

# CATÓLICA LAW REVIEW

VOLUME II  
n.º 1  
jan. 2018

## DIREITO PÚBLICO

Guilherme da Fonseca Teixeira

Hakim Yasir Abbas

Patrícia Fragoso Martins

Ricardo Rodrigues de Oliveira

Catarina Santos Botelho



CATÓLICA

RESEARCH CENTRE  
FOR THE FUTURE OF LAW

---

LISBOA - PORTO

# CATÓLICA LAW REVIEW

VOLUME II \ n.º 1 \ janeiro 2018

DOCTRINA

**Guilherme da Fonseca Teixeira**

Mestrando da Escola de Lisboa da Faculdade de Direito  
da Universidade Católica Portuguesa

**Hakim Yasir Abbas**

Assistant Professor  
University of Kashmir

**Patrícia Fragoço Martins**

Professora Auxiliar da Escola de Lisboa da Faculdade de Direito  
da Universidade Católica Portuguesa

**Ricardo Rodrigues de Oliveira**

PhD researcher at the European University Institute, Florence

RECENSÃO

**Catarina Santos Botelho**

Professora Auxiliar da Escola do Porto da Faculdade de Direito  
da Universidade Católica Portuguesa

UNIVERSIDADE CATÓLICA EDITORA

**Proprietário**

Católica Research Centre for the Future of Law  
Católica Law Review  
VOLUME II \ n.º 1 \ janeiro 2018

**Conselho de Direção**

Rui Medeiros  
Catarina Santos Botelho  
Elsa Vaz de Sequeira  
Gonçalo Almeida Ribeiro  
Maria d'Oliveira Martins  
Sofia Pais

**Redação e Administração**

Católica Research Centre for the Future of Law  
Faculdade de Direito  
Universidade Católica Portuguesa  
Palma de Cima 1649-023 Lisboa  
Tel. (351) 21 721 41 78 | Fax. (351) 21 721 41 77  
catolicallawreview.fd@ucp.pt | www.fd.lisboa.ucp.pt

Este trabalho é financiado por fundos nacionais através da FCT – Fundação para a Ciência e a Tecnologia, I.P., no âmbito do projeto Ref.ª UID/DIR/04859/2013

© Universidade Católica Editora

Revisão Editorial	António Brás
Capa e conceção gráfica	Ana Luísa Bolsa   4 ELEMENTOS
Paginação	acentográfico
Impressão	Sersilito – Empresa Gráfica, Lda.
Depósito Legal	420225/17
Data	janeiro 2018
Tiragem	300 exemplares
Periodicidade	quadrimestral
ISSN	2183-9336



Universidade Católica Editora  
Palma de Cima 1649-023 Lisboa  
Tel. (351) 217 214 020 | Fax. (351) 217 214 029  
uce@uceditora.ucp.pt | www.uceditora.ucp.pt

# ÍNDICE

---

## 9 Nota da Direção

---

### DOCTRINA

- 11 Identidade e autodeterminação informacional no novo Regulamento Geral de Proteção de Dados: a inevitável privatização dos deveres estaduais de proteção

**Guilherme da Fonseca Teixeira**

**Resumo:** A problemática da proteção de dados pessoais afigura-se como uma realidade incontornável da sociedade de risco hodierna, na qual o «tempo tecnológico» não se compadece com o «tempo jurídico», impondo-se à função administrativa a observância de um conjunto de regras e deveres de regulação jurídica das atividades de recolha, armazenamento, tratamento e utilização de dados pessoais que se revelam fundamentais para a tutela efetiva das posições jurídicas subjetivas dos particulares.

Ao longo do presente artigo, procurar-se-á analisar a jusfundamentalidade autónoma do direito à proteção de dados no contexto do direito nacional e do direito comparado, visando delimitar o seu recorte dogmático próprio. Caberá, de igual modo, versar, de forma crítica, sobre as soluções adotadas pelo legislador europeu, na atual revisão do quadro normativo da UE, que assumem um papel determinante na conformação do quadro da legislação nacional sobre proteção de dados.

**Palavras-chave:** direitos fundamentais; sociedade de risco; proteção de dados; deveres estaduais de proteção; encarregado de proteção de dados.

**Abstract:** The problematic issue of personal data protection appears to be an unavoidable reality of today's risk society, in which "technological time" is not compatible with "legal time", imposing on the administrative function the observance of a set of rules and regulation duties regarding the collection, storage, processing and use of personal data that proves to be fundamental to the effective protection of the subjective legal positions of individuals.

Throughout this article, it will be sought to analyze the autonomous fundamental nature of the right to data protection in the context of national and comparative law, in order to identify its own dogmatic shape.

It will be equally important to critically appraise the solutions that are adopted by the European legislator in the current revision of the EU regulatory

framework, which has a decisive role in shaping the national legal system on data protection.

**Keywords:** fundamental rights; risk society; data protection; State's protection duties; data protection officer.

39 The muddled science of comparative law: mending terminology and mapping its' benefits within indian constitutional discourse

**Hakim yasir abbas**

**Abstract:** The article is an attempt to critically analyse the definitional predicament faced by “comparative law” as an independent subject of legal studies. It endeavours to first of all highlight the definitional problem within a specific literature, particularly American. This is being done for two reasons. Firstly, in order to highlight the lack of similar discourse in India. Secondly, to emphasize that the core issues related to comparative law which exist in USA arise in relation to India as well, particularly within Indian constitutional jurisprudence. The article then argues how the use of “jurocomparatology” as a broad term can be used to effectively deal with this definitional predicament. Moreover, the article also tries to explain how lack of such dialogue in India has led to discriminatory use of foreign authorities and international law by the Indian constitutional courts. A subsequent attempt has been made to highlight various benefits of comparative law as they exist in American jurisprudence and how same have manifested themselves within Indian constitutional jurisprudence.

**Keywords:** Comparative Law, Jurocomparatology, Constitutionalism, International Law, Law Reforms, Legal Methodology.

**Resumo:** O artigo é uma tentativa de analisar criticamente a dificuldade enfrentada pelo «direito comparado» no que toca a ser tratado como um assunto independente dentro dos estudos legais. Trata-se, em primeiro lugar, de destacar o problema dentro de uma literatura específica, particularmente a americana. O que se faz por dois motivos. Em primeiro lugar, para destacar a falta de discurso semelhante na Índia. Em segundo lugar, para enfatizar que os principais problemas relacionados com o direito comparado que existem nos EUA também existem na Índia, particularmente na jurisprudência constitucional indiana. O artigo discute então como o uso da «juscomparatologia» como um termo amplo pode ser usado para lidar efetivamente com esta situação. Além disso, o artigo também tenta explicar como a falta desse diálogo na Índia levou ao uso discriminatório das autoridades estrangeiras e do direito internacional pelos tribunais constitucionais indianos. No final, faz-se uma tentativa de destacar vários benefícios do direito comparado, tal como eles se apresentam na jurisprudência americana e como se manifestaram dentro da jurisprudência constitucional indiana.

**Palavras-chave:** Direito Comparado, Juscomparatologia, Constitucionalismo, Direito Internacional, Reformas Legais, Metodologia Legal.

77 Things we lost in the fire: EU constitutionalism after Brexit  
**Patrícia Fragoso Martins**

**Abstract:** It is said that Brexit is irreversible. The perspective of withdrawal by the United Kingdom of the European Union represents the most significant institutional challenge for the European project. It is feared that withdrawal dramatically changes the nature of European integration. Article 50 TEU is, as a rule, considered to be an emblematic manifestation of the intergovernmental nature of EU cooperation, contrasting with the trend towards a more perfect form of federal integration. Yet the exact legal and political consequences flowing from Brexit remain unknown. In any case, it is clear that the process involves more than the loss of one Member State. The trust on an ever-growing project grounded on the so-called “spill-over” effects seems compromised. Notwithstanding, at the same time, Brexit represents a unique opportunity for the affirmation of the core values of EU constitutionalism. The purpose of this paper is to reflect on how withdrawal reinforces the constitutional nature of the Union under whose lens it necessarily needs to be assessed and negotiated.

**Keywords:** Brexit, article 50, withdrawal from the EU, EU constitutionalism, federalism, secession.

**Resumo:** Tem-se dito que o Brexit é irreversível. A perspectiva da saída do Reino Unido da União Europeia representa o desafio institucional mais significativo de sempre para o projeto europeu. Neste âmbito, teme-se que a saída represente uma alteração dramática da natureza da integração europeia. Na verdade, o artigo 50.º do TUE é, em regra, considerado uma manifestação emblemática da natureza intergovernamental da cooperação europeia, em contraste com a tendência para uma forma mais perfeita de integração federal. Sem prejuízo, as exatas consequências políticas e jurídicas do Brexit são ainda desconhecidas. Certo que o processo envolve mais do que a perda de um Estado-membro. A crença num projeto sempre crescente, fundado nos chamados efeitos «*spill-over*», parece comprometida. Não obstante, importa notar que, ao mesmo tempo, o Brexit representa uma oportunidade única para a afirmação dos valores centrais do constitucionalismo europeu. Neste contexto, o propósito deste artigo é refletir na forma como a saída de um Estado-membro reforça a natureza constitucional da União sob a lente da qual tem, necessariamente, de ser entendida e negociada.

**Palavras-chave:** Brexit, artigo 50, saída da UE, constitucionalismo da UE, federalismo, secessão.

- 95 Yet another prying eye  
Surveillance as a consented cultural phenomenon?  
**Ricardo Rodrigues de Oliveira**

**Abstract:** Authorities locate citizens through their e-trail because everything we do online is recorded. Information technologies are transforming our connections but most people forget using electronic devices is a trade-off. We are surrounded by tools that can trace our steps; yet, the desire to keep up to date with a fast-moving reality has made individuals relinquish secrecy and privacy in their daily relations. This paper is a nutshell reflection on what's happening and resorts to the notion of consent to explain the depth of modern surveillance practices. It begins by depicting a random day focusing on gadgets that monitor us. It continues by looking at surveillance and shedding light on critical discussions on the topic; and common yet misleading slogans head the following sections. The main argument that surveillance is becoming a cultural phenomenon through technological development is presented in the last segment. It makes way for the conclusions, such as sustainability and transparency being keys to unlocking a healthier tech future.

**Keywords:** IT; surveillance; secrecy; data; consent.

**Resumo:** As autoridades localizam os cidadãos através do seu e-rasto porque tudo o que fazemos *online* é registado. As tecnologias da informação estão a transformar as nossas ligações, mas a maioria das pessoas esquece-se que usar aparelhos eletrónicos é uma troca. Estamos rodeados por ferramentas que podem seguir os nossos passos; porém, o desejo de nos mantermos atualizados com uma realidade veloz tem levado os indivíduos a abdicar do sigilo e privacidade nas suas relações diárias. Este trabalho é uma reflexão concisa do que está a suceder e recorre à noção de consentimento para explicar a profundidade das técnicas modernas de vigilância. Começa por retratar um dia aleatório com enfoque nos dispositivos que nos monitorizam. Continua olhando para a vigilância e trazendo luz a discussões essenciais sobre o assunto; e comuns, embora traiçoeiros, *slogans* titulam as secções seguintes. O principal argumento de que a vigilância está a tornar-se um fenómeno cultural através do desenvolvimento tecnológico é apresentado no último segmento. Este prepara o caminho para as conclusões, tais como a sustentabilidade e a transparência serem chaves para se desbloquear um futuro tecnológico mais saudável.

**Palavras-chave:** TI; vigilância; sigilo; dados; consentimento.

---

RECENSÃO

- 129 *The Foundations and Traditions of Constitutional Amendment*  
**Catarina Santos Botelho**





## Nota da Direção

---

O primeiro número de 2018 representou para a *Católica Law Review* um grande desafio. Pela primeira vez, editamos uma revista com artigos que resultam inteiramente de uma *call for papers* e, simultaneamente, de um processo sério de *peer review*.

Terminamos este processo de seleção, baseado num sistema de *double blind peer review*, com quatro excelentes artigos de Guilherme da Fonseca Teixeira (Mestrando da Católica – Lisboa); Hakim Yasir Abbas (University of Kashmir); Patrícia Fragoso Martins (Católica – Lisboa); e Ricardo Rodrigues de Oliveira (PhD researcher at the European University Institute, Florence). Contamos ainda com uma recensão de Catarina Santos Botelho (Católica – Porto).

O contributo de Guilherme da Fonseca Teixeira versa sobre o direito fundamental à proteção de dados pessoais, analisando criticamente as soluções adotadas pelo legislador europeu que assumem um papel determinante na conformação do quadro da legislação nacional sobre esta matéria. O texto de Hakim Yasir Abbas trata sobre o direito comparado, tal como é visto nos Estados Unidos e na Índia, enfatizando que os principais problemas relacionados com o direito comparado que existem nos EUA também existem na Índia, particularmente na jurisprudência constitucional indiana. O artigo de Patrícia Fragoso Martins reflete acerca do Brexit, explicando como a saída do Reino Unido pode representar uma oportunidade única para a afirmação dos valores centrais do constitucionalismo europeu. Ricardo Rodrigues de Oliveira explica como as nossas vidas estão a ser transformadas pelas ligações que fazemos *online* e pelo e-rasto que deixamos, e procura, através da noção de consentimento, encontrar as chaves para se desbloquear um futuro tecnológico mais saudável.

A recensão de Catarina Santos Botelho analisa o livro *The Foundations and Traditions of Constitutional Amendment*, editado por Richard Albert (Texas-Austin), Xenophon Contiades (Centre for European Constitutional Law) e Alkmene Fotiadou (Centre for European Constitutional Law), pela Editora Hart Publishing.

Mais uma vez, a preparação deste número constituiu um exercício estimulante, revelador da potencialidade que a *Católica Law Review* tem, como polo de um debate científico, que se quer aberto ao mundo.

## Editorial Note

---

The first issue of 2018 represented a major challenge for the Catholic Law Review. For the first time, we have edited an issue with articles that are entirely the result of a call for papers and a serious peer review process.

We have finished this selection process, based on a double blind peer review system, with four excellent articles by Guilherme da Fonseca Teixeira (Católica – Lisboa); Hakim Yasir Abbas (University of Kashmir); Patrícia Fragoso Martins (Católica – Lisboa); and Ricardo Rodrigues de Oliveira (PhD researcher at the European University Institute, Florence). We also have a book review by Catarina Santos Botelho (Católica – Porto).

The contribution of Guilherme da Fonseca Teixeira deals with the fundamental right to the protection of personal data, analyzing critically the solutions adopted by the European legislator that play a decisive role in shaping the framework of national legal system on this matter. Hakim Yasir Abbas's text reflects on comparative law, as it is seen in the United States and India, emphasizing that the core issues related to comparative law which exist in USA arise in relation to India as well, particularly within Indian constitutional jurisprudence. The article by Patrícia Fragoso Martins is about Brexit, explaining how it represents a unique opportunity for the affirmation of the core values of EU constitutionalism. Ricardo Rodrigues de Oliveira explains how our lives are being transformed by the connections we make online and by the e-trail we leave and seeks, through the notion of consent, to find the keys to unlock a healthier technological future.

The book review presented by Catarina Santos Botelho comments *The Foundations and Traditions of Constitutional Amendment*, edited by Richard Albert (Texas-Austin), Xenophon Contiades (Centre for European Constitutional Law) e Alkmene Fotiadou (Centre for European Constitutional Law), by the Hart Publishing.

Once again, the preparation of this issue was a stimulating exercise, revealing the potentiality that the Catholic Law Review has, as an instrument of a scientific debate that is open to the world.

# Identidade e autodeterminação informacional no novo Regulamento Geral de Proteção de Dados: a inevitável privatização dos deveres estaduais de proteção

**Guilherme da Fonseca Teixeira<sup>\*</sup>**

Mestrando da Escola de Lisboa da Faculdade de Direito  
da Universidade Católica Portuguesa

---

## SUMÁRIO

1. Introdução
2. Da jusfundamentalidade do direito à proteção de dados
3. Revisão do quadro normativo de proteção de dados pessoais:  
alterações, inovações e desafios
4. O encarregado de proteção de dados (*Data Protection Officer*)  
e a privatização dos deveres estaduais de proteção
5. Conclusão
6. Bibliografia

---

\* Licenciado em Direito pela Faculdade de Direito da Universidade de Lisboa. Mestrando em Direito Administrativo na Faculdade de Direito da Universidade Católica Portuguesa – Escola de Lisboa, encontra-se atualmente a elaborar a dissertação de natureza científica. O presente artigo corresponde, com algumas alterações, ao relatório final apresentado na cadeira de Proteção Administrativa de Direitos Fundamentais, lecionada pelo Professor Doutor Jorge Pereira da Silva. *E-mail*: guilhermefonsecateixeira@gmail.com.

