (e.g., deforestation in commodity supply-chains) as part of domestic law²⁴. Therefore, the comparative analysis suggests that the EU and UK are best served by coordinated but distinct approaches: UK pursuing sovereign frameworks but aligned sufficiently with EU and multilateral standards

²⁴ Hansard, HC, 26 May 2021, vol. 696.

to avoid fragmentation; EU maintaining internal cohesion while enabling external partnerships.

In conclusion, the comparative historical-institutional unfolding of sustainability policy in the EU and UK provides important lessons for the next decade. The UK, now fully autonomous from the EU, faces the challenge of constructing a credible, enforceable, and ambitious sustainability framework at home, while managing alignment with external actors. The UK and EU have historical convergences in aims and values; the critical test is whether their divergent ways can still bring similar outcomes. In an era of shared climate and environmental risk, interdependence or divergence highlight that cooperation in sustainable development is paramount. And meaningful to all.

“EXODUS” - BOB MARLEY’S WAR IN THE XXI CENTURY: WORD HUNGER AND THE UN 2030 AGENDA OF SUSTAINABLE DEVELOPMENT GOALS

João Proença Xavier¹

DOI: <https://doi.org/10.62140/JPX476056085>

“That until the basic human rights

Are equally guaranteed to all without regard to race

Dis a war” by Bob Marley & the Wailers²

Abstract: Hunger is a problem that has plagued the world since time immemorial, with many people starving in first world countries, but the situation is much worse in the poorest countries, where 90% of the population is in need of food and drinking water. Some of these countries are of great concern to the UN, such as Somalia, Afghanistan, Ethiopia and South Sudan, where it is estimated that around 970 million people could die of hunger in the short term if nothing is done to help them. To combat this scourge, there are non-governmental organisations (NGOs) and United Nations (UN) programmes that advocate the use of the World

¹ PhD in Human Rights | University of Salamanca / Associated Researcher and Professor in CEIS20 – Centre for Interdisciplinary Studies | University of Coimbra (Portugal). Postdoctoral Research Scientist – “Derechos Humanos en Perspectiva Comparada Brasil España”. Institution: CEB | Centre for Brazilian Studies of the University of Salamanca (Spain). Master in Human Rights – Faculty of Law | University of Salamanca (Spain). University of Coimbra (Portugal) Law Degree and Master in “Human Rights and Democratization “and in European Law Studies. E-mail joao.xavier@uc.pt / joao.proenca.xavier@usal.es

² In War: song recorded in 1976 by Bob Marley and the Wailers from the album Rastaman Vibrations / Island Label, the lyrics of which are inspired by the speech made by Selassie I, Emperor of Ethiopia, in his appearance before the United Nations General Assembly on 4 October 1963.

Food Programme (WFP), which has many volunteers who take food to the remotest parts of the world in an attempt to somehow alleviate world hunger. However, despite the combined efforts of these institutions, it is not enough; unfortunately, profound malnutrition is a very common reality in several places around the world today. In an attempt to end hunger around the world, the UN has included SDG2 in its 2030 agenda, which aims to eradicate hunger and develop healthy agriculture for all.

Keywords: United Nations; Word Hunger; Sustainable Development Goals; Food programme; 2030 Agenda.

“EXODUS” - BOB MAREY’S WAR IN THE XXI CENTURY

World hunger is a pressing issue that continues to challenge the global community. From this perspective, author Francisco Turra describes the problem of world hunger as “a complex problem that can be broadly defined as a situation in which the food needs of an individual or group of individuals are not adequately met”.³

The Vienna Declaration, adopted at the 1993 World Conference on Human Rights, recognised that everyone has the right to an adequate standard of living, including adequate food.⁴

In 1996, the issue was addressed at the World Food Summit in Rome, organised by the Food and Agriculture Organization of the United Nations (FAO). This declaration gave international recognition to the need for adequate, safe and nutritious food and the recognition of food as a human right.⁵

³ Turra, F. (2012). Existe uma solução para o problema da fome no mundo?. Revista de Política Agrícola, 10(2), 53-54.

⁴ International Law Portal. Vienna Declaration and Program of Action. Available at [1993 Declaração e Programa de Acção adoptado pela Conferência Mundial de Viena sobre Direitos Humanos em junho de 1993.pdf \(oas.org\)](#). Accessed on 31 de julho de 2023

⁵ de Queiroz, A. G. S. (2018). A Erradicação Da Fome No Brasil a Partir da Declaração de Roma De 1996: Estruturas De Combate, Avanços E Pontos Frágeis. Revista Da Agu, 17(1).

On the same occasion, the Plan of Action to 2015 was drawn up, in which UN member states committed themselves to implementing the principles of the UN Charter and recognising food as a universal human right.⁶

Despite progress in the fight against food insecurity, millions of people around the world still lack adequate and nutritious food for a healthy life. Various factors, including socio-economic, political, environmental and climate issues, influence this complex and multifaceted phenomenon.

The current panorama of world hunger reveals an alarming reality. Statistics from international organisations such as the UN Food and Agriculture Organisation (FAO) and the World Food Programme (WFP) show that, according to a UN report, around 735 million people will go hungry in 2022, and around 20 million of those who die of hunger every year are children.⁷

The underlying causes of hunger are multiple and interconnected. Extreme poverty remains a key factor, limiting the access of the most vulnerable populations to adequate and quality food. In addition, political instability and armed conflict in various regions have contributed to worsening food insecurity, affecting production, distribution and access to essential food.⁸

Another important issue when it comes to world hunger is agriculture. The way in which agricultural land is used is thought to affect whether or not people go hungry, as Flávia Bliska et al. point out: *“In some countries, one hectare of land is*

⁶PIOVESAN, Flávia. Direitos Humanos e Justiça Internacional: Um estudo comparativo dos sistemas regionais europeu, interamericano e africano. 9ª ed. São Paulo: Editora Saraiva, 2019, p. 13.

⁷ Abramovay, R. (2017). O que é fome. Brasiliense.

⁸ Alves, J. S. L. (2019). O papel da universidade na implementação dos objetivos de desenvolvimento sustentável das Nações Unidas: uma análise dos projetos de extensão da Universidade Federal da Paraíba.

*cultivated per inhabitant and the population still goes hungry; in others, half that area is cultivated per inhabitant and most of the population does not go hungry”.*⁹

The price of food is a factor that increases hunger. Over the past two decades, food prices have skyrocketed, most recently due to the Covid-19 pandemic, the recent war in Ukraine, and the heat wave in South Asia, India and Pakistan, which has severely affected agricultural production and threatened food security not only in these regions, but throughout the world.¹⁰

In an effort to end world hunger and ensure food security for all, the UN has added SDG2 to its 2023 Agenda, which aims to eradicate hunger.

1. Sustainable Development Goals (SDGs)

In 2015, the United Nations created a global agenda – the Sustainable Development Goals (SDGs) – comprising 17 goals and 169 targets to be achieved by 2030.¹¹ Each goal represents a specific area for development. For the purposes of this study, we will focus on SDG 2, which aims to end hunger, achieve food security and improved nutrition, and promote sustainable agriculture.¹²

SDG 2 consists of eight targets, the first five of which relate to food security and agricultural sustainability, while the last three deal with market-related measures, focusing on increasing agricultural investment and reducing trade disruptions. The targets are categorised as follows:¹³

⁹ de Mello Bliska, F. M., Vegro, C. L. R., & Bliska, A. A. (2009). A propagação da fome no mundo: questão financeira, tecnológica ou política?. Revista Ceres, 56(4), 379-389.