## 1. Introdução

Na sociedade atual, em que se inscreve a democratização das tecnologias de informação, os cidadãos vêm-se confrontados, embora de forma silente na «penumbra» da legalidade que lhes é cognoscível, com uma tensão dialética entre o fenómeno de recolha, armazenamento, tratamento e transmissão de dados de carácter pessoal<sup>1</sup> e o seu próprio estatuto jurídico-cívico.

De facto, o desenvolvimento tecnológico exponencial no domínio do controlo, vigilância e segurança na transmissão de dados informatizados<sup>2</sup>, registado nas últimas décadas do século xx, ficou marcado, de forma paradigmática, por: i) novas tecnologias com elevada capacidade de processamento, de transmissão e de armazenamento de dados; ii) redes interconectadas de partilha de informação; e iii) tecnologias de localização geográfica em tempo real.

Ora, afigura-se problemático, do ponto de vista da tutela dos bens jusfundamentais dos cidadãos, reconhecer que lhes é, em certa medida, desconhecido que a recorrente disponibilização a terceiros de múltiplos dados pessoais (v.g., nome, género, filiação, origem étnica, morada, profissão, elementos clínicos, dados genéticos, crenças religiosas, ideologias políticas, gostos literários e musicais, opções de consumo), pese embora se insira num momento quotidianamente determinado ou determinável e com um fim aparentemente específico ou concretamente delimitável, se tornou uma constante ineliminável da sociedade atual<sup>3</sup>, que pode, inclusivamente, permitir aos detentores materiais dos seus dados um uso indistinto, ilegítimo e indiscriminado dos mesmos e, *in extremis*, culminar na elaboração de bancos de ficheiros consolidados, contendo um perfil detalhado sobre cada indivíduo, numa ou em diversas dimensões suas.

---

1 Neste sentido, ROSA MATA CÁN, María, 2011, *Protección de Datos Personales en la Sociedad de la Información y la Vigilancia*, La Ley, Madrid, p. 15. Considera-se que o grau de perceção do risco tecnológico influencia decisivamente a tomada de decisão pública (em especial, legislativa e administrativa), sendo os sujeitos relevantes na perceção do risco quanto à problemática da proteção de dados os seguintes: i) público em geral e comunidades locais; ii) autoridades públicas; iii) profissionais do sector; iv) trabalhadores; v) peritos; vi) comunicação social.

2 Cfr. GRAHAM, Stephen, 1988, *Spaces of surveillant simulation: New Technologies, digital representations and material geographies*, Environment and Planning D: Society and Space, pp. 483 e ss.

3 Neste sentido, TEIXEIRA, Maria Leonor da Silva, 2013, «A União Europeia e a protecção de dados pessoais: "Uma visão futurista"?»», in *Revista do Ministério Público*, n.º 135, p. 66, afirma que «A evolução científica, o desenvolvimento dos meios de comunicação e das tecnologias informáticas permitem a dispersão quase imediata e incontrolável dos dados pessoais recolhidos [...] torna-se, pois, essencial dotar o cidadão de meios que lhe permitam controlar, em cada momento, quem, como, onde e por que razão circulam ou são conhecidas quaisquer informações sobre parcelas da sua vida mais ou menos íntima, mais ou menos privada».

Verifica-se, portanto, a pouco e pouco, um fenómeno de crescente *captura silenciosa* da identidade pessoal de cada um, com um potencial lesivo, direto ou indireto, quase ilimitado do bloco de direitos fundamentais constitucionalmente reconhecido aos particulares.

Ainda que se tome como indispensável ou, de certo modo, inevitável algum grau de renúncia à intimidade e privacidade nos tempos modernos (*v.g.*, no acesso e no desempenho de determinados cargos profissionais, na simples atuação enquanto operador económico do mercado ou mero consumidor), tendo em vista as exigências que decorrem, nos casos de atividades jurídico-administrativas exercidas por entidades públicas ou entidades privadas no exercício de prerrogativas ou de poderes públicos, dos princípios da transparência, da imparcialidade, da boa administração e dos demais ditames e princípios gerais da atividade administrativa, também se há de reconhecer que o potencial lesivo subjacente sobre os direitos fundamentais dos particulares é bastante considerável, sobretudo no âmbito das suas esferas pessoal, familiar e profissional.

Na verdade, revelando os dados disponibilizados uma «imagem» da pessoa (nas suas várias dimensões), tais informações podem vir a ser utilizadas para fins contrários ao princípio da dignidade da pessoa humana<sup>4</sup>, instrumentalizando o titular dos dados num contexto de situações verdadeiramente patológicas que, por isso, justificam forte prevenção e repressão jurídica, moral e ética, não apenas em sede de atuação das entidades públicas, mas também de entes privados no exercício de funções públicas<sup>5</sup>.

A tensão entre as diferentes valorações em colisão afigura-se manifesta no contexto atual: se, por um lado, se exige a construção de uma esfera de liberdade dos cidadãos enquanto indivíduos com capacidade de autodeterminação pessoal, sem ingerência estatal ou privada de modo arbitrário ou autoritário quanto aos fragmentos da sua individualidade que a recolha, tratamento, armazenamento e utilização ilegítima dos seus dados pessoais constitui; por outro,

---

4 Cfr. NOVAIS, Jorge Reis, 2015, *A Dignidade da Pessoa Humana*, vol. I, Almedina, pp. 58 e ss., afirma que a dignidade da pessoa humana se identifica com «a ideia de um valor próprio, supremo e inalienável atribuído à pessoa só pelo facto de o ser, por simples facto da sua humanidade; a ideia de respeito, de igual consideração dos interesses de cada pessoa, da sua vida, da sua autonomia, liberdade e bem-estar; a ideia da pessoa como fim e não como mero meio ou instrumento de outros; a ideia de que é a pessoa individualmente considerada, e não qualquer realidade transpersonalista, que justifica a existência do Estado e do poder político organizado da comunidade», concretizando a «fórmula do objeto» que teve, historicamente, origem na jurisprudência do Tribunal Constitucional Alemão. Importa, neste âmbito, impedir o fenómeno de transformação do cidadão em mero objeto de informações para o Estado ou entidades privadas, sem qualquer poder de controlo sobre si ou sobre os seus dados pessoais.

5 Afirma-se como característica inegável da globalização a fuga ao controlo democrático das atuações de recolha, tratamento e utilização de dados pessoais efetuados por entidades privadas, uma vez que, não estando sujeitas ao escrutínio público (*razão pela qual carecem de legitimidade democrática ou de uma verdadeira public accountability*), dão azo a novos perigos para os direitos fundamentais dos indivíduos.

o valor da segurança<sup>6</sup>, que norteia o sistema jurídico, também exige a dotação prévia dos entes que se relacionam com os particulares nesta sede de certas capacidades intrusivas nos seus direitos e liberdades, sobretudo através de instrumentos que permitam o acesso a determinados tipos de informação, a fim de tutelar, de forma reflexa, bens jusfundamentais de terceiros e da comunidade.

Na senda das considerações apresentadas, o presente artigo demandará uma análise sobre o fundamento constitucional do direito à proteção de dados pessoais (*Datenschutz*) e sobre as suas fontes normativas de maior relevo, assim como um excursus sobre a recente revisão operada pelo legislador europeu do quadro normativo relativo à proteção de dados.

Abordar-se-á, em particular, o novo Regulamento Geral de Proteção de Dados, que lança novos problemas e desafios, num campo paradigmático da atual sociedade de risco (mormente, de risco tecnológico<sup>7</sup>), sobre o atual entendimento relativo ao escopo de proteção dos direitos, liberdades e garantias dos cidadãos<sup>8</sup>.

---

6 Cfr. CANARIS, Claus-Wilhelm, 1989, *Pensamento sistemático e conceito de sistema na Ciência do Direito*, Lisboa, pp. 9 e ss. A segurança, sendo inseparável da noção de Estado de Direito Democrático e Social, transcende a dimensão constitucional para se afirmar como valor imanente e enformador do próprio sistema jurídico, ao fixar as finalidades axiológicas pelas quais o mesmo se deve orientar. Ora, considerando que a norma, enquanto critério de decisão do caso concreto que exprime um «dever ser» (seja norma-regra ou norma-princípio), «representa um momento necessário do processo de integração fático-axiológica, ordenando factos sociais sob o influxo de valores» (Cfr. REALE, Miguel, 2005, *Filosofia do Direito*, II, n.º 207, in ASCENSÃO, Oliveira, *O Direito – Introdução e Teoria Geral*, Almedina, p. 215, de acordo com a teoria tridimensional do Direito que é propugnada pelo autor), impõe-se concluir que o valor da segurança se encontra, por esta via, necessária e normativamente positivado nos diversos ordenamentos jurídicos, ainda que, considerando determinados fatores (v.g., contexto histórico-cultural, político e sociológico), se revele sob formas distintas. No ordenamento jurídico nacional, e considerando a temática do presente escrito, o valor em causa revela-se na conformação do conteúdo do direito fundamental à proteção de dados, previsto no artigo 35.º da Constituição da República Portuguesa, e no correspondente conjunto de restrições constitucionais e legais que se consideram admissíveis ao mesmo.

7 Cfr. TERRINHA, Luís Heleno, *Direito e contingência: com e para além de Ulrich Beck*, In *Memoriam Ulrich Beck*, Atas do colóquio promovido pelo ICJP e pelo CIDP em 22 de outubro de 2015, disponível em [https://www.icjp.pt/sites/default/files/publicacoes/files/ebook\\_ulrichbeck\\_0.pdf](https://www.icjp.pt/sites/default/files/publicacoes/files/ebook_ulrichbeck_0.pdf), p. 21, afirma que a conceptualização da sociedade de risco constitui «uma sugestiva construção semântica através da qual descobrir ou representar uma certa unidade da sociedade (daí, também, a sua força atrativa num contexto de complexidade), unidade essa que é reconduzida aos riscos ameaçadores que resultam do progresso técnico e tecnológico da humanidade e à inevitabilidade de o preço a pagar pelas vantagens que esse progresso nos traz se traduzir na necessidade de aceitar determinadas consequências negativas laterais».

8 Cfr. BRITO, Miguel Nogueira de, *O admirável novo constitucionalismo da Sociedade de Risco*, In *Memoriam Ulrich Beck*, Atas do colóquio promovido pelo ICJP e pelo CIDP em 22 de outubro de 2015, disponível em [https://www.icjp.pt/sites/default/files/publicacoes/files/ebook\\_ulrichbeck\\_0.pdf](https://www.icjp.pt/sites/default/files/publicacoes/files/ebook_ulrichbeck_0.pdf), pp. 54 e ss. É inegável que a sociedade atual se confronta com tendências securitárias que, muitas vezes, surgem encapotadas de políticas de justiça de prevenção e repressão da criminalidade altamente organizada ou terrorismo, que fazem perigar a efetividade dos direitos, liberdades e garantias constitucionais dos cidadãos. Recentemente, a aprovação do *Investigatory Powers Act* pelo Parlamento do Reino Unido, em 29 de novembro de 2016 (que entrou em vigor em 30 de dezembro do mesmo ano), também designado por «*The Snooper's Charter*», constituirá certamente um marco histórico, porquanto o diploma expande os poderes investigatórios e de vigilância das forças policiais e de inteligência britânicas ao ponto de permitir o

## 2. Da jusfundamentalidade do direito à proteção de dados

O direito fundamental à proteção de dados surge, originariamente, consagrado no artigo 35.º da Constituição da República Portuguesa<sup>9</sup> (doravante, «CRP»), constituindo uma opção legislativa inovadora em face das soluções adotadas pelas suas congéneres ao nível europeu e internacional. A sua consagração, *ab initio*, no texto fundamental pelo legislador constituinte é de salutar, sobretudo pela sua particular proatividade em função do exponencial desenvolvimento tecnológico, associado aos riscos para os direitos fundamentais dos cidadãos que lhe são inerentes, que se veio a verificar na Sociedade da Informação nos anos que se seguiriam.

O dispositivo em causa, note-se, apresenta uma natureza compreensiva, na medida em que se desdobra em diversos corolários específicos consoante a dimensão sobre a qual recai o perigo concreto de instrumentalização do direito.

No plano da sua função garantística<sup>10</sup>, o preceito positiva, nomeadamente, as seguintes vertentes do direito à proteção de dados pessoais: i) o direito de

---

recurso a técnicas de *hacking* e similares de forma a aceder aos dados pessoais de quaisquer sujeitos que sejam alvo de investigação. A aprovação do diploma em causa simboliza uma opção clara do Legislador britânico pela «legalização» de atividades que, na prática, foram recorrentemente exercidas, ao longo dos últimos anos, em evidente violação do direito à proteção de dados pessoais e do direito à privacidade dos cidadãos, simultaneamente, como o demonstra a decisão do *Investigatory Powers Tribunal* – a única jurisdição com competência para julgar ações interpostas contra o *MIS*, o *M16* e o *GCHQ* –, de 4 de novembro de 2015, que condenou as agências de segurança britânicas pela recolha – através de técnicas de vigilância da atividade telefónica e informática – e armazenamento ilegais de quantidades maciças de dados pessoais dos cidadãos (*Bulk Communications Data* – BCD), incluindo informação financeira, fiscal, comercial, médica e do foro pessoal e familiar, durante os últimos 17 anos (!) (1998-2015), em violação do disposto no artigo 8.º da Convenção Europeia dos Direitos do Homem, que consagra, *lato sensu*, o direito à privacidade.

9 A Constituição Portuguesa foi o primeiro texto constitucional a consagrar a proteção de dados pessoais como um direito fundamental autónomo em face do direito à reserva da intimidade da vida privada. Embora o artigo 35.º tenha sido introduzido na constituição originária de 1976, o seu conteúdo atual resulta, em grande medida, da quarta revisão constitucional, de 1997, que visou compatibilizar o dispositivo com o que se preceituava na Diretiva n.º 95/46/CE. Neste sentido, LOPES, Joaquim de Seabra, 2016, *O artigo 35.º da Constituição: da génese à atualidade e ao futuro previsível*, in Fórum de Proteção de Dados, n.º 2, pp. 15 e ss., associando a sua introdução no ordenamento jurídico nacional como uma reação à Lei n.º 2/73, de 10 de fevereiro, que instituiu o registo nacional de identificação através da atribuição de um número de identificação único a todos os cidadãos, e PINHEIRO, Alexandre Sousa, 2015, *Privacy e proteção de dados: a construção dogmática do direito à identidade informacional*, Lisboa, pp. 695 e ss.

10 Neste sentido, CANOTILHO, Gomes / MOREIRA, Vital, 2017, *Constituição da República Portuguesa Anotada*, vol. I, Coimbra Editora, pp. 551 e ss., consideram que a operatividade do direito à proteção de dados, nomeadamente do direito de acesso e conhecimento dos dados pessoais registados, se encontra na dependência do correto desempenho da função hermenéutica e orientadora de um conjunto de princípios-quadro e de *guidelines* neste âmbito: i) publicidade; ii) justificação social (sujeição das atividades de recolha, tratamento e utilização de dados a um «objetivo geral e usos específicos socialmente aceites»); iii) transparência; iv) especificação de finalidades; v) limitação da recolha, de acordo com os ditames e



acesso, alteração, atualização, retificação e eliminação dos registos informáticos do titular do direito (n.º 1, 1.ª parte); *ii*) o direito de informação sobre as finalidades a que se destinam os dados informatizados, assim como da identidade dos responsáveis pelo tratamento de dados (n.º 1, 2.ª parte); *iii*) a imposição de que a fiscalização do cumprimento das diretrizes constitucionais e legais quanto à recolha, armazenamento, tratamento e utilização de dados pessoais seja da competência de uma entidade administrativa independente, não sujeita aos poderes de direção, superintendência e tutela da Administração direta do Estado, nomeadamente do Governo e restante aparelho da Administração Central, de modo a evitar «tentações» sobre utilizações ilegítimas e/ou discriminatórias com fins político-partidários (n.º 2); *iv*) o direito ao não tratamento informático de certos tipos de dados pessoais que, historicamente, fundaram atos discriminatórios atentatórios da dignidade da pessoa humana, salvo consentimento expresso do titular, autorização legal com garantias de não discriminação ou processamento de dados para fins meramente estatísticos não individualmente identificáveis (n.º 3); *v*) o direito ao sigilo em relação aos responsáveis pelos ficheiros informatizados e a terceiros, incluindo o direito à não interconexão de dados fora dos casos legalmente previstos, proibindo-se a criação de um perfil completo e detalhado da pessoa contendo dados de diversa natureza (n.ºs 4 e 5); *vi*) o direito de acesso às redes informáticas de uso público (n.º 6); *vii*) a extensão da proteção aos dados pessoais constantes de ficheiros manuais ou não informatizados (n.º 7).

De notar, a este propósito, que as dimensões enunciadas possuem, necessariamente, diferentes graus de intensidade de controlo<sup>11</sup>, a ser aferidas perante a violação concreta da específica vertente em causa, no que constitui um parâmetro essencial de conformação da atuação estadual no âmbito da restrição de

---

corolários do princípio da proporcionalidade; *vi*) princípio da fidelidade; *vii*) limitação da utilização; *viii*) garantias de segurança; *ix*) responsabilidade legal, ética e deontológica; *x*) princípio da política de abertura; *xi*) princípio de limitação de tempo.

A dimensão garantística do direito fundamental à proteção de dados projeta-se no escopo de proteção dos demais direitos fundamentais dos cidadãos, funcionando como um mecanismo de proteção reflexa dos direitos sobre os quais a natureza da informação recai. De facto, se, *v.g.*, uma empresa detentora dos registos de pesquisa na Internet de determinado cidadão tiver elaborado um perfil de saúde médica do sujeito com base na compilação de um conjunto de pesquisas sobre determinado tipo de doença e, posteriormente, «disponibilizar» (mais corretamente, «alienar») esse perfil a determinada empresa farmacêutica, que passa a assumir práticas constantes de envio de propaganda e publicidade não solicitada ao indivíduo em causa sobre os medicamentos ou tratamentos recomendados para a doença específica – bens ou serviços esses que ela própria comercializa –, então não estará em causa apenas uma violação do direito à proteção de dados (que ocorre num primeiro momento, com a disponibilização da empresa detentora do motor de busca dos dados e com o acesso ilegítimo da farmacêutica aos mesmos), mas também, eventualmente, uma violação do direito à privacidade (na dimensão de *right to be let alone* e de intimidade privada e familiar), à saúde e à autodeterminação pessoal.

11 Cfr. ALEXANDRINO, José Melo, 2014, «Jurisprudência da Crise. Das questões Prévias às Perplexidades», *O Tribunal Constitucional e a Crise – Ensaios Críticos*, p. 67.

direitos fundamentais dos particulares<sup>12</sup>, consoante a estrutura normativa concreta em que as vertentes referidas se encontrem constitucional e legalmente consagradas<sup>13</sup>.

No sentido de dar cumprimento ao impulso legiferante<sup>14</sup> que consta da 1.ª parte do n.º 2 do artigo 35.º da CRP, o legislador ordinário veio densificar o conceito de «dados pessoais»<sup>15</sup>, nos termos do artigo 3.º, al. a), da Lei n.º 67/98, de 26 de outubro, ou Lei de Proteção de Dados Pessoais<sup>16</sup>, considerando-se como tal «qualquer informação, de qualquer natureza e independentemente do respetivo suporte, incluindo som e imagem, relativa a uma pessoa singular identificada ou identificável [“titular dos dados”]», sendo «identificável a pessoa que possa ser identificada direta ou indiretamente, designadamente por referência a um número de identificação ou a um ou mais elementos específicos da sua identidade física, fisiológica, psíquica, económica, cultural ou social».

Foram, ainda, aprovados um conjunto de diplomas que estabelecem o regime quanto à recolha, armazenamento, tratamento, utilização e circulação de dados pessoais, impondo determinadas condicionantes e restrições em nome da salvaguarda dos direitos, liberdades e garantias do titular dos dados.

No quadro do bloco de legalidade ordinária que se impõe à função administrativa sobre proteção de dados pessoais, deve realçar-se que – pese embora o Código do Procedimento Administrativo de 1991 (aprovado pelo Decreto-Lei n.º 442/91, de 15 de novembro) não contemplasse qualquer dispositivo que, de forma expressa e inequívoca, tutelasse a proteção de dados dos particulares – era pacífico na doutrina e na jurisprudência que, em face da consagração constitucional do direito no artigo 35.º da Constituição e do restante bloco de

---

12 Neste sentido, NOVAIS, Jorge Reis, 2010, *As restrições aos Direitos Fundamentais não expressamente autorizadas pela Constituição*, 2.ª ed., Coimbra Editora, p. 799.

13 Neste sentido, EGÍDIO, Mariana Melo, 2010, «Análise da estrutura das normas atributivas de direitos fundamentais. A ponderação e a tese ampla da previsão, in *Estudos em Homenagem ao Prof. Doutor Sérvulo Correia*», vol. I, Faculdade de Direito da Universidade de Lisboa, pp. 626 e ss., defendendo que «com o recurso à ponderação, pode frequentemente estabelecer-se um resultado racional, através da limitação da mencionada operação discricionária pelo recurso, nomeadamente, a metaprincípios, sem significar que tal operação conduza sempre a um único resultado».

14 Neste sentido, MIRANDA, Jorge / MEDEIROS, Rui, 2017, *Constituição Portuguesa Anotada*, tomo I, 2.ª edição revista, Universidade Católica Editora, e o acórdão do Tribunal Constitucional n.º 182/89, disponível em <http://www.dgsi.pt>.

15 Para uma perspetiva histórica da controvérsia associada à delimitação do conceito de «dados pessoais» no ordenamento nacional, veja-se NICOLAU, Tatiana Duarte, 2015, *O armazenamento de amostras de ADN e as bases de dados de perfis genéticos*, Comissão Nacional de Proteção de Dados, pp. 32 e 33.

16 A Lei n.º 67/98 transpõe para a ordem jurídica portuguesa a Diretiva n.º 95/46/CE, relativa à proteção de pessoas singulares no que concerne ao tratamento de dados pessoais e à livre circulação desses dados.

legislação vigente<sup>17</sup>, ao direito fundamental em causa sempre foi reconhecida força vinculativa imediata no âmbito do procedimento administrativo, independentemente de a competência para a sua realização ser atribuída a entidades públicas ou a entidades privadas no exercício de funções públicas.

Atualmente, com a revisão do CPA operada pelo Decreto-Lei n.º 4/2015, de 7 de janeiro, consagrou-se expressamente o princípio da proteção de dados pessoais, no artigo 18.º, numa opção de positivização na legislação jusprocedimental administrativa com uma notória função pedagógico-preventiva dirigida aos serviços da administração pública<sup>18</sup>.

Feito este breve excurso, cumpre destacar que se afigura da maior relevância a opção pela autonomização do direito à proteção de dados enquanto bem jusfundamental autónomo, em face do direito fundamental à reserva da intimidade da vida privada, previsto no artigo 26.º da CRP, o que não constitui, de todo, uma solução consensual do ponto de vista legislativo, doutrinário e jurisprudencial no direito comparado, identificando-se sistemas nos quais se seguiu a via da autonomização do direito à proteção de dados<sup>19</sup> e sistemas nos

---

17 Para este efeito, e no âmbito da economia do presente artigo, importa realçar a já referida Lei de Proteção de Dados, a Lei n.º 41/2004, de 18 de agosto (que regula a proteção de dados pessoais nas comunicações eletrónicas), e a Lei n.º 26/2016, de 22 de agosto (que regula o acesso à informação administrativa e ambiental e de reutilização dos documentos administrativos), enquanto diplomas basilares que consagram o regime de proteção de dados pessoais que se impõe aos órgãos e serviços da Administração.

Para uma visão histórica sobre os diplomas internacionais de relevo na proteção de dados, TEIXEIRA, Maria Leonor da Silva, 2013, «A União Europeia e a protecção de dados pessoais: “Uma visão futurista”?», in *Revista do Ministério Público*, n.º 135, 2013, pp. 77 e 78, salientando-se a Convenção n.º 108 do Conselho da Europa, de 28 de janeiro de 1981, que pretendia «tutelar a intimidade e garantir o funcionamento do mercado interior e a livre circulação de dados pessoais entre os Estados aderentes».

18 Sustentando que da inter-relação e dos nexos intrasistemáticos que se podem estabelecer entre o princípio da proteção de dados e o princípio da administração aberta, consagrado no artigo 17.º, se deduzem «importantes inovações na forma como a proteção de dados se relaciona quer com o acesso a informação procedimental quer com a transparência administrativa», PINHEIRO, Alexandre Sousa, 2015, «A proteção de dados no novo Código do Procedimento Administrativo», in *Comentários ao Novo Código do Procedimento Administrativo*, 2.ª edição, AAFDL Editora, pp. 253 e ss.

19 Neste sentido, SERRANO PÉREZ, Maria, 2013, *El Derecho Fundamental a la protección de datos. Derecho español y comparado*, Civitas, Madrid, p. 72. A Constituição Espanhola, no artigo 18.º, n.º 4, acabou por seguir a mesma orientação que a Constituição Portuguesa ao consagrar o direito fundamental à proteção de dados pessoais, tendo em conta a orientação interpretativa da jurisprudência do Tribunal Constitucional Espanhol, nas sentenças n.ºs 290/2000 e 292/2000, de 30 de novembro.

Quanto ao ordenamento alemão, embora a Constituição Alemã não autonomize o direito em causa, a jurisprudência do Tribunal Constitucional Alemão, afirmando-se, neste âmbito, como marco histórico a sentença de 15 de dezembro de 1983, considera que a proteção do indivíduo contra a recolha, armazenamento, utilização e transmissão de dados ilegítima se pode retirar do disposto no artigo 2.º, n.º 1, da Constituição, que consagra um direito geral de personalidade dos indivíduos em nome do princípio da dignidade da pessoa humana, sob pena de «coisificação» do indivíduo enquanto mero objeto da atuação estadual («fórmula do objeto»).

Sendo certo que a Convenção Europeia dos Direitos do Homem também não autonomiza expressamente o direito à proteção de dados pessoais, a jurisprudência do Tribunal Europeu dos Direitos do Homem tem

Identidade e autodeterminação informacional no novo Regulamento Geral de Proteção de Dados: a inevitável privatização dos deveres estaduais de proteção \

**Guilherme da Fonseca Teixeira**

quais o direito em causa se considera como uma mera manifestação do direito à privacidade<sup>20</sup>.

---

entendido que este se terá, forçosamente, de retirar do artigo 8.º da mesma, que consagra a proteção da vida privada e familiar do domicílio e das comunicações. Nos acórdãos *Leander v. Suécia*, de 26 de março de 1987, e *Gaskin v. Reino Unido*, de 7 de julho de 1989, o tribunal reconheceu um direito de acesso às informações pessoais armazenadas do titular dos dados, mesmo que lhes seja atribuído carácter sigiloso pela entidade pública detentora dos mesmos, violando o disposto no artigo 8.º a recusa de facultar aos particulares acesso aos seus dados ou o seu tratamento ilegítimo.

No Direito da União Europeia, a autonomização do direito à proteção de dados pessoais, nos artigos 16.º do Tratado sobre o Funcionamento da União Europeia e 8.º da Carta dos Direitos Fundamentais da União Europeia em face do artigo 7.º da Carta, que consagra o direito à reserva da intimidade da vida privada. Ao nível do regime, que consta dos n.ºs 2 e 3 do artigo 8.º, consagram-se: i) condicionantes ou restrições à recolha, utilização e tratamento de dados, que deverão assentar no consentimento válido do titular (consentimento expresso, livre e esclarecido) ou em justificação bastante que legitime a desnecessidade de consentimento para as ações referidas, num elemento funcional (os dados devem ser recolhidos e armazenados apenas para determinados fins concretos, sendo ilegítima uma apropriação excessiva de dados pessoais em função do fim visado pela recolha de dados ou uma utilização para fins diversos dos que são informados ao titular ou permitidos legalmente) e observar os ditames do princípio da lealdade (nomeadamente, as imposições de transparência e imparcialidade que decorrem do mesmo); ii) o direito de acesso e de retificação dos dados recolhidos; iii) sujeição à fiscalização de uma autoridade independente do cumprimento das disposições – no plano comunitário, a Autoridade Europeia de Proteção de Dados, criada pelo Regulamento n.º 45/2001, de 18 de dezembro, e, no ordenamento nacional, a Comissão Nacional de Proteção de Dados (CNPd), criada pela Lei n.º 43/2004, de 18 de agosto.

A jurisprudência do Tribunal de Justiça da União Europeia afirmou, nos casos *Volker und Markus Schecke GbR (C-92/09)* e *Hartmut Eifert (C-93/09) v. Land Hessen*, de 9 de novembro de 2010, que o direito à proteção de dados não é absoluto, antes deve ser sujeito a uma reserva de ponderação que considere a sua função na sociedade.

20 Em diversos ordenamentos jurídicos não se considera necessária a autonomização, nos elencos constitucionais de bens fundamentais e na jurisprudência dos respetivos tribunais constitucionais, do direito fundamental à proteção de dados pessoais, mesmo que no confronto com os avanços tecnológicos e digitais registados e com a universalização do uso da informática por entidades públicas e privadas no exercício da função administrativa, com fundamento na agilização e economia dos procedimentos em nome dos princípios da eficiência, eficácia e boa administração. É o caso da Constituição Italiana, da Constituição Francesa (que, numa opção que pode ser alvo de críticas imediatas dada a desatualização do normativo em causa, se continua a reger pelos direitos e princípios consagrados na Declaração Universal dos Direitos do Homem e do Cidadão, de 1789), e do *Human Rights Act* inglês, de 1998.

Ora, o entendimento que subjaz a estes ordenamentos na opção de não autonomização do direito fundamental à proteção de dados é o de que o seu conteúdo normativo se encontra abrangido pelo direito à reserva da intimidade da vida privada, não se identificando um recorte dogmático próprio.

No entanto, parece ser uma solução dogmaticamente criticável dada a fluidez com que, no Direito Comparado dos Estados-membros da UE, o direito à proteção da intimidade da vida privada é concebido, por diversas vezes confundido com o direito à autodeterminação pessoal – vejam-se as críticas, julgo que infundadas, que são assacadas ao acórdão *A, B and C v Ireland* do Tribunal Europeu dos Direitos do Homem, de 2010, que considerou, de forma acertada, que do direito à reserva da intimidade da vida privada não se pode retirar um «direito ao aborto» ao abrigo do artigo 8.º da CEDH, por GOULD, Imogen, 2015, «A, B and C v Ireland [2010]», in *Landmark Cases in Medical Law*, Hart Publishing, pp. 335 e ss., considerando que se trata de uma decisão conservadora, com o efeito útil de impor aos Estados uma obrigação de criar legislação clara e precisa sobre os critérios de permissibilidade ou proibitividade de realização de aborto, tendo preferido uma orientação decisória semelhante à que tem sido seguida na jurisprudência firmada no sistema legal norte-americano, em especial após o caso *Roe vs Wade*, de 1973, do *Supreme Court*, no qual se reconheceu um «direito ao aborto» adveniente do direito à privacidade.

No Direito norte-americano, o direito à privacidade (*privacy*) é concebido de modo amplíssimo (cfr. WARREN, Samuel / BRANDEIS, Louis, 1995, *El derecho a la intimidad*, Madrid: Civitas), não apenas na doutrina mas

Na verdade, talvez visando, apenas, introduzir medidas de segurança no domínio informático, o legislador constitucional acabou por consagrar o direito à proteção de dados enquanto direito à identidade e autodeterminação informativa<sup>21</sup>, que assume uma vertente ativa de titularidade do poder de controlo sobre os seus próprios dados pessoais<sup>22</sup>, que se afigura absolutamente essencial no cumprimento do escopo da norma em causa, no sentido da tutela efetiva da dignidade da pessoa humana em face da sociedade atual de reconhecido risco tecnológico, o que não se coaduna com a limitada vertente (historicamente) passiva como é concebido o direito à privacidade<sup>23</sup>, que meramente habilita o

---

também na jurisprudência (como o caso *Roe vs Wade* demonstra), sendo, usualmente, identificadas quatro dimensões nucleares (cfr. NICOLAU, Tatiana Duarte, 2015, *O armazenamento de amostras de ADN e as bases de dados de perfis genéticos*, Comissão Nacional de Proteção de Dados, pp. 27 e 28): i) direito a estar sozinho (*right to be alone*); ii) direito à intimidade da vida privada e familiar; iii) direito ao anonimato; iv) direito à não intervenção de terceiros (*right to be let alone*).