¹⁰ Arora, N. K., & Mishra, I. (2022). Current scenario and future directions for sustainable development goal 2: A roadmap to zero hunger. Environmental Sustainability, 5(2), 129-133.

¹¹ Barros, A. C. S. D. (2019). Aplicabilidade dos objetivos de desenvolvimento sustentável (ODS) em Fortaleza.

¹² United Nations Development Programme. The SDGs in Action. Available at [Objetivos de Desenvolvimento Sustentável | United Nations Development Programme \(undp.org\)](#). Accessed on 31 de julho de 2023

¹³ United Nations. Goal 2: Zero Hunger. 2020. Available at <https://www.un.org/sustainabledevelopment/hunger/>. Accessed on: 31 de julho de 2023

Target 2.1: by 2030 end hunger and ensure access by all people, in particular the poor and people in vulnerable situations including infants, to safe, nutritious and sufficient food all year round;

Target 2.2: by 2030, end all forms of malnutrition, (...) and address the nutritional needs of adolescent girls, pregnant and lactating women and older persons;

Target 2.3: By 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment;

Target 2.4: By 2030, ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality.

SDG 2 aims to ensure that all people have access to sufficient and nutritious food, and to promote sustainable agricultural practices to ensure the planet's food security now and in the future. This goal is critical to ending hunger and poverty and ensuring the well-being and prosperity of the world's population. Achieving this goal will require coordinated and committed action by governments, international organisations, the private sector, civil society and citizens around the world.

However, a statistical look at the current state of hunger in the world shows that SDG 2 has faced significant challenges since it was established by the

UN. In terms of statistics, the UN reported in 2017 that some 1.6 billion people lived in a situation of vulnerability, with more than 90 million children under the age of 5 seriously underweight for their age.¹⁴

The SDG report found that food security reached moderate and severe levels between 2019 and 2020, with the equivalent of 2.4 billion people in a situation of hunger, representing 30 % of the world's population. This increase is largely related to the Covid-19 pandemic, which pushed many people into extreme poverty.¹⁵

More recently, in 2022, the UN published a new report in which the figures showed a slight decline. The number of people in a situation of hunger is estimated to be 2.3 million, or 29.3% of the world's population. ¹⁶

Hunger has always plagued the world and there have been many international efforts to tackle the problem over the years. However, there has never been an effective solution to end hunger among adults and children. Although the UN created SDG 2 with the aim of eradicating hunger, in practice the number of people in situations of food insecurity has not fallen as much as it should, as can be seen from the reports published by the UN. It is estimated that the number of hungry people in 2030 will be equal or higher than it was in 2015, when the 2030 Agenda was launched.

¹⁴ BRASIL. UNITED NATIONS DEVELOPMENT PROGRAMME. O que são os ODS? 2022. Available at <https://www.undp.org/pt/brazil/objetivos-de-desenvolvimento-sustentavel>. Accessed on 01 de agosto de 2023

¹⁵ BRASIL. UNITED NATIONS DEVELOPMENT PROGRAMME. O que são os ODS? 2022. Available at <https://www.undp.org/pt/brazil/objetivos-de-desenvolvimento-sustentavel>. Accessed on 01 August 2023

¹⁶ UNITED NATIONS. Goal 2: Zero Hunger. 2020. Available at <https://www.un.org/sustainabledevelopment/hunger/>. Accessed on 01 August 2023

2. The UN's role in the fight against hunger

The UN works to fight hunger in a number of ways, through initiatives such as the SDGs, the World Food Programme (WFP), the Food and Agriculture Organization, the UN Alliance for Food Security and Nutrition, as well as local initiatives through support to NGOs.

The WFP is the world's largest humanitarian organisation, primarily providing food aid. To make the fight against hunger even more comprehensive, WFP helps people around the world, including in the remotest parts of the world, such as southern Sudan and northern Nicaragua, where the mobile rescue team travels by helicopter to identify and register people in need of food and food aid.

Using artificial intelligence, the WFP now works with a live hunger map that allows it to predict and track hunger in more than 90 countries in near real time.¹⁷

The Food and Agriculture Organization of the United Nations (FAO) aims to ensure food security and regular access to quality food for all people to lead active and healthy lives.¹⁸

In the context of agriculture and rural nutrition, the UN has two specific programmes that are part of the International Fund for Agricultural Development (IFAD), a specialised UN agency that works to reduce rural poverty and improve food security.

Another programme is UN Environment (UNEP), the United Nations system's environmental agency, which aims to promote and transform the

¹⁷ Programa Mundial de Alimentos. Combate à fome. Available at [Combate à fome | Programa Alimentar Mundial \(wfp.org\)](https://www.wfp.org/pt-br/combate-a-fome). Accessed on 01 August 2023

¹⁸ Sobre FAO. Available at [Sobre a FAO | Organização das Nações Unidas para a Alimentação e a Agricultura](https://pt-br.sites.un.org/pt-br/pt-br/organizacao-das-nacoes-unidas-para-a-alimentacao-e-a-agricultura). Accessed on 03 August 2023

sustainable use of natural resources and plays a key role in promoting sustainable agriculture to ensure the production of healthy food.¹⁹

The conclusion is that the UN has a fundamental role to play in the global fight against hunger, with teams reaching out to remote areas with the big goal of safe and consistent food for all.

Conclusion

In conclusion, in order to address the issue of hunger and sustainable agriculture, the UN has set parameters in Agenda 2030 in the Sustainable Development Goal (SDG) 2.

In our view, they have succeeded in putting the issue of solving world hunger on the agenda. At the same time, they have achieved serious goals in terms of food security. As can be seen from the critical and reflective analysis of the official and programmatic texts of the UN's SDG 2 that we analysed, its first objective is to end hunger by guaranteeing access to nutritious food for all people, including poor children and adults in vulnerable situations.

Even if the goal seems bold, it is still achievable. The UN has set this goal together with the various countries that share the 2030 Agenda and its guidelines, where everyone will do everything in their power to ensure that by 2030 there is no more hunger on our planet, or at least that this reality is much less than it is today.

In conclusion, this critical reflection on the official texts of the UN's 2030 SDGs shows that malnutrition is a symptom of the planet's lack of commitment to ending world hunger, because malnutrition is currently killing the world, day by day, hour by hour and minute by minute, and these lives could be saved with therapeutic or other food that all countries should distribute fairly, especially by

¹⁹ Investing in rural people. Available at [Fundo Internacional de Desenvolvimento Agrícola \(ifad.org\)](https://www.ifad.org/). Accessed on 03 August 2023

sharing these solutions between the richest and poorest countries, as long as there is the political will to do so.

Bibliographical references

Abramovay, R. (2017). O que é fome. Brasiliense.

Alves, J. S. L. (2019). O papel da universidade na implementação dos objetivos de desenvolvimento sustentável das Nações Unidas: uma análise dos projetos de extensão da Universidade Federal da Paraíba.