21 Neste sentido, FERREIRA, Pedro, 2006, *A protecção de dados pessoais na sociedade de comunicação – Dados de Tráfego, Dados de Localização e Testemunhos de Conexão*, O Espírito das Leis, pp. 144 e ss. Em sentido diverso, considerando que o direito à proteção de dados pessoais é uma mera garantia constitucional do direito à privacidade e reserva da intimidade da vida privada, MONIZ, Helena, «Os problemas jurídico-penais da criação de uma base de dados genéticos para fins criminais», 2002, *Revista Portuguesa de Ciência Criminal*, n.º 2, pp. 246 e ss. Partindo do mesmo entendimento que esta autora, a jurisprudência do Tribunal Constitucional tem sediado a fundamentação das suas decisões quanto ao tratamento informatizado de dados pessoais no direito à reserva da intimidade da vida privada, nos termos do artigo 26.º da CRP, não fazendo uso da autonomia constitucionalmente concedida ao direito à proteção de dados no artigo 35.º da CRP, num entendimento que, pelas críticas que já lhe foram dirigidas, não se afigura o mais correto do ponto de vista dogmático ou, sequer, o mais idóneo à proteção dos direitos, liberdades e garantias dos cidadãos. Vejam-se, nomeadamente, os acórdãos n.ºs 355/1997, 255/2002 e 386/2002, pesquisáveis em <http://www.dgsi.pt>.

22 Quanto à titularidade do direito, é discutível se o direito à proteção de dados pessoais se estende às pessoas coletivas, dada a sua íntima conexão com a esfera privada e de identidade pessoal do indivíduo. Sobre esta discussão, no direito comparado, cfr. POLLMAN, Elizabeth, 2014, «A Corporate Right to Privacy», in *Minnesota Law Review*, vol. 99, pp. 32 e 88, considerando que «most corporations in most circumstances should not have a constitutional right to privacy. There is simply no natural person, or persons, associated in a corporation with a privacy interest at stake and a need for the corporation to vindicate it», embora «Certain corporations (which) reflect an associational dynamic, with tightly connected individuals pursuing activity, social, political or religious in nature, that has long been valued in fostering our societal goals of liberty and democracy», incluindo organizações sem fins lucrativos, possam justificar a extensão, *mutatis mutandis*, do direito à proteção de dados.

23 A jurisprudência do Tribunal Constitucional Alemão densificou o direito à reserva da intimidade da vida privada através da tradicional «teoria das esferas», segundo a qual se identificam três níveis concêntricos de proteção diferenciada: a esfera privada (*Privatsphäre*), que, por se encontrar dentro do núcleo essencial do direito fundamental na proteção da vida pessoal e familiar mais íntima, não admite qualquer ingerência; a esfera íntima (*Inthimsphäre*), que admite ingerências de terceiros sob reserva de ponderação, caso o interesse público ou privado for preponderante para justificar a restrição do direito; a esfera individual (*Individualsphäre*), que simboliza uma área periférica do conteúdo normativo do direito, representando a exteriorização de certos aspetos de personalidade na comunidade, como o nome e a imagem, que admitem uma maior ingerência. Note-se que a evolução da jurisprudência constitucional alemã acabou por abandonar a aplicação da «teoria das esferas» na conformação do direito à proteção de dados pessoais, construindo o seu recorte dogmático a partir do princípio da dignidade da pessoa humana e do direito geral de personalidade constitucionalmente consagrado.

titular do direito a excluir terceiros, sejam entidades privadas ou públicas, da sua esfera de intimidade.

Por conseguinte, é possível identificar no direito à proteção de dados pessoais um recorte dogmático ou âmbito de tutela autónomo que, mais do que procurar garantir uma tutela dos dados pessoais dos cidadãos, consoante a maior ou menor proximidade das informações em causa com a esfera íntima, privada ou individual/social do sujeito (*maxime*, ao núcleo íntimo da pessoa), procura conferir ao titular dos dados o poder de manter na sua disponibilidade a gestão dos mesmos, configurando-se como o direito do indivíduo a controlar a obtenção, detenção, tratamento e transmissão de dados pessoais, autorizando a sua recolha, armazenamento, e utilização, conhecendo onde estão armazenados, a identidade dos responsáveis pelo seu tratamento e quais as suas finalidades, acedendo aos mesmos ou inclusivamente exigindo a sua alteração, retificação ou eliminação (*habeas data*).

### **3. Revisão do quadro normativo de proteção de dados pessoais: alterações, inovações e desafios**

Ao nível europeu, a União Europeia e o Mercado Interno Comum surgem como uma plataforma jurídica privilegiada de circulação e tratamento de dados pessoais, quer ao nível das instituições e órgãos da União Europeia quer das entidades públicas e privadas dos Estados-membros. Como já se referiu, o artigo 16.º do TFUE e o artigo 8.º da CDFUE contêm a positivização expressa do direito à proteção de dados pessoais e a sua regulamentação basilar, excluindo-se do âmbito de aplicação deste regime as matérias de Política Externa e Segurança Comum (PESC), às quais se aplica o disposto no artigo 39.º do TUE.

No entanto, dado o carácter marcadamente programático e incipiente da regulação do direito à proteção de dados nos dispositivos referidos, por um lado, e as disparidades observadas nos direitos nacionais dos Estados-membros quanto à proteção efetiva do bem jusfundamental em causa, por outro, cedo emergiu a necessidade de regulação da presente matéria, de modo mais densificado, em instrumentos jurídicos comunitários derivados, visando assegurar uma uniformização e harmonização jurídica ao nível da União, em nome dos princípios da equivalência e da efetividade<sup>24</sup> enquanto princípios gerais do Direito da UE.

---

24 Cfr. Casos *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* (C-33/76), *Express Dairy Foods Ltd. v International Board of Agricultural Produce* (C-130/79), *Factortame I* (C-213/89), *Francovich* (C-6/90 e 9/90) e *Palmisani* (C-261/95), da jurisprudência do TJUE.

Em face do quadro enunciado, foi aprovada a Diretiva 95/46/CE, relativa à proteção do tratamento e circulação dos dados pessoais, que fixa o princípio da livre circulação de dados entre os Estados-membros e estabelece o regime jurídico concretamente aplicável. Uma vez que a referida Diretiva assumia uma linha genérica de regulação da proteção de dados, houve a necessidade de enveredar por uma regulação sectorial da recolha, armazenamento, tratamento e utilização de dados em áreas de atuação com um potencial lesivo elevado dos direitos, liberdades e garantias dos cidadãos, em face das características específicas das respetivas atividades e dos segmentos de mercado em causa. Foi, neste sentido, aprovada a Diretiva 2002/58/CE (*ePrivacy Directive*), de 12 de julho de 2002, relativa ao tratamento de dados e à proteção da privacidade no sector das telecomunicações.

Volvidas quase duas décadas da entrada em vigor da Diretiva 95/46/CE, a significativa evolução tecnológica registada, a crescente assunção por parte de operadores económicos privados – dotados de um grande poder de influência nos mercados em que atuam e de elementos de transnacionalidade assinalável, dificultando sobremaneira a regulação e fiscalização da sua atividade – de um papel de relevo no âmbito da recolha, tratamento, utilização e circulação de dados e, bem assim, a identificação de algumas lacunas e/ou soluções menos eficazes na Diretiva levaram o legislador europeu a tomar a consciência da necessidade de revisão e de atualização do quadro normativo vigente em matéria de proteção de dados.

Assim, em 25 de janeiro de 2012, o Parlamento e a Comissão Europeia apresentaram uma Proposta de Regulamento relativo à proteção das pessoas singulares quanto ao tratamento de dados pessoais e à livre circulação dos mesmos, no âmbito da competência que lhes é atribuída no artigo 16.º, n.º 2, do TFUE.

Em 27 de abril de 2016, foi aprovado o Regulamento Geral sobre Proteção de Dados<sup>25</sup>, que visou atualizar, reforçar e uniformizar a proteção conferida ao direito à proteção de dados, assim como incentivar a consolidação do Mercado Interno da União, em face das novas realidades empresariais e tecnológicas, estabelecendo um conjunto de normas e princípios gerais para a proteção de dados e para o tratamento transfronteiriço dos mesmos.

---

25 Regulamento n.º 2016/679/UE, que entrará em vigor em 25 de maio de 2018, nos termos do artigo 99.º, n.º 2, do Regulamento, e que revoga a Diretiva 95/46/CE. Foram também aprovadas a Diretiva n.º 2016/680/UE (relativa à proteção das pessoas singulares no que diz respeito ao tratamento de dados pessoais pelas autoridades competentes para efeitos de prevenção, investigação, deteção ou repressão de infrações penais ou execução de sanções penais, e à livre circulação desses dados) e a Diretiva n.º 2016/681/UE (relativa à utilização dos dados dos registos de identificação dos passageiros [PNR] para efeitos de prevenção, deteção, investigação e repressão das infrações terroristas e da criminalidade grave) que, pela economia do presente escrito e pelas razões *supra* aduzidas, não serão consideradas na análise do direito fundamental à proteção de dados pessoais.



Quanto às alterações e inovações que constam do Regulamento, cabe sinalizar e analisar as soluções que assumem um maior relevo na realização do escopo do direito à proteção de dados, que são as que de seguida se apresentam<sup>26</sup>:

*i) autonomia do direito fundamental à proteção de dados* (artigo 1.º, n.º 2, do Regulamento): abandonou-se a solução prevista no artigo 1.º, n.º 1, da Diretiva 95/46/CE, que considerava o direito à proteção de dados pessoais como uma manifestação do direito à reserva da intimidade da vida privada, na senda do que o artigo 8.º da CDFUE preconiza. Trata-se, no confronto com a posição anteriormente assumida, de uma solução dogmáticamente mais ajustada a uma efetiva realização do escopo de proteção do direito, no sentido de reconhecer a titularidade de um poder de controlo do titular dos dados sobre as suas próprias informações, independentemente do maior ou menor grau de proximidade à esfera íntima que a natureza e o conteúdo das concretas informações possa revestir;

*ii) pseudoanonimização do tratamento de dados* (artigo 4.º, n.º 5, do Regulamento<sup>27</sup>): o diploma envereda por um tratamento desenvolvido da pseudoanonimização enquanto garantia essencial da efetividade do direito à proteção de dados, quer nos casos de tratamento que não tenham exigido identificação do titular dos dados (artigo 11.º do Regulamento), quer na fixação das condições de segurança do tratamento dos dados aplicáveis à generalidade dos procedimentos [artigo 32.º, n.º 1, al. a)], quer na aprovação de códigos de conduta pelas associações e outros organismos representantes de categorias de responsáveis pelo tratamento de dados que prevejam a pseudoanonimização [artigo 40.º, n.º 2, al. d), do Regulamento];

---

26 Pronunciando-se sobre algumas das soluções da Proposta do Regulamento que transitaram para o diploma final, ou sobre o Regulamento em si mesmo, cfr. LOPES, Joaquim de Seabra, 2016, «O artigo 35.º da Constituição: da génese à atualidade e ao futuro previsível», in *Fórum de Proteção de Dados*, n.º 2, pp. 15 e ss., CALVÃO, Filipa Urbano, 2015, «Modelo de supervisão e tratamento de dados pessoais na União Europeia: da atual Diretiva ao futuro Regulamento», in *Fórum de Proteção de Dados*, Lisboa, n.º 1, pp. 34 e ss., TEIXEIRA, Maria Leonor da Silva, 2013, «A União Europeia e a protecção de dados pessoais: “Uma visão futurista”?», in *Revista do Ministério Público*, n.º 135, pp. 91 e ss., RAMALHO, David Silva, 2016, *O novo Regulamento Geral sobre a Proteção de Dados e o Data Protection Officer*, disponível em [http://www.servulo.com/xms/files/00\\_SITE\\_NOVO/01\\_CONHECIMENTO/01\\_PUBLICACOES\\_SERVULO/2016/Updates/Update\\_PI\\_PD\\_e\\_TI\\_DSR\\_O\\_Novo\\_Regulamento\\_Geral\\_sobre\\_a\\_Protecao\\_de\\_Dados.pdf](http://www.servulo.com/xms/files/00_SITE_NOVO/01_CONHECIMENTO/01_PUBLICACOES_SERVULO/2016/Updates/Update_PI_PD_e_TI_DSR_O_Novo_Regulamento_Geral_sobre_a_Protecao_de_Dados.pdf).

27 Que define a «pseudonimização» como «o tratamento de dados pessoais de forma que deixem de poder ser atribuídos a um titular de dados específico sem recorrer a informações suplementares, desde que essas informações suplementares sejam mantidas separadamente e sujeitas a medidas técnicas e organizativas para assegurar que os dados pessoais não possam ser atribuídos a uma pessoa singular identificada ou identificável».



iii) *consagração dos princípios da transparência e da proporcionalidade*<sup>28</sup> ou da «*minimização dos danos*» [artigo 5.º, n.º 1, alíneas a) e c), do Regulamento]: visou-se, deste modo, garantir que a informação disponibilizada ao titular dos dados é clara, acessível, simples e perceptível, pugnando-se por uma recolha e tratamento de dados subordinado a um elemento funcional, ou seja, que os dados sejam adequados e limitados ao que é necessário para as finalidades a que se destinam. A sua consagração assume uma importante função pedagógica, uma vez que, enquanto princípio geral de Direito, o princípio da proporcionalidade já tinha imediata aplicabilidade no campo da proteção de dados, enquanto parâmetro de controlo das concretas atuações administrativas das entidades públicas ou privadas no exercício de poderes públicos, bem como no domínio das relações entre cidadãos e entidades privadas enquanto tais (sem se encontrarem no exercício de funções públicas);

iv) *tutela dos direitos dos menores* (artigo 8.º do Regulamento): pese embora a opção por sujeitar o consentimento fornecido por menores a alguns condicionalismos seja louvável (*maxime*, ao consentimento do progenitor ou do titular da guarda com responsabilidades parentais), dada a «validade reduzida» do consentimento obtido de certos menores, sobretudo de baixa faixa etária, atento o nível de desenvolvimento psicológico e cognitivo para formar um consentimento esclarecido – que demonstre a plena consciência dos dados que se estão a disponibilizar, das suas implicações e consequências e do regime aplicável –, trata-se de um aspeto de regime criticável, na medida em que se deixa aos Estados-membros dispor, no seu Direito nacional, sobre qual a idade a partir da qual se sujeita o consentimento dos menores aos condicionalismos previstos, desde que essa idade não seja inferior a 13 anos. Se o propósito era de uniformização e tutela efetiva do direito, trata-se de um ponto de regime dissonante do espírito da revisão;

v) *proibição geral de tratamento de certas categorias de dados* (artigo 9.º do Regulamento): concretizando o princípio da não discriminação, o Regulamento prevê uma proibição de tratamento de certas categorias de dados que

---

28 Defendendo que o princípio da proporcionalidade é um princípio geral do Direito, MULLER, Jorg Paul, 1983, *Éléments pour une théorie suisse des droits fondamentaux*, Berne. Atualmente, tem-se vindo a defender a superação da trilogia clássica alemã em que, tradicionalmente, é decomposto o princípio da proporcionalidade (adequação, necessidade e proporcionalidade em sentido restrito) devido às exigências acrescidas de controlo das leis e intervenções restritivas de direitos fundamentais, na sociedade atual, e às dificuldades de aplicação do «teste» da necessidade, SILVA, Suzana Tavares da, 2012, «O *tetralema* do controlo judicial da proporcionalidade no contexto da universalização do princípio: adequação, necessidade, ponderação e razoabilidade», *Boletim da Faculdade de Direito Coimbra*, n.º 2, pp. 668 e 678 (para uma visão sintética da controvérsia no direito comparado); CANOTILHO, Gomes, 2002, *Direito Constitucional e Teoria da Constituição*, Almedina, p. 272; ANDRADE, Vieira de, 2012, *Os direitos fundamentais na Constituição a República Portuguesa de 76*, Almedina, pp. 288 e ss.; e NOVAIS, Jorge Reis, 2004, *Os Princípios Constitucionais Estruturantes da República Portuguesa*, Coimbra Editora, pp. 162 ss.

Identidade e autodeterminação informacional no novo Regulamento Geral de Proteção de Dados: a inevitável privatização dos deveres estaduais de proteção \

**Guilherme da Fonseca Teixeira**

revelam a origem racial ou étnica, as opiniões políticas, as convicções religiosas ou filosóficas ou a filiação sindical, bem como o tratamento de dados genéticos, dados biométricos para identificar uma pessoa de forma inequívoca, dados relativos à saúde ou dados relativos à vida sexual ou orientação sexual de uma pessoa;

vi) *direito ao esquecimento* (artigo 17.º do Regulamento): enquanto manifestação do direito à autodeterminação informativa, reconhece-se ao titular dos dados o direito a solicitar a eliminação dos seus dados pessoais, na senda da jurisprudência anterior do TJUE<sup>29</sup>, visto que a perpetuação da acessibilidade a determinados dados pessoais tem um potencial lesivo enorme dos direitos, liberdades e garantias dos cidadãos, não só ao nível da privacidade, honra e bom nome, livre desenvolvimento da personalidade e autodeterminação, mas também da sua própria dignidade<sup>30</sup>;

vii) *direito à portabilidade dos dados* (artigo 20.º do Regulamento): confere-se ao titular dos dados o direito de receber os dados que lhe digam respeito e que tenha fornecido a um responsável pelo seu tratamento, assim como o direito a que o responsável em causa os transmita a um diferente responsável pelo tratamento de dados, sem que o responsável pelo tratamento originário se possa opor, de forma a que lhe seja possível conhecer o exato conteúdo das informações que prestou e, em última análise, poder dispor das mesmas;

viii) *direito de oposição* (artigo 21.º do Regulamento): permite-se ao titular dos dados a faculdade de se opor ao tratamento de dados pessoais que lhe diga respeito, incluindo a definição de perfis, salvo se o responsável pelo tratamento apresentar «razões imperiosas e legítimas para esse tratamento que prevaleçam sobre os interesses, direitos e liberdades do titular dos dados». Ora, a opção do legislador europeu em causa afigura-se criticável porque configura uma «cláusula em branco», que faz apelo a conceitos indeterminados e fluidos,

---

29 Cfr. ÁLVAREZ RIGAUDIAS, Cecilia, 2014, «Sentencia Google Spain y derecho al olvido», in *Actualidad Jurídica Úria Menendez*, pp. 110 e ss., em ação interposta pela Agência Espanhola para a Proteção de Dados contra a Google, o TJUE, em sentença de 13 de maio de 2014 (acórdão Costeja), «viene a reconocer el "derecho al olvido" en Internet, atribuyendo a los motores de búsqueda la responsabilidad de ponderar los intereses en juego en cada caso (y sin que se eliminen necesariamente los resultados en la web de origen), incluso si están sitios fuera de la Unión Europea, como es el caso de Google Inc.».

Sobre o tema, veja-se SIMÓN CASTELLANO, Pere, 2013, «El carácter relativo del derecho al olvido en la red y su relación con otros derechos, garantías e intereses legítimos», in *Libertad de expresión e información en Internet: amenazas y protección de los derechos personales*, Madrid: Centro de Estudios Políticos y Constitucionales. pp. 451 e ss., ÁLVAREZ CARO, María, 2014, «Reflexiones sobre la sentencia del TJUE en el asunto "Mario Costeja" (C-131/12) sobre derecho al olvido», in *Revista Española de Derecho Europeo*, n.º 51, pp. 165 e ss., SORIANO GARCÍA, Jose Eugenio, 2012, «Derecho al olvido y la creación de derechos», in *Revista de Economía e Direito*, Lisboa, vol. 17, n.º 1, pp. 207 e ss., e LINDSAY, David, 2014, «The "right to be forgotten" in European data protection law», in *Emerging challenges in privacy law: comparative perspectives*, Cambridge University Press, pp. 290 e ss.

30 Neste sentido, TEIXEIRA, Maria Leonor da Silva, 2013, «A União Europeia e a protecção de dados pessoais: "Uma visão futurista"?, in *Revista do Ministério Público*, n.º 135, p. 95.

não determinando nem a sua significância, nem elencando um conjunto de índices a partir dos quais o intérprete/aplicador poderá densificar o conceito de «razões imperiosas e legítimas prevalecentes». Assim sendo, cabe esperar pela jurisprudência do TJUE para clarificar esta matéria, embora se advogue, com razão, que este preceito pode dar azo, na prática, a um esvaziamento de conteúdo do direito de oposição ao tratamento de dados do titular, com severas implicações no escopo do direito à proteção de dados;

ix) *direito à não sujeição do titular dos dados a nenhuma decisão tomada exclusivamente com base no tratamento automatizado de dados*, incluindo a definição de perfis (artigo 22.º do Regulamento), salvo as restrições previstas no n.º 2 [que inclui, na alínea c), o consentimento do próprio titular, no âmbito da temática da disponibilidade e da renúncia a direitos fundamentais do titular]. Trata-se de um preceito de relevo em face da preferência crescente pela utilização de meios informáticos no âmbito do procedimento administrativo e restantes formas de atuação das Administrações dos Estados-membros (no ordenamento jurídico nacional, relevam os artigos 61.º a 64.º do CPA, estabelecendo-se que a preferência pela instrução dos procedimentos através da utilização de meios eletrónicos visa facilitar o exercício de direitos e o cumprimento de deveres, agilizar os procedimentos e garantir a sua maior economia e eficiência) com implicações na possibilidade de emissão de atos administrativos «eletrónicos» (decisões individuais e concretas automatizadas, sem intervenção humana, mediante o preenchimento de formulários informáticos que fixem os pressupostos sobre os quais assentará o dever de decisão do caso concreto, sobretudo nos casos de atos administrativos vinculados);

x) enfoque na *compliance* no âmbito do *regime do responsável pelo tratamento de dados* (artigos 4.º, parágrafo 7<sup>31</sup>, 24.º e 26.º-31.º do Regulamento): o legislador europeu coloca a ênfase dos deveres de fiscalização e de verificação prévia do cumprimento das regras relativas a proteção de dados sobre o «responsável pelo tratamento de dados», desonerando as entidades administrativas independentes de uma acumulação excessiva de funções de fiscalização que gera ineficiências claras, num fenómeno de *privatização dos deveres estaduais de proteção*<sup>32</sup> que se tem vindo a verificar no domínio do Direito Administrativo. Nesta senda, o responsável pelo tratamento dos dados é incumbido de

---

31 Que dispõe que se considera como responsável pelo tratamento «a pessoa singular ou coletiva, a autoridade pública, a agência ou outro organismo que, individualmente ou em conjunto com outras, determina as finalidades e os meios de tratamento de dados pessoais; sempre que as finalidades e os meios desse tratamento sejam determinados pelo direito da União ou de um Estado-Membro, o responsável pelo tratamento ou os critérios específicos aplicáveis à sua nomeação podem ser previstos pelo direito da União ou de um Estado-membro».

32 SILVA, Jorge Pereira da, 2015, *Deveres do Estado de Protecção de Direitos Fundamentais*, Universidade Católica Editora, pp. 729 e ss.

diversas tarefas, nomeadamente, a de fiscalizar a (in)observância dos princípios gerais sobre proteção de dados (artigo 5.º, n.º 2, do Regulamento); de verificar se o tratamento de dados recolhidos sem o consentimento do titular, ou com título habilitante em norma de Direito da União Europeia ou de Direito dos Estados-membros que cumpra com os ditames da proporcionalidade, é compatível com a finalidade para a qual os dados pessoais foram inicialmente recolhidos (artigo 6.º, n.º 4, do Regulamento); de poder demonstrar o consentimento do titular dos dados (artigo 7.º, n.º 1, do Regulamento); de disponibilizar informações ao titular, ao nível da finalidade do tratamento, período de conservação, possibilidade de retificação ou apagamento e direito de apresentar queixa (artigos 12.º-15.º, 18.º e 19.º do Regulamento); e, ainda, de implementar mecanismos eficazes de *compliance*, sob pena da aplicação de multas administrativas até 20 000 000,00 € ou, tratando-se de uma empresa, até 4% do seu volume de negócios anual a nível mundial<sup>33</sup>;

*xi) privacy by design e privacy by default* (artigo 25.º do Regulamento): o legislador europeu, no sentido de reforçar a prossecução efetiva do escopo de proteção do direito à proteção de dados, considerou que devem ser aplicadas um conjunto de medidas técnicas e organizativas que permitam a tomada em devida linha de conta de aspetos relacionados com a proteção de dados, aquando da criação e desenvolvimento de cada novo serviço ou produto, por parte das entidades que possam deter dados pessoais de terceiros. Por outro lado, impõe-se que quando o serviço ou produto seja comercializado, deva sê-lo com a parametrização das definições automáticas no sentido de garantirem o maior nível de privacidade possível do próprio consumidor;

*xii) medidas de segurança no tratamento dos dados* (artigo 32.º do Regulamento): prevê-se, neste âmbito, um conjunto de medidas técnicas adequadas para assegurar um nível de segurança consoante o risco envolvido, seja pela natureza sensível das informações seja pela possibilidade de se lesar não apenas o titular dos dados, mas também de terceiros, entre as quais medidas que assegurem a confidencialidade, a cifragem e a disponibilidade dos dados, assim como a implementação de um processo que teste a eficácia das medidas;

---

33 Para uma análise crítica do regime sancionatório, MOUTINHO, José Lobo, / RAMALHO, David Silva, 2015, *Notas sobre o regime sancionatório da Proposta de Regulamento Geral sobre a Protecção de Dados do Parlamento Europeu e do Conselho*, in Fórum de Proteção de Dados, Lisboa, n.º 1, pp. 25 e ss., considerando que o legislador europeu foi «demasiado ambicioso» e que a «tutela sancionatória carece de ser cuidadosamente (re)pensada e (re)definida, tendo em atenção a natureza das infrações em causa. Com efeito, a tutela dos bens jurídicos subjacentes à proteção de dados não se cria pela imposição externa de sanções desproporcionais ao agente da infração, num pensamento, afinal, de uma prevenção geral entendida de forma bastante primária, devendo ser antes o fruto de um labor de sensibilização que faça brotar da consciência jurídica comum a compreensão dos referidos valores e a importância do seu respeito para a tutela da pessoa humana no que é a realidade da vida social e comunicacional dos nossos dias, unindo, assim, a comunidade em torno da sua preservação».

*xiii) avaliação de impacto sobre proteção de dados e consulta prévia* (artigos 35.º e 36.º do Regulamento): em casos de tratamentos de dados que impliquem a utilização de novas tecnologias ou que sejam suscetíveis de implicar um elevado risco para os direitos, liberdades e garantias dos titulares de dados, prevê-se a realização de uma avaliação de impacto e uma consulta prévia, enquanto garantias procedimentais das valorações materiais – de proteção dos dados e informações dos visados – que lhes subjazem;

*xiv) encarregado de proteção de dados* (artigos 37.º a 39.º do Regulamento): embora a previsão da figura não seja uma verdadeira inovação (visto que já se encontrava prevista genericamente e a título facultativo, nos artigos 18.º, n.º 2, e 20.º, n.º 2, da Diretiva 95/46/CE), a sua consagração a título obrigatório é uma medida significativa na realização do escopo do direito à proteção de dados.

Considerando que a futura entrada em vigor do Regulamento Geral sobre a Proteção de Dados, em 25 de maio de 2018, terá como consequência a revogação da Diretiva *ePrivacy*, nos termos do artigo 94.º do Regulamento, a Comissão Europeia publicou, em 10 de janeiro de 2017, a nova proposta de Regulamento relativo à proteção da privacidade e ao tratamento de dados pessoais no sector das comunicações eletrónicas, visando reforçar a segurança no mercado único digital<sup>34</sup>.

A revisão do bloco de legalidade em matéria de proteção de dados, levada a cabo pelo legislador europeu, exigirá, para além da imediata compatibilização da legislação interna com as novas soluções consagradas no Regulamento, um esforço de adequação das estruturas institucionais e empresariais públicas e privadas com as novas diretrizes e, bem assim, o desempenhar de um papel mais ativo por parte da CNPD, no caso português, e das restantes entidades administrativas independentes, nos restantes Estados-membros, na fiscalização do cumprimento do bloco de regras e princípios aprovado<sup>35</sup>.

No entanto, em face do carácter genérico ou programático que o novo Regulamento assume na regulação de determinadas matérias, também se considera necessária uma atividade de densificação e concretização, por via regulamentar ou através de comunicações interpretativas, das soluções constantes de diversos preceitos do Regulamento, em função das particularidades concretas de cada Estado-membro, nomeadamente ao nível da estrutura e funcionamento da Administração Pública.

---

34 Disponível em <https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-privacy-and-electronic-communications>.

35 Aliás, seria, de todo em todo, benéfica a promoção de um conjunto de ações de sensibilização dos cidadãos para o acervo de direitos que lhes é, de forma inovatória, reconhecido no Regulamento.

Ora, pelo exposto, impõe-se concluir que, ao fixar uma regulamentação mais densa e uniforme no espaço europeu (*rectius*, mais exigente), o escopo do direito à proteção de dados sai, inequivocamente, reforçado com a aprovação e implementação do novo bloco de legalidade.

#### **4. O encarregado de proteção de dados (*Data Protection Officer*) e a privatização dos deveres estaduais de proteção**

De entre as diversas inovações introduzidas pelo Regulamento no domínio da proteção de dados, a imposição, a título obrigatório, da nomeação de um encarregado de proteção de dados (DPO) merece especial destaque.

Com efeito, no artigo 37.º, n.º 1, do Regulamento, prevê-se a obrigação de designar um encarregado de proteção de dados nos seguintes casos:

i) Quando o tratamento seja efetuado por uma autoridade ou um organismo público<sup>36</sup>, com exceção dos tribunais;

ii) Quando as atividades principais do responsável pelo tratamento de dados ou do subcontratante consistam em operações de tratamento que, devido à sua natureza, âmbito e/ou finalidade, exijam um controlo regular e sistemático dos titulares dos dados em grande escala;

iii) Quando as atividades principais do responsável pelo tratamento de dados ou do subcontratante consistam em operações de tratamento, em grande escala, de categorias especiais de dados ou de dados relacionados com condenações e infrações penais.

Sobre o estatuto da pessoa concreta que pode ser nomeada como encarregado de proteção de dados, e sobre a sua posição jurídica no respetivo seio empresarial público ou privado, é possível enfatizar os seguintes elementos:

a) Trata-se de um trabalhador ou prestador de serviços, contratado pela entidade responsável pelo tratamento de dados ou pelo subcontratante, selecionado com base nas suas *qualidades profissionais e conhecimentos especializados* no domínio da proteção de dados, nos termos do artigo 37.º, n.ºs 5 e 6;

b) Estabelece-se um conjunto de *deveres de informação e de cooperação* dos responsáveis pelo tratamento de dados perante o encarregado de proteção de dados, facultando-lhe as informações e os meios necessários ao regular e

---

36 Permite-se, inclusivamente, nos termos do n.º 3 do artigo 37.º, que, dependendo da respetiva estrutura empresarial em termos de organização e dimensão, seja possível nomear um único encarregado de proteção de dados para várias entidades, em nome dos princípios da eficácia, eficiência e boa administração.

eficiente desempenho das suas funções<sup>37</sup>, tal como se dispõe nos n.ºs 1 e 2 do artigo 38.º;

c) Garante-se um *estatuto de independência*, que permite ao encarregado de proteção de dados não estar vinculado às instruções do responsável do tratamento dos dados quanto ao exercício das suas funções, não podendo ser penalizado pela inobservância das mesmas; diga-se, aliás, que à luz do Direito Administrativo nacional, estabelece-se um verdadeiro *dever de desobediência* perante quaisquer ordens ou instruções provenientes do responsável pelo tratamento, que se afigurariam como atos nulos;

d) Consagram-se *deveres de sigilo e confidencialidade*, no que tange à natureza e conteúdo dos dados pessoais dos seus titulares, nos termos do artigo 38.º, n.º 5.

A obrigatoriedade de nomeação de um encarregado de proteção de dados, nos casos já referidos, exigirá uma adaptação por parte das entidades e empresas, quer sejam de natureza pública ou privada, ao nível da sua estrutura organizativa no sentido de promover a integração do encarregado de proteção de dados de acordo com os ditames do Regulamento, de modo a que possa exercer eficazmente as suas funções de garantia do direito fundamental à proteção de dados dos cidadãos.

Pese embora o exposto, deve notar-se que o Regulamento contém um regime genérico e lacunar em diversos aspetos quanto à figura do encarregado de proteção de dados, o que pode constituir fonte de insegurança e incerteza jurídica sobre os titulares de dados quanto à segurança e efetividade da proteção do seu direito, tal como nos próprios operadores económicos ao nível da adaptação das suas estruturas organizativas. O mesmo se pode afirmar relativamente ao âmbito das funções do encarregado de proteção de dados e às condicionantes e restrições existentes na dinâmica de relacionamento a

---

37 O artigo 39.º do Regulamento prevê, a título de mínimo (em conformidade com o que se dispõe no n.º 6 do artigo 38.º e do n.º 1 do artigo 39.º), que o âmbito das funções que estão adstritas ao encarregado da proteção de dados são: «a) Informa e aconselha o responsável pelo tratamento ou o subcontratante, bem como os trabalhadores que tratem os dados, a respeito das suas obrigações nos termos do presente regulamento e de outras disposições de proteção de dados da União ou dos Estados-membros; b) Controla a conformidade com o presente regulamento, com outras disposições de proteção de dados da União ou dos Estados-membros e com as políticas do responsável pelo tratamento ou do subcontratante relativas à proteção de dados pessoais, incluindo a repartição de responsabilidades, a sensibilização e formação do pessoal implicado nas operações de tratamento de dados, e as auditorias correspondentes; c) Presta aconselhamento, quando tal lhe for solicitado, no que respeita à avaliação de impacto sobre a proteção de dados e controla a sua realização nos termos do artigo 35.º; d) Cooperar com a autoridade de controlo; e) Ponto de contacto para a autoridade de controlo sobre questões relacionadas com o tratamento, incluindo a consulta prévia a que se refere o artigo 36.º, e consulta, sendo caso disso, esta autoridade sobre qualquer outro assunto.» No fundo, trata-se de avaliar e promover a implementação de mecanismos de cumprimento da legislação sobre proteção de dados e de prestar aconselhamento ao responsável pelo tratamento de dados, assim como de cooperar com a CNPD.



estabelecer entre o encarregado de proteção e a empresa ou entidade, com o intuito de se cumprir integralmente as obrigações legais a que se encontram adstritos.