Arora, N. K., & Mishra, I. (2022). Current scenario and future directions for sustainable development goal 2: A roadmap to zero hunger. *Environmental Sustainability*, 5(2), 129-133.

Barros, A. C. S. D. (2019). Aplicabilidade dos objetivos de desenvolvimento sustentável (ODS) em Fortaleza.

BRASIL. UNITED NATIONS DEVELOPMENT PROGRAMME. O que são os ODS? 2022. Available at <https://www.undp.org/pt/brazil/objetivos-de-desenvolvimento-sustentavel> . Accessed on 01 August 2023

de Queiroz, A. G. S. (2018). A Erradicação Da Fome No Brasil a Partir Da Declaração De Roma De 1996: Estruturas De Combate, Avanços E Pontos Frágeis. *Revista Da Agu*, 17(1).

de Mello Bliska, F. M., Vegro, C. L. R., & Bliska, A. A. (2009). A propagação da fome no mundo: questão financeira, tecnológica ou política?. *Revista Ceres*, 56(4), 379-389

Investing in rural people. Available at [Fundo Internacional de Desenvolvimento Agrícola \(ifad.org\)](https://www.ifad.org/). Accessed on 03 August 2023

In War: song recorded in 1976 by Bob Marley and the Wailers from the album *Rastaman Vibrations* / Island Label, the lyrics of which are inspired by the speech made by Selassie I, Emperor of Ethiopia, in his appearance before the United Nations General Assembly on 4 October 1963.

Nações Unidas. Conflitos e desastres naturais aumentam a insegurança alimentar e fome no mundo. Available at [Conflitos e desastres naturais aumentaram insegurança alimentar e fome no mundo | ONU News](#). Accessed on 30 July 2023

PIOVESAN, Flávia. Direitos Humanos e Justiça Internacional: Um estudo comparativo dos sistemas regionais europeu, interamericano e africano. 9ª ed. São Paulo: Editora Saraiva, 2019, p. 13.

Portal de direito internacional. Declaração e programa de ação de Viena. Available at [1993 Declaração e Programa de Acção adoptado pela Conferência Mundial de Viena sobre Direitos Humanos em junho de 1993.pdf \(oas.org\)](#) . Accessed on 31 July 2023

Programa Mundial de Alimentos. Combate à fome. Available at [Combate à fome | Programa Alimentar Mundial \(wfp.org\)](#). Accessed on 01 August 2023

Sobre FAO. Available at [Sobre a FAO | Organização das Nações Unidas para a Alimentação e a Agricultura](#). Accessed on 03 August 2023

The Sustainable Development Goals Report. Available at [The-Sustainable-Development-Goals-Report-2021.pdf \(un.org\)](#). Accessed on 31 July 2023

Turra, F. (2012). Existe uma solução para o problema da fome no mundo? Revista de Política Agrícola, 10(2), 53-54.

UNITED NATIONS. Goal 2: Zero Hunger. 2020. Available at <https://www.un.org/sustainabledevelopment/hunger/>. Accessed on 31 July 2023

United Nations Development Programme. The SDGs in Action. Available at [Objetivos de Desenvolvimento Sustentável | United Nations Development Programme \(undp.org\)](#). Accessed on 31 July 2023

THE SOCIAL TRANSFORMATION OF THE FAMILY AND ITS IMPACT ON FILIATION

Stephanie Rohlfing Dijoux

DOI: <https://doi.org/10.62140/SRD382372142>

Abstract: The contribution analyses the recent transformation of the family by new acts in family law and by comparing the situation in Germany and in France. The new possibilities offered by recent family law reforms such as homosexual marriage, adoption for homosexual couples and gender change has completely changes the composition of the traditional family. The presentation deals with the impacts of recent laws on the composition of the family and children rights such as rights of other family members focusing on gender changes of married persons or parents.

Profound changes in the organisation of family life are taking place in all Western societies. Beginning with the creation of the Civil Solidarity Pact (PACS) in France and continuing logically with the authorisation of marriage for all, the law must therefore also evolve in terms of filiation.

These changes can be seen in many European countries, with mutual influence between them. German law is often quite progressive.

Unlike in France, in Germany, profound changes in the conception of family law come from case law, particularly from the Federal Constitutional Court. In France, on the other hand, it is the legislature that is at the origin of these changes. The watchword of constitutional case law in Germany is the fundamental right of individual freedom.

PART ONE: The social transformation of the family

1. The third gender and the possibility of gender reassignment

1.1 The third gender, gender reassignment and name changes in Germany

Unlike France, Germany legalised a ‘third gender’ on birth certificates back in 2018, making it a pioneer in this area in Europe. Parents of an intersex newborn can choose not to indicate their child's gender on the birth certificate. The child can then change their gender identity whenever they wish.

In terms of gender reassignment, Germany has gone even further. In Germany, with regard to the topic of gender reassignment, we can find two landmark decisions by the German Constitutional Court that completely changed the legal situation in Germany. The first dates from 2011 and declares the former requirements for gender reassignment, which were sterilisation and medical evidence, to be contrary to the German Constitution¹.

The second judgement dates from 2017 and considers that the word is not binary, and a third neutral sex must be recognised by the state. The binary concept doesn’t fit with the reality. The reality is colourful with a lot of different graduation of genders.

These people are known as intersexual or intersexed and are distinguished from transsexuals, whose sexual characteristics are not equivocal but contradict their psycho-social sex.

The general right of personality (Art. 2 I in conjunction with Art. 1 I GG) protects gender identity. The principle of equal

¹ 11.01.2011 - 1 BvR 3295/07 BVerfG: 299. Requirements for the legal recognition of transsexuals under Section 8 (1) Nos. 3 and 4 of the Transsexuals Act are unconstitutional (Art. 1 Abs. 1, 2 Abs. 1 und 2 GG).

treatment also protects people who cannot be permanently categorised as either male or female from discrimination based on their gender. Transgender people's fundamental rights are both violated if civil status law forces them to register their gender but does not permit any positive gender entry other than female or male².

Transgender is a generic term for people whose external sexual characteristics do not, do not fully or do not always match their perceived gender, the so-called identity gender.

Transsexualism is the desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.

In Germany as consequence of the two key judgement the legislator voted a new law that came into force on 1 November 2024 SBGG ³. The main new rules of this law are based on the principles of self-determination regarding gender registration:

- Self-declaration of the gender for the civil status (depends exclusively on the gender perception of the applicant);
- Possibility to wave the gender;

² BVerfG, 10.10.2017 – 1 BvR 2019/16.

³ Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag vom 1. November 2024.

- Creation of a third gender (neutral) or no declaration in civil status law;
- No more medical expertise;
- Neither a psychological expertise, just a declaration of the person;
- No need for sterilisation of the person (it existed in Germany until 2011⁴).

The Law permits changing easily the gender entry by self-disclosure. Such a change to the gender entry is now possible without significant bureaucratic effort and, above all, without medical or even psychological assessments.

Nevertheless, some restrictions are created in the Act aiming the protection of the family structure:

- Three-month reflection period from the date of application for sex reassignment,
- Parental consent required for minors,
- The child's agreement is required in the case of a declaration by the parents,
- No change of the first name without changes of gender,
- One year waiting period to change sex again.

⁴ See Nr.1

The reflection period of three month should protect against hasty decisions and demonstrate the seriousness of the change request. However, the gender change can have serious consequences for family members if it occurs in the case of married persons or persons who are already parents.

1.2 Le troisième sexe neutre et le changement de sexe et de nom en France

In France no third neutral sex is foreseen and authorized until now in the civil status of a person, neither a possibility of not declaring sex at the civil registry office. In a procedure against France at the European Court of Human Rights the judges decided that this legislation is not violating Human Rights⁵. In this judgment handed down on 31 January 2023, the ECHR ruled that France's refusal to replace the word 'male' with 'gender-neutral' or 'intersex' on an applicant's birth certificate did not violate his right to respect for private life.

In France it is possible to change gender, but the person concerned must present evidence to show that the gender indicated in their birth or marriage certificates does not correspond to the gender in which they present themselves and are known. It may be necessary to attach medical evidence to the application. The result of the gender change request is a Court decision on the recognition. It's a judicial procedure that takes long time.

The discrepancy between biological identity and legal identity can cause people suffering and anxiety. The need for a reliable civil status register is

⁵ ECHR, 31 janvier 2023, n°76888/17

paramount. However, the right to respect for private and family life had not been violated by the authorities' refusal in the opinion of the European Human Rights Court.

On the other hand, for birth certificates for children born in France, a declaration of Parent 1 and Parent 2 on the birth certificate replaces the mention of mother and father. Hence two men or two women may declare birth as legal parent, what is not possible in Germany until now.

En France dans les actes d'état civil, il n'existe que deux mentions relatives au sexe (« masculin » / « féminin »). Vous souhaitez changer l'indication du sexe sur vos actes d'état civil ? Il n'est pas nécessaire d'avoir suivi un traitement médical ou d'avoir été opéré. Vous devez démontrer que le sexe indiqué sur votre état civil ne correspond pas à celui de votre vie sociale (identité de genre). Cependant, la demande est faite auprès du tribunal et nécessite une procédure. Si le changement de sexe est accepté, la personne peut également changer de prénom.

Une circulaire relative à l'état civil des personnes intersexuées présente les dispositions permettant de différer dans le temps l'inscription du sexe dans l'acte de naissance et de rendre possible la rectification postérieure du sexe dans l'acte de naissance sans laisser de trace sur la copie de l'acte intégral.

In Article 57 of the Civil Code, the legislator provides for the possibility of derogating from the declaration of sex within five days. Paragraph 55 of the circular of 28 October 2011 on specific rules for various civil status acts relating to birth and filiation provided for this possibility for two years in cases of intersexuality and linked the declared sex to the medical treatment administered. In its report of 28 June 2018 on the bioethics law, the Council of State considered that the provisions allowing for the possibility of not registering anything within a period of one or two years, whereas Article 57 requires the sex to be registered at

the time of declaration, ‘could be regarded [...] as unlawful’. The ECHR supported France's position.

2. Les conséquences du changement de sexe

2.1 Recognition of gender and name changes in other EU Member States

On 4 October 2024⁶, the European Court of Justice ruled in that a provision of a Member State which refuses to recognise the change of first name and gender identity of a national of that Member State, which was lawfully obtained in another Member State, and to enter it on the birth certificate of the person concerned, is contrary to Union law.

Articles 20 and 21 TFEU, read in the light of Art. 7 and 45 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding legislation of a Member State which does not authorise the change of the forename and gender identity of a national of that Member State, lawfully acquired in another Member State during the exercise of his right to freedom of movement and residence, to be recognised and entered on the birth certificate of the person concerned, with the consequence that he is obliged to initiate new proceedings in the first Member State, and enter it on the birth certificate of the person concerned, with the result that he is obliged to initiate a new procedure of a judicial nature in

⁶ ECJ, Case C-4/23, 4.10.2024

the first Member State to change his gender identity, which disregards that change already lawfully acquired in the other Member State.

2.2 Right to marriage and family for transsexuals

A transgender person should enjoy the same human rights as any other person and thus also have the right to marriage and protection of their family life and privacy. However, the rights of several family members may conflict with each other.

A problem may arise if a gender change takes place and has been registered after a heterosexual marriage. One may ask what the consequences for joint children are. Could it be grounds for divorce? Is a marriage for gender-neutral persons authorised?

Marriage of gender-neutral persons is possible in Germany as homosexual marriage is also permitted. In France, there are officially no gender-neutral people. So, the question does not arise.

In Countries where a same-sex marriage is not authorised the change of gender will not be possible for a married person.

2.3. The regulations about birth certificates regarding the sex of new borns:

In **Germany**, the sex of the child must be registered according to the biological sex. Ob die Eltern es als divers oder geschlechtslos ansähen, sei

irrelevant. Es gebe auch kein Recht darauf, den Eintrag bis zu einer späteren Entscheidung des Kinds selbst offenzuhalten.

In **France**, under article 57 of the Civil Code, the birth certificate must state the child's sex. When the child's sex is uncertain, the sex that appears most likely to the doctor must be indicated. However, when the doctor considers that he or she is not immediately able to give an indication of the probable sex of the newborn child but will be able to do so within 2 years, following appropriate treatment, the birth certificate may exceptionally not state the child's sex. It will subsequently be supplemented by a court decision.

PART TWO : Parentage law

The parentage law regulates the question of which person is (which) parent of a child in the legal sense. Traditionally there is a distinction between 'mother' and 'father'

1. Filiation in Germany

In Germany it is ruled in §1591 BGB⁷ "*The mother of a child is the woman who gave birth to it.*"⁸ And after § 1592 BGB "The father of a child is the man who is married to the child's mother at the time of birth, who has recognised paternity or whose paternity has been established by a court."

⁷ Bürgerliches Gesetzbuch (German Civil Code)

⁸ Latin Law adage "madre sempre est »

For transgender people, these regulations mean if a biological woman conceives a child before changing her gender, she is legally considered the child's mother and is also named as such on the child's birth certificate. The same applies to the woman's husband before the change of sex: he is the 'father' of the child on the birth certificate.

And the birth certificate will remain like this despite a former gender change.

2. Filiation in France

Parentage of a child born to a mixed marriage in relation to the father and mother. The husband of the woman who gives birth is presumed to be the father of the child and does not need to recognise the child. Both are listed on the birth certificate.

The filiation of a child born to an unmarried couple in France is not automatic, as civil partnerships are not considered equivalent to marriage for the purposes of filiation. With regard to the mother, the Roman law *adage mater semper certa est* (which is not without exceptions) still applies. The mother is listed on the birth certificate. With regard to the father, an act of recognition is necessary, but possession of status may replace it. Recognition by the father is only permitted if the mother is not married to another man. In this case, if the husband objects to the recognition, it is not permitted.

In practice, filiation with regard to married same-sex couples depends on whether the couple is female or male.

If there is a biological mother in a female couple, the woman who gives birth is considered the mother (adage) and the wife can adopt the child.

For a male homosexual couple, there is no birth, so there is no adage *mater semper certa est*. However, the child's biological father can recognise the child and his husband can subsequently adopt the child. If neither spouse has a biological link to the child, both can adopt the child together.

For unmarried same-sex couples, the situation is almost identical, except that adoption can only be done by one of the spouses and subsequent adoption can then take place.