Em princípio, dependendo da natureza pública ou privada da entidade na qual exercerá as suas funções, ao encarregado de proteção de dados será aplicado, subsidiária e respetivamente, a Lei Geral do Trabalho em Funções Públicas (Lei n.º 35/2014, de 20 de junho) ou o Código do Trabalho (Lei n.º 7/2009, de 12 de fevereiro), com as devidas adaptações.

Em face do quadro enunciado, afigura-se previsível e necessário que as entidades administrativas independentes dos Estados-membros incumbidas de regular o sector da proteção de dados, como é o caso da CNPD, venham a emitir um conjunto de regulamentos, orientações ou comunicações interpretativas que concretizem as normas que se extraem dos artigos 37.º a 39.º do Regulamento, de forma não só a colmatar as lacunas subsistentes como a adaptar o normativo às especificidades da realidade nacional.

Ora, atenta a necessidade de se empreender a tarefa de densificação do regime aplicável ao encarregado de proteção de dados, é possível identificar, desde já, dois aspetos que certamente serão alvo de debate e controvérsia aquando da futura conformação do bloco de legalidade ao novo Regulamento e, bem assim, da aplicação prática do mesmo:

i) Deve o acesso ao cargo de encarregado de proteção de dados ser restringido/limitado a pessoas que tenham conhecimentos jurídicos obtidos por via académica (*v.g.*, uma licenciatura em Direito ou uma pós-graduação/especialização em certa área jurídica)?

De facto, o Regulamento não prevê que categorias profissionais ou que condições académicas permitem o acesso ao cargo, apenas afirmando a necessidade de o profissional reunir as qualidades profissionais e conhecimentos técnicos especializados sobre a área enquanto requisitos.

Ora, se é verdade que a natureza das funções desempenhadas pelo DPO, sobretudo na vertente de garantia do direito à proteção de dados dos titulares e da responsabilidade pelo cumprimento das suas obrigações estatutárias, pode conduzir a uma ideia de maior «habilitação legal e técnica» no acesso ao cargo por profissionais ligados ao Direito, certo é que tal restrição representaria uma violação do princípio da igualdade, sem justificação bastante, nos termos do artigo 13.º da CRP, visto que não é demonstrável que apenas os profissionais com habilitações académicas na área do Direito possam desempenhar eficazmente as funções cometidas ao encarregado de proteção de dados.

Se pensarmos em certos conjuntos de categorias profissionais, *v.g.*, ligadas à engenharia informática, que possuem conhecimentos técnicos sobre o funcionamento dos sistemas de recolha, tratamento e utilização de dados, a situação



de desconformidade com o princípio da igualdade torna-se evidente, à qual, neste caso, necessariamente acresce que se trataria de uma restrição abusiva da liberdade de escolha de profissão e de acesso à função pública, nos termos do artigo 47.º da CRP, e da livre iniciativa económico-empresarial, tal como se dispõe no artigo 61.º da CRP.

ii) Pode a CNPD criar um processo de certificação direta de DPO – dada a assumida falta de especialistas no mercado nesta área e, por outro lado, o elevado número de entidades públicas e privadas que se encontram abrangidas pela obrigação de nomear um DPO – que se assuma como uma condição de legitimidade e de acesso ao exercício do cargo?

Mais uma vez, trata-se de uma questão discutível, sobretudo à luz do princípio da concorrência e do princípio da livre iniciativa económico-empresarial, na vertente de liberdade de organização e gestão da empresa enquanto direito institucional da empresa em si mesma.

No entanto, diga-se que também não é desejável que se entregue às entidades públicas e privadas discricionariedade total sobre a nomeação do seu encarregado de proteção de dados, considerando a exigência que consta do Regulamento de garantir as «qualidades profissionais» e os «conhecimentos especializados» do DPO, nos termos do n.º 5 do artigo 37.º do Regulamento.

Uma solução possível, de compromisso entre as diversas vertentes e valorações em ponderação, passaria pela implementação de um sistema de certificação indireta ou em escada, no qual a CNPD certificasse certas entidades que reunissem os requisitos necessários para tal (*v.g.*, caso de certas universidades ou de certos institutos públicos), como estando habilitadas a desenvolver, por sua vez, processos de habilitação e certificação legal dos candidatos, para que estes venham a exercer, futuramente, o cargo de encarregado de proteção de dados, afastando-se, desta forma, o obstáculo que uma intervenção direta da CNPD na livre iniciativa privada neste âmbito pode gerar.

Apesar de toda a incerteza que rodeia a figura do DPO, um elemento do regime revela-se bastante nítido: em face do disposto no n.º 4 do artigo 38.º<sup>38</sup>, o encarregado de proteção de dados assume uma função de garantia não apenas da legalidade objetiva relativa à proteção de dados (cumprimento do conjunto de regras e princípios que formam o bloco de legalidade em causa, de um ponto de vista de ordem pública e valores de segurança e justiça), mas também de garantia da legalidade subjetiva, ou seja, de fiscalizar que a entidade detentora dos dados pessoais não viola o direito fundamental à proteção de dados do seu titular.

---

38 Que dispõe que «Os titulares dos dados podem contactar o encarregado da proteção de dados sobre todas as questões relacionadas com o tratamento dos seus dados pessoais e com o exercício dos direitos que lhe são conferidos pelo presente regulamento».

Por conseguinte, tal como também se constata quando o Regulamento prevê certas obrigações para o responsável pelo tratamento de dados ou para o subcontratante<sup>39</sup>, é possível verificar que a previsão da obrigatoriedade de nomeação de um encarregado de proteção de dados, com as funções que lhe são cometidas, é uma manifestação do fenómeno de *privatização de deveres estaduais de proteção*<sup>40</sup> que se tem vindo a verificar no Direito Administrativo, conferindo-se a particulares (no caso de se tratarem de estruturas empresarias de natureza privada que lidem com quantidades maciças de dados ou dados sensíveis) tarefas de fiscalização e verificação do cumprimento integral da legalidade que, *a priori*, estariam a cargo de entidades públicas, no âmbito da função administrativa do Estado – fenómeno ao qual certamente não serão alheias as considerações sobre o momento atual de crise de recursos financeiros que, inevitavelmente, influencia a capacidade do agir público<sup>41</sup>.

A propósito da privatização dos serviços de correios e de telecomunicações que se verificou em Portugal, também se afirmou que da privatização dos deveres de proteção do Estado inerentes às áreas em causa (nomeadamente no que respeita ao sigilo da correspondência) não pode resultar qualquer diminuição de garantia dos bens jusfundamentais em causa, mantendo-se, pelo menos, o mesmo nível de proteção em face do que anteriormente existia.

Afirmou-se, nessa sede, que a «manutenção do *standard* de proteção do direito ao sigilo de correspondência continua a ser um dever do Estado, exigirá que os poderes públicos, através de normas adequadas (desde normas legislativas, até normas técnicas elaboradas por entidades ou autoridades independentes ou comissões técnicas), tem o dever de manter um nível de proteção elevado do segredo de correspondência», consagrando-se uma «responsabilidade estadual pelos resultados da privatização»<sup>42</sup>.

---

39 Analisadas *supra*.

40 Cfr. SILVA, Jorge Pereira da, 2015, *Deveres do Estado de Protecção de Direitos Fundamentais*, Universidade Católica Editora, p. 731, afirma que «os particulares são chamados a desempenhar funções de proteção de direitos fundamentais inseridos no âmbito de estruturas relacionais tetrapolares (ou multipolares), em que à relação triangular original se vem juntar um outro sujeito privado que – a par do Estado ou em sua substituição – é encarregado de zelar pela proteção dos bens jurídicos do titular sob ameaça».

41 Sobre o modo como a falta de recursos, associada à atual crise económico-financeira, influi sobre o agir da Administração e sobre a normatividade concreta à qual se lhe deve exigir o cumprimento, VENTAS, Rosa María, HERNÁNDEZ, Ignacio [et al.], 2012, *La Administración en tiempo de crisis: presupuestación, cumplimiento de obligaciones y responsabilidades*, Thomson Reuters, Aranzadi, pp. 1071 e ss., para uma visão da problemática no Direito Espanhol.

42 Cfr. CANOTILHO, Gomes, 2008, *Estudos sobre Direitos Fundamentais*, Coimbra Editora, p. 164. Sendo certo que o autor parte da realidade existente no sector específico das telecomunicações e dos correios, na qual se verificou uma privatização não apenas dos deveres, mas também das próprias estruturas empresariais, é de considerar que o entendimento exposto pelo autor também revela a sua utilidade, *mutatis mutandis*, na compreensão dos casos de mera privatização dos deveres estaduais de proteção,

De resto, resulta do dispositivo constitucional, previsto no artigo 18.º, n.º 1, da Constituição, a vinculação imediata das entidades privadas ao cumprimento das dimensões garantísticas do direito fundamental à proteção de dados, enquanto posição jurídica subjetiva compreensiva, que se desdobra num conjunto de corolários relevantes na garantia da efetividade da proteção do direito.

Portanto, o DPO, ao desempenhar funções que tutelam, de um modo imediato – não só no contacto direto com os titulares de dados, mas também no contacto que, por via das obrigações de informação e cooperação, terá com a CNPD –, o direito fundamental à proteção de dados pessoais dos cidadãos, assumir-se-á como um funcionário público no exercício de poderes públicos e, mesmo nos casos de encarregados de proteção de dados que não sejam funcionários públicos (porque integrados em estruturas empresariais privadas) como um privado no exercício de funções públicas ou jurídico-administrativas<sup>43</sup>, que, como tal, poderá vir a ser responsabilizado, em ambos os casos, nos termos dos artigos 1.º, n.º 5, e 7.º e ss. da Lei n.º 67/2007, de 31 de dezembro, ou Regime da Responsabilidade Civil Extracontratual do Estado.

## 5. Conclusão

A problemática da proteção de dados pessoais é uma questão incontornável da sociedade de risco tecnológico atual, ao introduzir novos perigos aos direitos, liberdades e garantias dos cidadãos que devem ser devidamente enquadrados e acautelados.

O reconhecimento de um recorte dogmático próprio ao direito à proteção de dados constitui um primeiro passo no reforço da efetividade do escopo do direito, aliado à elaboração de regimes legais que tutelem a posição do titular dos dados de forma adequada em face dos constantes avanços tecnológicos registados.

Neste sentido, sentiu-se a necessidade de rever o quadro normativo da UE ao nível da proteção de dados, aprovando-se o novo Regulamento Geral sobre Proteção de Dados que, certamente, irá desempenhar um papel essencial no seio do bloco de legalidade de proteção de dados dos diferentes Estados-membros.

---

assentes na entrega a entidades privadas de deveres de fiscalização e de verificação do cumprimento do bloco de legalidade (sobretudo, de funções de fiscalização prévia ou *ex ante*) que, originariamente, pertenciam à competência de entidades públicas.

43 Cfr. OTERO, Paulo, 2001, «Coordenadas jurídicas da privatização da Administração Pública», in *Os caminhos da privatização da Administração Pública*, Coimbra, pp. 37 e ss.

Por fim, e ainda que se possa argumentar que o «tempo do direito» nunca conseguirá alcançar, de forma plena, o «tempo da tecnologia» neste campo (dada a maior morosidade e ponderação que é, em princípio, exigida a um processo legislativo do que a um processo de criação, desenvolvimento e comercialização de uma nova tecnologia ou de novas funcionalidade da mesma tecnologia), reservando-se *ad aeternum* um papel essencialmente reativo perante os avanços tecnológicos e os perigos ou lesões efetivas entretanto verificadas, sempre será possível afirmar que, para o exercício efetivo do direito fundamental à proteção de dados, o particular tem de se afirmar como o «pleno proprietário» dos seus próprios dados, sobretudo numa época em que «A “morte da privacidade” deve, assim, ser reinventada para reclamar antes a transparência dos procedimentos de restrição de direitos»<sup>44</sup>.

## 6. Bibliografia

- ALEXANDRINO, José Melo, 2014, «Jurisprudência da Crise. Das questões Prévias às Perplexidades», *O Tribunal Constitucional e a Crise – Ensaios Críticos*, p. 67.
- ÁLVAREZ CARO, María, 2014, «Reflexiones sobre la sentencia del TJUE en el asunto “Mario Costeja” (C-131/12) sobre derecho al olvido», *Revista Española de Derecho Europeo*, n.º 51, pp.165 e ss.
- ANDRADE, Vieira de, 2012, *Os direitos fundamentais na Constituição a República Portuguesa de 76*, Almedina, pp. 288 e ss.
- ASCENÇÃO, Oliveira, 2005, *O Direito – Introdução e Teoria Geral*, Almedina, p. 215.
- BRITO, Miguel Nogueira de, 2015, *O admirável novo constitucionalismo da Sociedade de Risco*, *In Memoriam Ulrich Beck*, Atas do colóquio promovido pelo ICJP e pelo CIDP, disponível em [https://www.icjp.pt/sites/default/files/publicacoes/files/ebook\\_ulrichbeck\\_0.pdf](https://www.icjp.pt/sites/default/files/publicacoes/files/ebook_ulrichbeck_0.pdf), pp. 54 e ss.
- CALVÃO, Filipa Urbano, 2015, *Modelo de supervisão e tratamento de dados pessoais na União Europeia: da atual Diretiva ao futuro Regulamento*, in Fórum de Proteção de Dados, Lisboa, n.º 1, pp. 34 e ss.
- CANARIS, Claus-Wilhelm, 1989, *Pensamento sistemático e conceito de sistema na Ciência do Direito*, Lisboa, pp. 9 e ss.
- CANOTILHO, Gomes, 2002, *Direito Constitucional e Teoria da Constituição*, Almedina, p. 272.
- CANOTILHO, Gomes / MOREIRA, Vital, 2007, *Constituição da República Portuguesa Anotada*, vol. I, Coimbra Editora, pp. 551 e ss.

---

44 Cfr. NETO, Luísa, 2011, «Acórdãos do TC n.ºs 213/2008 e 486/2009: a prova numa sociedade transparente», in *Revista da Faculdade de Direito da Universidade do Porto*, p. 343.

- EGÍDIO, Mariana Melo, 2010, «Análise da estrutura das normas atributivas de direitos fundamentais. A ponderação e a tese ampla da previsão», in *Estudos em Homenagem ao Prof. Doutor Sérvulo Correia*, vol. I, Faculdade de Direito da Universidade de Lisboa, pp. 626 e ss.
- FERREIRA, Pedro, 2006, *A protecção de dados pessoais na sociedade de comunicação – Dados de Tráfego, Dados de Localização e Testemunhos de Conexão*, O Espírito das Leis, pp. 144 e ss.
- GOOLD, Imogen, 2015, «A, B and C v Ireland [2010]», in *Landmark Cases in Medical Law*, Hart Publishing, pp. 335 e ss.
- GRAHAM, Stephen, 1998, *Spaces of surveillant simulation: New Technologies, digital representations and material geographies*, Environment and Planning D: Society and Space, pp. 483 e ss.
- LINDSAY, David, 2014, «The “right to be forgotten” in European data protection law», in *Emerging challenges in privacy law: comparative perspectives*, Cambridge University Press, pp. 290 e ss.
- LOPES, Joaquim de Seabra, 2016, *O artigo 35.º da Constituição: da génese à atualidade e ao futuro previsível*, in Fórum de Proteção de Dados, n.º 2, pp. 15 e ss.
- LUHMANN, 1999, *Funktionem und Folgen formaler Organisation*, Berlim, pp. 304 e 305.
- MARÍA VENTAS, ROSA / HERNÁNDEZ, Ignacio [et al.], 2012, *La Administración en tiempos de crisis: presupuestación, cumplimiento de obligaciones y responsabilidades*, Thomson Reuters, Aranzadi, pp. 1071 e ss.
- MIRANDA, Jorge / MEDEIROS, Rui, 2010, *Constituição Portuguesa Anotada*, tomo I, Coimbra Editora.
- MONIZ, Helena, 2002, «Os problemas jurídico-penais da criação de uma base de dados genéticos para fins criminais», in *Revista Portuguesa de Ciência Criminal*, n.º 2, pp. 246 e ss.
- MOUTINHO, José Lobo / RAMALHO, David Silva, 2015, *Notas sobre o regime sancionatório da Proposta de Regulamento Geral sobre a Protecção de Dados do Parlamento Europeu e do Conselho*, in Fórum de Proteção de Dados, Lisboa, n.º 1, pp. 25 e ss.
- MULLER, Jorg Paul, 1983, *Éléments pour une théorie suisse des droits fondamentaux*, Berne.
- NETO, Luísa, 2011, «Acórdãos do TC n.ºs 213/2008 e 486/2009: a prova numa sociedade transparente», in *Revista da Faculdade de Direito da Universidade do Porto*, p. 343.
- NICOLAU, Tatiana Duarte, 2015, *O armazenamento de amostras de ADN e as bases de dados de perfis genéticos*, Comissão Nacional de Proteção de Dados, pp. 32 e 33.

- NOVAIS, Jorge Reis, 2004, *Os Princípios Constitucionais Estruturantes da República Portuguesa*, Coimbra Editora, pp. 162 e ss.
- NOVAIS, Jorge Reis, 2010, *As restrições aos Direitos Fundamentais não expressamente autorizadas pela Constituição*, 2.ª ed., Coimbra Editora, pp. 799 e ss.
- NOVAIS, Jorge Reis, 2015, *A Dignidade da Pessoa Humana*, vol. I, Almedina, pp. 58 e ss.
- OTERO, Paulo, 2001, «Coordenadas jurídicas da privatização da Administração Pública», in *Os caminhos da privatização da Administração Pública*, Coimbra, pp. 37 e ss.
- PINHEIRO, Alexandre Sousa, 2015, «A proteção de dados no novo Código do Procedimento Administrativo», in *Comentários ao Novo Código do Procedimento Administrativo*, 2.ª edição, AAFDL Editora, pp. 253 e ss.
- PINHEIRO, Alexandre Sousa, 2015, *Privacy e proteção de dados: a construção dogmática do direito à identidade informacional*, Lisboa, pp. 695 e ss.
- POLLMAN, Elizabeth, 2014, «A Corporate Right to Privacy», in *Minnesota Law Review*, vol. 99, pp. 32 e 88.
- RAMALHO, David Silva, 2016, *O novo Regulamento Geral sobre a Proteção de Dados e o Data Protection Officer*, disponível em [http://www.servulo.com/xms/files/00\\_SITE\\_NOVO/01\\_CONHECIMENTO/01\\_PUBLICACOES\\_SERVULO/2016/Updates/Update\\_PI\\_PD\\_e\\_TI\\_DSR\\_O\\_Novo\\_Regulamento\\_Geral\\_sobre\\_a\\_Protecao\\_de\\_Dados.pdf](http://www.servulo.com/xms/files/00_SITE_NOVO/01_CONHECIMENTO/01_PUBLICACOES_SERVULO/2016/Updates/Update_PI_PD_e_TI_DSR_O_Novo_Regulamento_Geral_sobre_a_Protecao_de_Dados.pdf).
- ROSA MATAcÁN, Maria, 2011, *Protección de Datos Personales en la Sociedad de la Información y la Vigilancia*, La Ley, Madrid.
- SERRANO, Rita, 2017, *Proposta de Regulamento do Parlamento Europeu e do Conselho, relativo à proteção da privacidade e ao tratamento de dados pessoais no sector das comunicações electrónicas («Proposal for na ePrivacy regulation»)*, disponível em [http://www.servulo.com/xms/files/00\\_SITE\\_NOVO/01CONHECIMEN TO/01\\_PUBLICACOES\\_SERV ULO/2017/Updates/Update\\_Propriedade\\_Intelectual\\_RSO\\_01.02.2017\\_ePrivacy\\_Regulation.pdf](http://www.servulo.com/xms/files/00_SITE_NOVO/01CONHECIMEN TO/01_PUBLICACOES_SERV ULO/2017/Updates/Update_Propriedade_Intelectual_RSO_01.02.2017_ePrivacy_Regulation.pdf).
- SERRANO PÉREZ, Maria, 2003, *El Derecho Fundamental a la protección de datos. Derecho español y comparado*, Civitas, Madrid, p. 72.
- SILVA, Jorge Pereira da, 2015, *Deveres do Estado de Protecção de Direitos Fundamentais*, Universidade Católica Editora, pp. 729 e ss.
- SILVA, Suzana Tavares da, 2012, «O tetralema do controlo judicial da proporcionalidade no contexto da universalização do princípio: adequação, necessidade, ponderação e razoabilidade», in *Boletim da Faculdade de Direito Coimbra*, n.º 2, pp. 668 e 678.
- SORIANO GARCÍA, Jose Eugenio, 2012, «Derecho al olvido y la creación de derechos», in *Revista de Economía e Direito*, Lisboa, vol. 17, n.º 1, pp. 207 e ss.

TEIXEIRA, Maria Leonor da Silva, 2013, «A União Europeia e a protecção de dados pessoais: “Uma visão futurista”?», in *Revista do Ministério Público*, n.º 135, p. 66.

TERRINHA, Luís Heleno, 2015, *Direito e contingência: com e para além de Ulrich Beck*, In *Memoriam Ulrich Beck*, Atas do colóquio promovido pelo ICJP e pelo CIDP, disponível em [https://www.icjp.pt/sites/default/files/publicacoes/files/ebook\\_ulrichbeck\\_0.pdf](https://www.icjp.pt/sites/default/files/publicacoes/files/ebook_ulrichbeck_0.pdf), p. 21.

WARREN, Samuel / BRANDEIS, Louis, 1995, *El derecho a la intimidad*, Madrid: Civitas.

# The Muddled Science of Comparative Law: Mending Terminology and Mapping its' Benefits within Indian Constitutional Discourse

## Hakim Yasir Abbas

Assistant Professor University of Kashmir

---

### SUMMARY

#### Introduction

1. Jurocomparatology: a way out of comparative law's terminological quagmire
  - 1.1. Jurocomparatology: An Answer to Comparative Law's Definitional Predicament
  - 1.2. Jurocomparatology: Defining the Nature and Scope
  - 1.3. Jurocomparatology: Defining the Subject-Matter
    - 1.3.1. Law for the Purpose of Comparative Law
    - 1.3.2. Foreign for the Purpose of Comparative Law
  - 1.4. Jurocomparatology: Justifying Use of International Law as a Separate Category
2. Mapping the benefits of jurocomparatology within indian jurisprudence
  - 2.1. Intellectual use of Jurocomparatology
  - 2.2. Gains for Methodology
  - 2.3. Law Reforms
  - 2.4. Judicial Process
  - 2.5. Comparative Method and Development of International Law
3. Conclusion



## Introduction

Comparing the task of deciding cases to “brewing a compound (tea)”, Benjamin N. Cardozo, argues that judges use different principles, ingredients and tools to formulate a judicial decision (a compound)<sup>1</sup>. The qualitative and quantitative use of these ingredients varies according to the facts and circumstances of each case and the nature of law involved therein. It may happen that while one ingredient “X” would play a strong role in a case, its’ relevance in other cases would be nominal (or it may play no role at all). The influence of each ingredient may also depend upon the “taste of the judge”. If a judge likes “strong tea”, he will use one ingredient (which brings such strong taste to the tea) more than the other ingredients. However, if a judge likes black tea, then he will not use an ingredient (milk) at all. If he likes green tea, he most certainly will use different ingredients<sup>2</sup>. In legal terminology these ingredients are usually referred to as “tools of interpretation” which can be categorised as primary and secondary tools<sup>3</sup>. “Foreign law” and “International law” are also tools of interpretation and this paper is an attempt to scrutinize the extent and the manner in which they are used within Indian jurisprudence.

Cardozo subsequently divides these principles or ingredients as those which judges use consciously and those which they use subconsciously<sup>4</sup>. Keeping this in mind, it becomes pertinent to mention here that the use of foreign law and international law as tools of interpretation by constitutional courts in India falls within the former category and it is an activity in which these courts engage intentionally and on purpose<sup>5</sup>. Engaging “foreign law” and “international law”, as

---

1 CARDOZO, Benjamin N., *Nature of Judicial Process* 10-11 (10<sup>th</sup> Indian Reprint, 2012) [Hereinafter Cardozo 2012].

2 This philosophy can be most associated with Legal Realism, the proponents of which argue that the judges decide the cases subjectively and use different legal tools and terminologies to cover-up their subjectivity. The standard account, as put by a legal historian, is this:

“Formalist judges [...] assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics [...] The Legal Realists [...], tutored by Holmes, Pound, and Cardozo, devastated these assumptions [...]. They sought to weaken, if not dissolve, the law-politics dichotomy, by showing that the act of judging was not impersonal or mechanistic, but rather was necessarily infected by the judges’ personal values.” [WIECEK, William M., 1988, *Liberty Under Law: The Supreme Court in American Life* 187, cited in TAMANAHA, Brian Z., 2009, *Understanding Legal Realism*, 87 *Texas Law Review* 731].

3 SINGH, G.P., 2010, *Principles of Statutory Interpretation* (12th ed.).

4 CARDOZO, 2012, *Supra* 2, at 11-12.

5 ABBAS, Hakim Yasir, *Domestication of International Law in India: A Connubial or a Concubine-al Indulgence? – Part 1*, SRIL Blog, available at 23 <http://srilindia.org/2015/08/23/domestication-of-international-law-in-india-a-connubial-or-a-concubine-al-indulgence-part-i/>, last seen on 10/12/2017 [Hereinafter Abbas SRIL]; TRIPATHI, P. K., 1957, *Foreign Precedents and Constitutional Law* 57 *Columbia Law Review* 319, 325 [Hereinafter Tripathi 1957]; SHANKAR, 2010, Shylashri, *The Substance of the Constitution: Engag-*

tools of interpretation, is a conscious activity, one in which Indian constitutional courts have engaged enthusiastically<sup>6</sup>.

The process of using both “foreign law” as well as “international law” as essential ingredient in decision making is in its golden age<sup>7</sup>. Their use has become an essential part of the legal culture in a large number of nations, including India. Moreover, their use is also abundant within legal research [by individuals as well as governmental and private institutions]. Globalization is one essential factor which has influenced the use of non-domestic legal authorities for domestic purposes. It has shrunk the world and changed the manner in which human beings, corporations and nations interact with each other. And it has done so for legal profession<sup>8</sup> as well and more so in regards to the manner in which courts

---

*ing with Foreign Judgments in India, Sri Lanka, and South Africa* 2 Drexel Law Review 373, 402 [Hereinafter Shankar 2010]; HALPÉRIN, Jean-louis, 2010, *Western Legal Transplants and India* 2(1) Jindal Global Law Review 14, 39 [Hereinafter Halperin 2010]; SCOTTI, Valentina Rita, 2013, *India: A Critical Use of Foreign Precedents on Constitutional Adjudication*, 69 in *The Use of Foreign Precedents by Constitutional Judges* [Tania Groppi and Marie Claire Ponthoreau (eds.)]; VINCENT, J. Cyril Mathias, 2010, *Legal Culture and Legal Transplants: The Evolution of the Indian Legal System (With Reference to Private Law)*, XVIII<sup>th</sup> International Congress of Comparative Law, Washington DC, available at <<http://isaidat.di.unito.it/index.php/isaidat/article/viewFile/44/50>>, last seen on 5/12/2017.

6 ABBAS SRIL, *Ibid*.

7 GLENSY, Rex D., 2005, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 Virginia Journal of International Law 357; JACKSON, Vicki C., 2003, *Transnational Discourse, Relational Authority, and the US Court: Gender Equality*, 37 Loyola of Los Angeles Law Review 271 [While referring to the use of foreign law and international law for domestic purposes she says, “looking outward to (such) transnational legal sources to encourage domestic adoption of and compliance with gender equality rights is an obvious legal strategy”, *Ibid* 277]; YEH, Jiunn-Rong, and CHANG, Wen-Chen, 2008, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 Penn State International Law Review 89 [Hereinafter Rong & Chang 2008]; TRUBEK, David M., and others, 1994, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 Case Western Reserve Law Review 407; HOWARD, A. E. Dick, 2009, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 Virginia Journal of International Law 3 [Hereinafter Howard 2009]; HIRSCHL, Ran, 2010, *Comparative Law: The Continued Renaissance of Comparative Constitutional Law*, 45 Tulane Law Review 771 [Hereinafter Hirschl 2010].

8 MAK, Elaine, 2014, *Judicial Decision-Making in a Globalized World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (1st ed.); SHAH, Prakash, 2005, *Globalisation and the Challenge of Asian Legal Transplants in Europe*, in *Singapore Journal of Legal Studies* 348; BELL, John, 2014, *Researching Globalisation: Lessons from Judicial Citations*, in *Cambridge Journal of International and Comparative Law* 961; MCGINNIS, John O., & SOMIN, Ilya, 2007, *Global Constitutionalism: Global Influence on U.S. Jurisprudence: Should International Law Be Part of Our Law?* 59 Stanford Law Review 1175; GELTER, Martin, & SIEMS, Mathias, 2012, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten of Europe’s Highest Courts*, 8 Utrecht Law Review 88 [Stating that in a globalised world, “law”, which has traditionally been the prerogative of the sovereign nation state, also seems to see some cross-border interaction *Ibid* 88]; YOO, John C., 1999, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Columbia Law Review 1955, 2004; SLAUGHTER, Anne-Marie, 2003, *A Global Community of Courts*, 44 Harvard International Law Journal 191; L’HEUREUX-DUBE, Claire, 1998, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa Law Journal 15; CHANDLER, Jason, 2011, *Foreign Law – A Friend of the Court: An Argument for Prudent Use of International Law in Domestic, Human Rights Related Constitutional Decisions*, 34 Suffolk Transnational Law Journal 117; TUSHNET, Mark, 2008-2009, *The Inevitable Globalisation of*

engage the jurisprudence from other jurisdictions<sup>9</sup>. The inevitable result has been the dilution of boundaries between “domestic law” and “foreign law” as well as between “international law” and “domestic law”<sup>10</sup>. Consequently, courts from across the globe have acknowledged and put to practice the use of foreign law and international law as valuable tools of interpretation<sup>11</sup>. The jurisprudence from countries like Ireland<sup>12</sup>, Brazil<sup>13</sup>, South Africa<sup>14</sup>, Germany<sup>15</sup>, Canada<sup>16</sup>, Aus-

---

*International Law*, 49 Virginia Journal of International Law 985; LAW, David S., 2008, *Globalization and the Future of Constitutional Rights*, 102 Northwest University Law Review 1277; ACKERMAN, Bruce, 1997, *The Rise of World Constitutionalism*, 83 Virginia Law Review 771, 772.

9 CLEVELAND, Sarah H., 2006, *Our International Constitution*, 31 Yale Journal of International Law 1 [Hereinafter Cleveland] [Referring to “globalisation” as one of the reasons which the justices of the US Supreme Court give to explain their willingness to look abroad (and towards international law) Ibid 5]; PETERS, Anne, 2009, *Supremacy Lost: International Law Meets Domestic Constitution*, 3 ICL-Journal 170 [Referring to how the convergence of international law and national constitutional law also leads to internationalization of the constitutions of the states. In other words, this convergence does not work only at a national level, but possesses the tendency to seep into the constitution of the states Ibid 174]; CHOUDHRY, Sujit, 1999, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Indiana Law Journal 819; FOSTER, Jacob, 2010, *The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa*, 45 University of San Francisco Law Review 79 [Hereinafter Foster]; SLAUGHTER, Anne-Marie, 2000, *Judicial Globalization*, 40 Virginia Journal of International Law 1103 [Hereinafter Slaughter].

10 CHOUDHRY, Sujit, 2007, *The Migration of Constitutional Ideas*; SEIPP, David J., 2006, *Our Law, Their Law, History and the Citation of Foreign Law*, 86 Boston University Law Review 1417-1446 [Hereinafter Seipp] [Arguing the transcendence of “rule of law” into a universal principle which cannot be bottled up and applied only to one nation Ibid 1442]; BUXBAUM, Hannah L., 2009, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 American Journal of Comparative Law 631.

11 SOCARRAS, Michael P., 2011, *International Law and the Constitution*, 4(2) Federal Court Law Review 1; FOMBAD, Charles Manga, 2012, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 American Journal of Comparative Law 439 [Hereinafter Fombad].

12 CAROLAN, Bruce, 2004, *The Supreme Court, Constitutional Courts and the Role of International Law in Constitutional Jurisprudence: The Search for Coherence in the Use of Foreign Court Judgments by the Supreme Court of Ireland*, 12 Tulsa Journal Comparative & International Law 123.