3. Paternity and maternity testing

In France, paternity testing is permitted. The biological father cannot oppose it, with the exception of sperm donors, who have the right to remain anonymous.

However, mothers have the option of giving birth anonymously. This means that mothers have the right to remain anonymous, but fathers do not, which raises the issue of equality.

Even if it is in the father's interest to remain anonymous, it is in the child's interest to know its origins, and this interest prevails in this case. However, the same interest exists with regard to the mother.

In Germany, the rights of biological fathers who wish to recognise their children were recently the subject of a ruling by the German Constitutional Court on 9 April 2024.

In this case, the mother's new partner had recognised paternity and established a socio-familial relationship with her child. In this constellation, the law had previously prohibited the biological father from contesting paternity without exception.

According to the family law in force in Germany, a biological father can only contest the paternity of another man if there is no close relationship – in the wording of the law: no ‘socio-familial relationship’ – between the latter and the child. However, this does not do justice to the rights of the biological father, according to the Federal Constitutional Court, which declared the relevant provision of § 1600 (2) BGB to be unconstitutional. The German legislature must now legislate in line with this ruling. The German legislature must therefore legislate in line with this ruling, which has not yet been done.

4. Gender reassignment of married transsexuals in birth certificates

Parentage law in Germany only recognises ‘mother’ and ‘father’ until now.

A female-to-male transsexual who has given birth to a child after the legally binding decision on the change of sex remain the child's mother in the legal sense⁹. The general right of personality is restricted regarding the regulatory function of civil status law and the fundamental rights of the children of a

⁹ BGH, judgement of 6.9.2017 – XII ZB 660/14

transsexual. The ECHR has confirmed in 2023 the judgement of the Highest German Civil Court BGH¹⁰.

He/she must be entered both in the child's register of births and in the birth certificates drawn up from the register of births - insofar as details of the parents are to be included there - as 'mother' with his/her previous female first names.

Rather, children should be legally assigned to their biological parents in such a way that their parentage cannot be traced back to two legal mothers or fathers in contradiction to their biological conception.

Aiming to recognize the full rights of transgender people and homosexual couple, the German Parliament planned a reform of the parentage law. The term of father /mother should be replaced by the term parent. A transgender person can then appear as a second parent without necessarily having to be male. Two women can also act as two parents on the birth certificate without the need for adoption. Nevertheless, the two-parent principle and the legal maternity of the birth mother should be maintained. But the second parent can exist independently of biological parenthood. Until now the reform of the parentage law in Germany has not been achieved¹¹.

¹⁰ ECHR (IV. Section) judgement of 4.4.2023 – 53568/18, 54741/18 (OH u. GH/Deutschland)

¹¹ Accessed on 6.10.2025
https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/2024_Reform_Kindschaftsrecht.html

Conclusion

Germany seems to respect better transgender rights and the opening to a “new” family structure is more advanced. On the other hand, in France we can have ‘parent one’ and ‘parent two’ instead of ‘mother and ‘father’, what is until now not possible in Germany.

But the German law on self-determination goes quite far and one may consider that too much facility for gender change is not serious and can aim to a proliferation of gender change by a mode effect. As consequences for children and family law are important, the gender change should not get too easy.

NOVOS CONCEITOS DE SUSTENTABILIDADE BASEADOS NAS POLÍTICAS DA UNIÃO EUROPEIA

New concepts of sustainability based on European Union policies

Fábio da Silva Veiga^{1 2}

DOI: <https://doi.org/10.62140/FSV729996524>

Resumo: Este artigo analisa a evolução do conceito de sustentabilidade no contexto europeu, destacando o papel crucial das instituições da União Europeia na promoção de políticas que visam integrar o crescimento económico com a proteção ambiental e a responsabilidade social. Examina a transição do quadro regulamentar inicial para as diretivas mais recentes, incluindo o *Green Deal*, a Diretiva sobre o Relato de Sustentabilidade Corporativa e a Diretiva de Devida Diligência e Sustentabilidade Empresarial, que visam reforçar a transparência e a conformidade empresarial. É dada especial atenção ao *Pacote Omnibus*, que introduziu alterações legislativas significativas, revelando as tensões entre as ambições ambientais e os desafios económicos e geopolíticos que caracterizam o atual cenário europeu. As conclusões enfatizam a necessidade de uma abordagem equilibrada e sinérgica entre instituições, empresas e sociedade civil para garantir uma transição sustentável que não seja apenas um objetivo político, mas se torne uma realidade concreta e duradoura, capaz de responder às necessidades presentes e futuras da União Europeia e dos seus Estados-Membros. Este trabalho utiliza a abordagem qualitativa, empregando o método dedutivo para analisar o arcabouço normativo e doutrinário, a fim de construir uma compreensão aprofundada do fenómeno jurídico em estudo.

Palavras-chave: regulação da sustentabilidade, políticas de sustentabilidade; União Europeia; Diretiva da devida diligência e sustentabilidade empresarial.

¹ Professor de Direito Empresarial da Universidade Lusófona (Lisboa e Porto). Doutor em Direito Empresarial pela Universidade de Vigo (Espanha) com a distinção do Prémio Extraordinário de Tese de Doutoramento. Presidente do Instituto Iberoamericano de Estudos Jurídicos – IBEROJUR. E-mail: fabio.veiga@ulusofona.pt

² O presente trabalho foi objeto de uma apresentação oral ministrada pelo autor na 29rd Annual Meeting of Nanterre Network, realizado em maio de 2025 na Università degli Studi di Cagliari, Itália.

Abstract: This paper analyzes the evolution of the concept of sustainability in the European context, highlighting the crucial role of European Union institutions in promoting policies aimed at integrating economic growth with environmental protection and social responsibility. It examines the transition from the initial regulatory framework to the most recent directives, including the Green Deal, the Corporate Sustainability Reporting Directive (CSRD), and the Corporate Sustainability Due Diligence Directive (CS3D), which aim to strengthen corporate transparency and compliance. Special attention is paid to the Omnibus Package, which introduced significant legislative changes, revealing the tensions between environmental ambitions and the economic and geopolitical challenges that characterize the current European scenario. The conclusions emphasize the need for a balanced and synergistic approach between institutions, businesses, and civil society to ensure a sustainable transition that is not just a political objective but becomes a concrete and lasting reality, capable of responding to the present and future needs of the European Union and its Member States. This work uses a qualitative approach, employing the deductive method to analyze the normative and doctrinal framework, to build an in-depth understanding of the legal phenomenon under study.

Keywords: sustainability regulation, sustainability policies; European Union; Corporate Sustainability Due Diligence Directive.

Introdução

Atualmente, a sustentabilidade é um tema central no que tange à aplicação de políticas públicas para mitigar o impacto ambiental gerado pelo desenvolvimento econômico ao longo dos últimos dois séculos. O capitalismo, como modelo social de desenvolvimento, na sua versão clássica, trouxe a ideia de que o desenvolvimento econômico era visto como um processo de acumulação de capital, expansão da produção e crescimento da renda nacional, onde o principal indicador de progresso se baseava no PIB (Produto Interno Bruto).

Esse desenvolvimento, no entanto, ignora alguns fatores importantes, como a manutenção de recursos naturais, a qualidade de vida dos cidadãos, as

questões sociais (como a desigualdade) entre outros fatores específicos regionais (como a preservação da cultura e a proteção de comunidades).

A sustentabilidade, entra, portanto, no debate político e, veremos que também no plano normativo, como uma tentativa de se criar uma política internacional para moldar o comportamento das economias capitalistas no sentido de ajustar o quadro regulatório de grandes empresas, especialmente as empresas transnacionais, cujo objetivo principal declarado por documentos de organizações internacionais (ONU e UE) é o de atingir a neutralidade climática até 2050³.

Para garantir a competitividade de longo prazo da economia, a União Europeia sabe que é essencial criar políticas de sustentabilidade, no sentido de fomentar a transição para uma economia segura, com impacto neutro no clima, tendo resiliência às alterações climáticas e utilizar-se de recursos eficientes numa economia circular. A sustentabilidade ocupa, há já muito tempo⁴, uma posição central no projeto da União Europeia, sendo as suas vertentes social e ambiental refletidas no Tratado da União Europeia (art. 3.º, n.º 3)⁵ e no Tratado sobre o Funcionamento da União Europeia (artigos 11.º e 191.º a 193.º).

³ O Regulamento (UE) 2021/1119, adotado pelo Parlamento Europeu e pelo Conselho da UE em 30 de junho de 2021, conhecido como “Lei Europeia do Clima” (**European Climate Law**), estabelece o quadro legal para alcançar a neutralidade climática na União Europeia, com metas para 2030 e 2050. Este regulamento integra o Pacto Ecológico Europeu e traduz os compromissos climáticos da UE em obrigações legais. Uma das metas do referido Regulamento é a redução de pelo menos 55% das emissões líquidas de gases com efeito de estufa até 2030, em comparação com os níveis de 1990. No plano político, o Regulamento obriga os Estados-membros da UE a alinhar as suas políticas nacionais com a meta de neutralidade climática.

⁴ Embora não seja um documento da União Europeia, o Relatório Brundtland da ONU (Our Common Future) de 1987, foi a primeira formulação internacional do conceito de desenvolvimento sustentável, que mais tarde influenciou fortemente as políticas europeias. Antes, em 1972, a Conferência das Nações Unidas sobre o Meio Ambiente e Desenvolvimento em Estocolmo foi um marco inicial de discussões. Internamente, o Tratado de Maastricht – o Tratado que fundou a União Europeia (TUE), em 1992, foi o primeiro tratado europeu a incluir explicitamente o conceito de “desenvolvimento sustentável” nos objetivos da União Europeia. Trecho-chave (art. 2 do TUE, versão de 1992): “A Comunidade terá por missão promover... um crescimento sustentável e não inflacionário, respeitando o meio ambiente.”

⁵ Art. 3 n.º 3 TUE: “A União estabelece um mercado interno. Empenha-se no desenvolvimento sustentável da Europa, assente num crescimento económico equilibrado e na estabilidade dos preços, numa economia social de mercado altamente competitiva que tenha como meta o pleno emprego e o

1. Conceito Central de Sustentabilidade

A sustentabilidade é apresentada teoricamente, como um conceito sistêmico que une preocupações ambientais, econômicas e sociais. Fundamenta-se no *Relatório Brundtland* das Nações Unidas de 1987, o qual prescreve:

“Desenvolvimento sustentável é aquele que satisfaz as necessidades do presente sem comprometer a capacidade das gerações futuras de satisfazerem as suas próprias necessidades.” (*World Commission on Environment and Development*, 1987, Ch. 2, IV, 1).

Com essa definição, a igualdade ecológica intergeracional, ou seja, a responsabilidade de uma geração pelas consequências de suas ações em todas as gerações subsequentes, é declarada explicitamente⁶. Além disso, o relatório também deixa claro que os desafios ecológicos devem ser considerados em conjunto com o crescimento econômico e a justiça social, pois esses aspectos podem ter impacto significativo nos aspectos ecológicos da sustentabilidade.

Retomando o conceito sistêmico da sustentabilidade, tem-se, portanto, os três pilares da sustentabilidade: o ambiental, o social e o econômico. Na base do conceito, encontra-se o pilar do meio ambiente, pelo qual visa-se a preservação dos ecossistemas e recursos naturais da humanidade como um todo. Este pilar é o mais debatido nas políticas dos organismos internacionais, e é o que mais tem levantado discussões de regulação. O segundo pilar é o social, consagrado com fundamento nos valores de equidade, inclusão e justiça entre indivíduos e grupos. O terceiro

progresso social, e num elevado nível de proteção e de melhoramento da qualidade do ambiente. A União fomenta o progresso científico e tecnológico”.

⁶ Cfr. FISCHER [et al]. *Sustainable Business Managing the Challenges of the 21st Century*, SpringerBriefs in Business, Springer, 2023, p. 17.

pilar, é bastante discutido em relação à sua promoção quanto aos mecanismos que os Estados devem adotar relativamente à eficiência e estabilidade econômica de longo prazo.

Os autores FISCHER⁷ (et al, 2023) desenvolvem uma análise baseada no que denominam princípios-chave da sustentabilidade: *eficiência*, *consistência* e *suficiência*. Pela eficiência, entende-se que se deve fazer mais com menos recursos. A vertente da consistência significa que se deve alinhar a produção e o consumo a ciclos naturais. Por sua vez, a suficiência está relacionada à redução do consumo excessivo e o respeito aos limites planetários. Todas essas abordagens visam reduzir o consumo de recursos. Naturalmente, nenhuma delas pode reduzir os impactos ambientais a zero, mas, se aplicadas em conjunto, podem melhorar significativamente a sustentabilidade de um sistema relacionada aos recursos.

No conceito de sustentabilidade encontra-se uma outra característica que transcende a individualidade de regiões, países e continentes: *a interdependência global*. Há que pensar, nesse sentido, que a sustentabilidade deve ser aplicada numa escala planetária considerando as interconexões entre países, economias e culturas. Adicionalmente, as responsabilidades devem ser compartilhadas por todos os atores globais. Nesta última ideia conceitual, encontram-se as questões de políticas normativas adotadas nos últimos anos, especialmente após o debate sobre os Objetivos do Desenvolvimento Sustentável (ODS) das Nações Unidas, que de certa forma influenciou legislações ao redor do mundo.

2. Crescimento econômico

⁷ Cfr. FISCHER [et al]. Sustainable Business Managing the Challenges of the 21st Century, SpringerBriefs in Business, Springer, 2023, p. 19-20.

Historicamente, as nações que alcançaram alto nível de desenvolvimento econômico foram capazes de fortalecer simultaneamente suas instituições e promover inclusão social⁸. O crescimento econômico é imprescindível para a humanidade, pois sem desenvolvimento econômico, é improvável que os avanços em saúde, educação e qualidade de vida sejam sustentáveis ao longo do tempo.⁹

No entanto, o crescimento econômico, conforme tradicionalmente entendido, ignora os custos ecológicos e não garante distribuição equitativa de benefícios. O esgotamento dos recursos naturais, a poluição e o aumento das desigualdades são frequentemente mascarados por estatísticas de crescimento positivo. O que se chama de “crescimento” pode, na verdade, representar a destruição de capital natural ou a exploração social.

Conforme Fischer (et al. 2023), é preciso redefinir o papel do crescimento dentro de uma economia sustentável: em alguns casos, pode ser necessário adotar estratégias de crescimento seletivo, crescimento zero ou até mesmo decrescimento em setores com impacto ambiental desproporcional¹⁰. A sustentabilidade exige que o crescimento seja compatível com os limites ecológicos do planeta e que promova justiça intergeracional. Em vez de buscar crescimento por si só, a nova economia deve priorizar o bem-estar humano, a equidade e a resiliência ecológica como objetivos centrais.

3. Antecedentes da regulação europeia da sustentabilidade

⁸ Cfr. NORTH, D. C. In: *Institutions, Institutional Change and Economic Performance*. Political Economy of Institutions and Decisions. Cambridge University Press; 1990.

⁹ Cfr. WORLD BANK. *World Development Report – Trading for development in the age of global value chains*, 2020, p. 81. Disponível em: <https://digitallibrary.un.org/record/3850531?v=pdf> (acedido em 10 jul. 2025).

¹⁰ Cfr. FISCHER [et al]. *Sustainable Business Managing the Challenges of the 21st Century*, SpringerBriefs in Business, Springer, 2023, p. 12-13.

A União Europeia tem regulado a sustentabilidade no âmbito empresarial mais intensamente após os anos 2020, quando lançou o Pacto Ecológico Europeu (*Green Deal*), em 2019, que passou a ter vigência no ano de 2020. Este documento europeu é o contributo da UE para o Acordo de Paris (2015), no qual a UE e todos os seus países-membros ratificaram, fixando, com isso, o objetivo de manter o aquecimento global a um máximo de +1,5 °C em comparação com os níveis pré-industriais.

A partir do Pacto Ecológico Europeu (PEE), o Parlamento Europeu passou a regular a sustentabilidade com uma série de instrumentos normativos. Não significa dizer que anteriormente ao PEE, não houvesse normas obrigatórias nessa matéria, até porque, o Direito do Ambiente está amplamente regulado por normas internas dos países-membros da UE. Contudo, há algum tempo, no presente século, nota-se uma crescente regulação de matérias relacionadas ao meio-ambiente nos setores empresariais, considerando os movimentos da Responsabilidade Social Corporativa¹¹ (RSC) e do ESG (*environment, social and Governance*). Esse movimento, iniciado por BOWEN nos anos 50 do século XX, foi se intensificando em torno dos movimentos sociais e ambientais a partir dos anos 70 (direitos civis, ambientais, trabalhistas), pelo qual as empresas passaram a ser mais pressionadas por suas condutas. Entre os anos 90 e início do milênio, a RSC passa a ser vista como parte da *gestão estratégica* das empresas, ligando os “atos de responsabilidade social” à reputação da empresa, à sua marca e ao desempenho financeiro¹². PORTER e KRAMER (2006) argumentam que a RSC deve ser

¹¹ A obra que inaugurou teoricamente a disciplina da RSC foi a “Social Responsibilities of the Businessman” de Howard Rothmann Bowen, publicada em 1953. Bowen defendia que os empresários deveriam considerar os impactos sociais em suas decisões. Cfr. BOWEN, Howard Rothmann. Social Responsibilities of the Businessman, Harper: New-York, 1953. Antes de Bowen, nos seus primórdios, a RSC era vista com uma finalidade filantrópica, no qual empresários como Andrew Carnegie e John Rockefeller defendiam o uso da riqueza privada para o bem público (ex., criação de fundações e bibliotecas).

¹² Cfr. PORTER, M. E.; KRAMER, M. R. “Strategy and society: The link between competitive advantage and corporate social responsibility”, in: Harvard Business Review, 84(12), 2006, p.78-92.

integrada à estratégia central das empresas, e não tratada como um apêndice filantrópico. Nesse sentido, as empresas podem gerar “valor compartilhado” (*shared value*) — ou seja, criar benefícios econômicos enquanto resolvem problemas sociais e ambientais. A vantagem competitiva pode ser ampliada quando as práticas de RSC forem alinhadas aos recursos, competências e o *core business* da empresa. A partir disso, visando uma estratégia de gestão, criam-se códigos de conduta corporativos, normas internas que procuram padronizar modelos de comportamentos que permeiam a estrutura diretiva e funcional das empresas, cujo resultado pretendido é a implementação de condutas empresariais éticas. Normas como ISO 14001 (meio ambiente) e o início da *Global Reporting Initiative* (GRI) ajudam a padronizar essas práticas.

O termo ESG (*Environmental, Social and Governance*) começou a ser utilizado oficialmente em 2004, e sua origem está associada ao documento da ONU “*Who Cares Wins – Connecting Financial Markets to a Changing World*”, iniciativa do Pacto Global da ONU (*UN Global Compact*), que teve apoio do Banco Mundial e do IFC – *International Finance Corporation*¹³. No relatório *Who Cares Wins*, líderes financeiros e investidores globais foram convocados para incorporar critérios ambientais, sociais e de governança (ESG) nas análises de investimentos e decisões empresariais.

3.1. Quadro jurídico europeu da regulação da sustentabilidade empresarial

Disponível em: <https://hazrevista.org/wp-content/uploads/strategy-society.pdf> (acedido em 20 jul. 2025).

¹³ Cfr. UNITED NATIONS THE GLOBAL COMPACT. *Who Cares Wins – Connecting Financial Markets to a Changing World*, Geneva, 2004. Disponível em: <https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/280911488968799581/who-cares-wins-connecting-financial-markets-to-a-changing-world> (acedido 20 jul. 2025).

A Diretiva sobre *Divulgação de Informações Não Financeiras* 2014/95/EU, conhecida pela sigla inglesa NFRD deu início às obrigações de informações não financeiras por parte das grandes empresas. Sabemos que as informações financeiras são obrigações típicas de toda e qualquer empresa comercial devido às prestações de contas de caráter contabilístico legalmente imposto à publicidade das empresas. Contudo, a partir desta Diretiva 2014/95/EU, as grandes empresas e grupos de empresas (especialmente aquelas cotadas em Bolsa de Valores) passam a ter a obrigação de divulgação de informações não financeiras e informações sobre a diversidade. Essa diretiva exige que certas empresas, principalmente grandes entidades de interesse público, publiquem um relatório de *Demonstração Não Financeira* contendo informações sobre questões ambientais, sociais, respeito pelos direitos humanos e combate à corrupção e suborno. No ano 2022, a Diretiva NFRD foi substituída pela atual Diretiva 2022/2464/UE, CSRD – Diretiva sobre o Relato de Sustentabilidade Corporativa (*Corporate Sustainability Reporting Directive*) –, na qual propõe aumentar a transparência e a comparabilidade das informações não financeiras divulgadas pelas empresas. No mesmo sentido da Diretiva anterior, exige que as empresas reportem sobre os seus impactos ambientais, sociais e de governança, neste ponto, obriga às grandes empresas cotadas a elaborarem Relatórios ESG de forma mais detalhada e padronizada.

Recentemente, em 13 de junho de 2024 o Parlamento Europeu publicou a Diretiva 2024/1760, sobre Devida Diligência e Sustentabilidade Empresarial (*Corporate Sustainability Directive Due Diligence*) habitualmente utilizam-se as siglas CSDDD ou CS3D. A Diretiva CS3D propõe, em síntese, um dever corporativo substantivo para algumas empresas realizarem a *devida diligência* para promover práticas empresariais responsáveis e sustentáveis, exigindo que as empresas identifiquem, previnam, mitiguem e reparem os impactos negativos sobre os direitos humanos e o meio ambiente nas suas operações e cadeias de valor globais.

3.2. Pacote Omnibus de simplificação

Em 26 de fevereiro de 2025, a Comissão Europeia adotou um pacote de propostas para simplificar as regras da União Europeia sobre sustentabilidade e, teoricamente, aumentar a competitividade, o denominado *Pacote Omnibus de Simplificação*. Entre outras coisas, o pacote propõe a aplicação da Diretiva CSRD apenas às maiores empresas (aquelas com mais de 1.000 funcionários), concentrando as obrigações de comunicação de sustentabilidade nas empresas com maior probabilidade de causar os maiores impactos nas pessoas e no meio ambiente. Além disso, busca garantir que os requisitos de comunicação de informações para grandes empresas não sobrecarreguem as empresas menores em suas cadeias de valor.

O que é este “Pacote Omnibus” neste contexto?

Trata-se de uma versão reduzida e simplificada da Diretiva original sobre *due diligence* empresarial, negociada em 2024 (CS3D), porque a versão anterior enfrentou resistência política de alguns Estados-Membros (como Alemanha e Itália), preocupados com o impacto económico nas empresas.

O que o pacote simplificado alterou?

a) A redução no número de empresas incluiu: o limite foi aumentado para empresas com mais de 1.000 funcionários e um volume de negócios global superior a € 450 milhões, excluindo assim muitas empresas de médio porte.

b) Exclusão de alguns setores de risco: a versão original incluía setores de alto risco (como têxtil, mineração e agricultura), mesmo quando envolvia empresas de menor porte. Esta parte foi removida.

c) Eliminação da obrigação direta de *due diligence* em toda a cadeia de valor: a nova versão reduz o escopo da cadeia de suprimentos abrangida, limitando a responsabilidade direta das empresas.

d) Compromissos climáticos menos vinculativos: a exigência de alinhamento do modelo de negócios com o Acordo de Paris foi diluída, de modo que não é obrigatória para todas as empresas.

e) Foco exclusivo em grandes grupos empresariais: o impacto sobre as PMEs (pequenas e médias empresas) é evitado, o que era uma grande preocupação para alguns governos.

Nesse sentido, indaga-se qual é o objetivo político do pacote?

Compreendemos que é o de facilitar a aprovação final da Diretiva CS3D, teoricamente, preservando o cerne da proposta, ou seja, responsabilizar grandes empresas por graves violações de direitos humanos e ambientais em suas cadeias de suprimentos, ainda que de forma mais limitada.

Mas, politicamente, parece-nos que a UE sentiu o impacto global dos novos movimentos geopolíticos, como a guerra na Ucrânia – que desencadeou o risco energético na Europa –, os conflitos no médio-orient (que também aumenta o risco energético e os riscos nos transportes de mercadorias). A sustentabilidade, como foi promovida inicialmente nos documentos oficiais europeus, sofreu pela pressão externa (guerras e incertezas no mundo), assim como sofreu pela pressão interna – Alemanha e Itália – pediram maior flexibilização na aplicação das Diretivas.

Nesse sentido, em abril de 2025 o Parlamento europeu aprovou a Diretiva EU 2025/794 – *Stop the Clock*, no sentido de prorrogar os prazos de aplicação da Diretiva sobre Devida Diligência e Sustentabilidade empresarial (UE) 2024/1760 – que a princípio deviam ser transpostos a partir de 26 de julho 2026. Desse modo, concedeu-se novos prazos, que se inicia em julho de 2027 e vai até 2029.

Conclusões

Em suma, a sustentabilidade não é apenas um objetivo ético, mas agora um elemento essencial da governança econômica e política global. A União Europeia tem desempenhado um papel fundamental na promoção de políticas e instrumentos regulatórios capazes de orientar as empresas para práticas responsáveis, conciliando competitividade e respeito aos limites ecológicos. No

entanto, revisões legislativas recentes, como o Pacote Omnibus e a Diretiva Stop the Clock, evidenciam as tensões entre ambições ambientais e pressões econômicas e geopolíticas.

O futuro da sustentabilidade na Europa dependerá da capacidade de manter um equilíbrio entre a necessidade de proteger o meio ambiente e os direitos humanos e a de garantir o crescimento econômico e a estabilidade social. Portanto, é essencial que instituições, empresas e sociedade civil cooperem sinergicamente, para que a transição para um modelo de desenvolvimento sustentável não seja apenas um imperativo político, mas uma realidade concreta e duradoura.

BIBLIOGRAFIA

BOWEN, Howard Rothmann. *Social Responsibilities of the Businessman*, Harper: New-York, 1953.

FISCHER [et al]. *Sustainable Business Managing the Challenges of the 21st Century*, SpringerBriefs in Business, Springer, 2023. Disponível em: https://link.springer.com/chapter/10.1007/978-3-031-25397-3_2?utm_source=chatgpt.com (acedido em 6 jul. 2025).

GADINIS, S.; MIAZAD, A. The ESG Information System, *Seattle University Law Review*, 47, n.º 2, 2024, p. 695-732. Disponível em: <https://digitalcommons.law.seattleu.edu/sulr/vol47/iss2/13/> (acedido em 12 jul. 2025).

GINER INCHAUSTI, B. (2021). “Novedades en el ámbito de la regulación de los informes de sostenibilidad”, in: *Economistas*, n.º 175, 2021, págs. 8-13. Disponible en: <https://privado.cemad.es/revistas/online/Revistas/Economistas-Num-175-A4-V1-WEB.pdf/191> (acedido 28 sept. 2025).

NORTH, D. C. In: *Institutions, Institutional Change and Economic Performance*. Political Economy of Institutions and Decisions. Cambridge University Press; 1990.

PORTER, M. E.; KRAMER, M. R. “Strategy and society: The link between competitive advantage and corporate social responsibility”, in: *Harvard Business Review*, 84(12), 2006, p.78-92. Disponível em: <https://hazrevista.org/wp-content/uploads/strategy-society.pdf>

UNITED NATIONS THE GLOBAL COMPACT. *Who Cares Wins – Connecting Financial Markets to a Changing World*, Geneva 2004. Disponível em: <https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/280911488968799581/who-cares-wins-connecting-financial-markets-to-a-changing-world>

VEIGA, Fábio da Silva. “A criação de valor da empresa socialmente responsável na perspectiva jurídica do interesse social”, in: *Estudos de Direito, Desenvolvimento e Novas Tecnologias*, Porto: Instituto Iberoamericano de Estudos Jurídicos e Universidade Lusófona do Porto, 2020, p. 80-89. Disponível em: https://biblioteca.web.uah.es/Libros/Estudios_de_Direito_Developolvimento_e_novas_tecnologias.pdf (acedido em 28 set. 2025)

WORLD BANK. *World Development Report – Trading for development in the age of global value chains*, 2020. Disponível em: <https://digitallibrary.un.org/record/3850531?v=pdf> (acedido em 10 jul. 2025).

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