13 REIS FREIRE, Alonso, 2007, *Evolution of Constitutional Interpretation in Brazil and the Employment of Balancing “Method” by Brazilian Supreme Court in Judicial Review*, (7<sup>th</sup> World Congress of the International Association of Constitutional Law, Athens) <[http://www.academia.edu/8306512/Evolution\\_of\\_Constitutional\\_Interpretation\\_in\\_Brazil\\_and\\_the\\_Employment\\_of\\_Balancing\\_Method\\_by\\_Brazilian\\_Supreme\\_Court\\_in\\_Judicial\\_Review](http://www.academia.edu/8306512/Evolution_of_Constitutional_Interpretation_in_Brazil_and_the_Employment_of_Balancing_Method_by_Brazilian_Supreme_Court_in_Judicial_Review)>, last seen 20/12/2017.

14 LOLLINI, Andrea, 2012, *The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law*, 8 Utrecht Law Review 55; Fombad, Supra 12; RAUTENBACH, Christa, & PLESSIS, Lourens du, 2013, *In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges* 14 German Law Journal 1539; FOSTER 2010, Supra 10; BENTELE, Ursula, 2008-2009, *Mining the Gold: The Constitutional Court of South Africa’s Experience with Comparative Constitutional Law*, 37 Georgia Journal of International & Comparative Law 219; OPPONG, Richard Frimpong, 2007, *Re-Imagining International law: An Examination of Recent Trends in the Reception in the Reception of International Law into National Legal Systems in Africa*, 30 Fordham International Law Journal 296.

15 GRAEBNER, Riley J., 2011, *Dialogue and Divergence: The Vienna Convention on Consular Relations in German, American, and International Courts’* 42 Georgetown Journal of International Law 605.

16 SCHNEIDERMAN, David, 2002, *Exchanging Constitutions: Constitutional Bricolage in Canada*, 40 Os-

tralia<sup>17</sup>, Hungary<sup>18</sup>, Singapore<sup>19</sup>, Taiwan<sup>20</sup>, South Korea<sup>21</sup>, Netherlands<sup>22</sup>, Israel<sup>23</sup> and New Zealand<sup>24</sup> perfectly highlights the same.

This phenomenon of cross-border judicial dialogue and engagement with international law manifests itself within Indian jurisprudence as well<sup>25</sup>. The Indian constitutional jurisprudence is disseminated with the practice of using foreign (non-Indian) legal authorities and international law as essential tools of

---

goode Hall Law Journal 401; LEFLER, Rebecca, 2001, *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, The Supreme Court of Canada, and the High Court of Australia* 11 Southern California Interdisciplinary Law Journal 165-191 [Hereinafter Lefler].

17 LEFLER 2001, *Ibid.*; ARONERY, Nicholas, 2007, *Comparative Law in Australian Constitutional Jurisprudence*, 26 University of Queensland Law Journal 317.

18 TRANG, Duc. V., 1995, *Beyond the Historical Justice Debate: The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary*, 28 Vanderbilt Journal of Transnational Law 1.

19 RAMRAJ, Victor V., 2002, *Comparative Constitutional Law in Singapore*, 6 Singapore Journal of International & Comparative Law 302-334.

20 CHANG, Wen-Chen, 2010, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36 North Carolina Journal of International Law and Commercial Regulation 594 [Hereinafter Chang].

21 *Ibid.*

22 MAK, Elaine, 2012, *Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices*, 8 Utrecht Law Review 20-34.

23 HAMMER, Leonard M., 1998, *Reconsidering the Israeli Courts' Application of Customary International Law in the Human Rights Context*, 5 ILSA Journal International & Comparative Law 23.

24 ALLAN, James, HUSCROFT, Grant, and LYNCH, Nessa, 2007, *The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?*, 11 Otago Law Review 433.

25 *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011 [Hereinafter *Vishaka*] [Accepting "gender equality" to be a universally recognised basic human right, the court constructively relied on international law to frame guidelines for protection of women against sexual harassment at workplace]; MELDENSOHN, Oliver, 2005, "The Indian Legal Profession, the Courts and Globalisation" J. South Asian Studies 301; PAPA, Mihaela, & WILKINS, David B., 2011, *Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession* 18 International Journal of Legal Profession 175-209; SMITH, Adam M., 2006, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case* 24 Berkeley Journal of International Law 218 [Hereinafter Smith] [Refers to the initial reliance of the Supreme Court of India on international law and the subsequent intensification of the same since 1990s because of the fact that "the Indian Court [...] amassed more power and the country [underwent] significant changes through its immersion in globalization." *Ibid* 259]; KHOSLA, Madhav, 2011, *Inclusive Constitutional Comparison: Reflections on Sodomy Decision*, 59 American Journal Comparative Law 909 [Hereinafter Khosla]; DEVA, Surya, 2006, *Human Rights Realization in an Era of Globalization: The Indian Experience* 12 Buffalo Human Rights Law Review 93; BALAKRISHNAN, K. G., "The Role of Foreign Precedents in a Country's Legal System" (Keynote Address Northwestern University Illinois 2008) < <http://docs.manupatra.in/newsline/articles/Upload/DD0D1FD1-B18C-4240-9B41-15C5923FE819.pdf> > last accessed on 20/12/2017; BALAKRISHNAN, K. G., "Justice in the 21st century: The challenge of Globalisation" (Introductory Note Qatar Law Forum 2009) < <http://www.delhihighcourt.nic.in/library/articles/Justice%20in%20the%2021st%20century%20-%20The%20challenge%20of%20globalisation.pdf> > last seen 20/10/ 2017.

interpretation and construction<sup>26</sup>. Cross-border judicial decisions, international law and other non-Indian sources have influenced a plethora of judicial opinions in India<sup>27</sup>, ranging from right to privacy<sup>28</sup>, freedom of press<sup>29</sup>, restraints on foreign travel<sup>30</sup>, custodial torture<sup>31</sup>, constitutionality of death penalty<sup>32</sup>, protection of women against sexual harassment at work place<sup>33</sup>, prior restraints on publication<sup>34</sup> and the criminalisation of certain forms of speech and expression on the internet<sup>35</sup>. Unlike USA, where engaging in cross-jurisdictional constitutional dialogue has been looked upon with some scepticism<sup>36</sup>, the constitutional courts in India have accepted/adopted this practice with a lot of enthusiasm<sup>37</sup>. Even though the hon'ble Supreme Court of India has from time to time cautioned

---

26 SCOTTI, Valentina Rita, 2013, *India: A Critical Use of Foreign Precedents in Constitutional Adjudication*, 69, in *The Use of Foreign Precedents by Constitutional Judges* [Tania Groppi and Marie Claire Ponthoreau (eds.)].

27 TRIPATHI 1957, Supra 6; SMITH 2006, Supra 26; SHANKAR 2010, Supra 6; HALPERIN 2010, Supra 6; KHOSLA 2011, Supra 26; ABBAS, Hakim Yasir, 2013, "Critical Analysis of the Role of Non-Indian Persuasive Authorities in Constitutional Interpretation" 1(II) Comparative Constitutional Law and Administrative Law Quarterly 46, available at [http://www.calq.in/sites/default/files/CALQ\\_1\\_2.pdf](http://www.calq.in/sites/default/files/CALQ_1_2.pdf), last seen on 20/12/2017 [Hereinafter Abbas 2013].

28 Kharak Singh v. State of Uttar Pradesh & Ors., AIR 1963 SC 1295 [Unauthorised police surveillance as considered as violative of 'right to privacy'].

29 Bennett Coleman v. Union of India, AIR 1973 SC 106 [Challenge against governmental limits on import of newsprint].

30 Maneka Gandhi v. Union of India, AIR 1978 SC 597 [Hereinafter Maneka Gandhi 1978] [Challenge against government's refusal to issue passport to petitioner].

31 D. K. Basu v. State of West Bengal, AIR 1997 SC 610; HALABI, Sam F., 2013, *Constitutional Borrowing as Jurisprudential and Political Doctrine in Shri D.K. Basu v. State of West Bengal*, 3 Notre Dame Journal International & Comparative Law 73-121.

32 Bachan Singh v. Union of India, AIR 1980 SC 898 [Majority opinion approving of death penalty in rarest of rare cases].

33 VISHAKA, Supra 26.

34 R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.

35 Shreya Singhal v. Union of India, (2013) 12 SCC 73.

36 ROSENKRANTZ, Carlos F., 2003, *Against Borrowings and Other Non-authoritative Uses of Foreign Law*, 1(2) International Journal Constitutional Law 269; LAW, David S., & CHANG, Wen-Chen, 2011, *The Limits of Global Judicial Dialogue*, 86 Washington Law Review 523; SAUNDERS, Cheryl, 2006, *The Use and Misuse of Comparative Constitutional Law*, 13 Indiana Journal of Global Legal Studies 37, 39; HOWARD 2009, Supra 8 at 11-14; HIRSCHL 2010, Supra 8.

37 The evolution of Indian environmental jurisprudence by the constitutional courts is the perfect reflection of this enthusiasm. Virtually all of the Indian legal jurisprudence in relation to environmental law has been developed by the Supreme Court through the interpretation of Constitution and a major portion of this jurisprudence has relied on foreign law. The Supreme Court has developed a reputation of being an activist Court that has, since mid-1980s, transformed itself into a guardian of India's natural environment; See BAXI, Upendra, 2003, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In] Justice*, 1 in *Fifty Years of the Indian Supreme Court: Its Grasp and Reach* [S. K. Verma and Kusum (eds.)]; BANDOPADHYAY, Saptarishi, 2010, *Because the Cart Situates the Horse: Unrecognised Movements Underlying the Indian Supreme Court's Internationalization of International Environmental Law*, 50 Indian Journal of International Law 204 [Hereinafter Saptarishi].

against the disproportionate and inconsiderate use of foreign authorities and international law in statutory<sup>38</sup> and constitutional<sup>39</sup> interpretation, it has failed to lay down an objective test, or guidelines or proper methodology for engaging in such practice<sup>40</sup>.

Moreover, even though there is no doubt about the use of non-Indian persuasive authorities by constitutional courts, doubts and arguments have been raised about the manner and the extent to which the courts engage in such practice<sup>41</sup>. Even such practice and the doubts associated with the same manifests themselves in many forms and fold<sup>42</sup>, the discussion on the same does not fall within the ambit of this article. This article is an endeavour to critically analyse the issue of comparative law's identity crisis and it argues how the term "jurocomparatology" provides an answer to the same. Moreover, the article also discusses the benefits of engaging in such an activity and highlights how these benefits are already reflected within Indian jurisprudence.

Part I of the article critically analyses the problem of terminology faced by so called "comparative law". It also discusses the dilemma about whether comparative law is a "science" or a "methodology" and explains how using a term like "jurocomparatology" can provide an answer to the same. Part II of the article discusses the benefits of using foreign law and international law for the purpose of constitutional interpretation and identifies how these benefits have already manifested themselves within Indian constitutional jurisprudence.

## 1. Jurocomparatology: a way out of comparative law's terminological quagmire

Comparative law, a misnomer, suffers from identity crisis. And the proliferation of scholarship on the same in the last two decades seems to have deeply

---

38 M. C. Mehta v. Union of India, (1987) 1 SCC 395 [As per Bhagwati CJ] "*We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for that matter in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence.*" Ibid at 421.

39 Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 [The Hon'ble Supreme Court denied to apply the concept of "affirmative action" as it exists in U.S.A. to Indian conditions and stated that: "*under these circumstances (where the social context in which the law is made is different), judgments from the US, while entitled to respect, must be approached with great caution, for their adoption would lead to jettisoning of over half a century of our jurisprudence.*" Ibid. at 307].

40 SATHE, S. P., 2003, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2nd ed.); See also SAPTARISHI 2010, Supra 38.

41 FRANKENBERG, Gunter, 1985, *Critical Comparisons: Re-thinking Comparative Law*, 26 Harvard International Law Journal 411 [Hereinafter Frankenberg].

42 ABBAS 2013, Supra 28, at 46-73.



worsened the same. Comparative law's definitional predicament is an essential contributor to this crisis, an issue which has not been adequately addressed by legal scholarship, particularly in India<sup>43</sup>. Often times comparative law, foreign law and international law have been used interchangeably; a practice which tends to jeopardise the qualitative value of the same<sup>44</sup>. Can/Should the same be done? If yes, then what do we mean by foreign law? How do we define the "foreign" in it? Should the definition be based on "territoriality" or "institutional origin" or on "authors' citizenship"? Does it include everything that does not originate in the author's country? Does it include international law as well? If yes, then does it include primary as well as secondary sources of international law?<sup>45</sup> And how do we define "law" for its purposes? What does it include? Does it only include legislations and judicial decisions or does it also include reports of governmental authorities, scholarly articles/books and other judicial/legislative and quasi-judicial/legislative authorities. All this signifies a much more complicated problem associated with the definitional issue than is originally raised or perceived. However, can we simply run away from this problem by preferring "comparative law" to "foreign law" because "comparative law" is broader and encompasses a lot more authorities than "foreign law"? It would be difficult to say so. "Comparative law" has difficulties of its' own, the fundamental being the dilemma about

---

43 WATERS, Melissa A., 2007, *Creeping Monism: The Judicial Trend towards Interpretive Incorporation of Human Rights Treaties*, 107 Columbia Law Review 628 [Hereinafter Melissa]; WIGMORE, John H., 1931-1932, *Jottings on Comparative Legal Ideas and Institutions*, 6 Tulane Law Review 48; See also SMITH 2006, *Supra* 26, at 225.

44 Different authors have used different terminologies to explain this phenomenon. For example, ["comparative legalism/constitutionalism" PARRISH, Austen L., 2007, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, University of Illinois Law Review 637; KAHN, Paul W., 2003, *Marbury in the Modern Era: Comparative Constitutionalism in a New Key*, 101 Michigan Law Review 2677; ["transnational legalism/constitutionalism" BACKER, Larry Cata, 2007-2008, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21<sup>st</sup> Century*, 27 Mississippi College Law Review 11; YAP, Po-Jen, 2005, *Transnational Constitutionalism in the United States: Toward a Worldwide Use of Interpretive Modes of Comparative Reasoning*, 39 University of San Francisco Law Review 999; ["transnational judicial conversations/dialogues" and "quasi-constitutional arrangements" RONG & CHANG 2008, *Supra* 8; LEVIT, Janet Koven, 2004, *The Supreme Court, Constitutional Courts and the Role of International Law in Constitutional Jurisprudence: A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 Tulsa J. Comp.& Int'l L. 163]; ["legal transplants" MILLER, Jonathan M., 2003, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 American Journal of Comparative Law 839; DUCA, Louis Del, DUCA Patrick Del, and GENTILI, Gianluca, 2010, *Introduction to the IALS Conference on Comparative Constitutional Law* 28 Penn State International Law Review 293]; ["borrowing" TUSHNET, Mark, 1998, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 University of Pennsylvania Journal of Constitutional Law 325]; ["trans-judicial communication/influence" SLAUGHTER, Anne-Marie, 1994, *A Typology of Trans-judicial Communication* 29 University of Richmond Law Review 99; SLAUGHTER 2000, *Supra* 10].

45 Does it only include treaty or conventions only? Or does it include "customary international law" and the ancillary sources of international law as provided in Article 38 (1) (c) and (d) of the ICJ Statute? CHANG 2010, *Supra* 21 [Showing how "international law" also plays a crucial role in constitutional interpretation].

whether it is a “methodology” or a “substantive law”. This part considers these questions and argues that the use of a term like “jurocomparatology” can provide an answer to this definitional predicament.

### 1.1. Jurocomparatology: An Answer to Comparative Law's Definitional Predicament

A conversation (legal or otherwise) about comparative law cannot be same as the one on contract law. While the latter involves a statute passed by a competent legislature, containing a body of rules and regulations with the ability of creating legal rights, duties, obligations, liabilities, privileges, immunity, disability, and remedies, and capable of being enforceable in a court of law, the *corpus juris* of the former is not the same. Therefore, jurisprudentially speaking, comparative law cannot be treated as “law” in the strict sense of the term. So, why then is it called comparative “law” and what then does it deal with? If it is not a “law” in the strict sense of the term, then is it a “methodology” and should it be therefore be called “comparative analysis of law”?<sup>46</sup> Legal scholarship seems to lack consensus on the same and the loose (and perhaps the wrong) manner in which “comparative law”, “foreign law”, “international law” and “comparative analysis of law” have been used interchangeably begs appropriate consideration and elucidation<sup>47</sup>. Utter disregard to the distinction between these phrases has also led some scholars to state that going into such debate would be a futile activity now<sup>48</sup>. The term “comparative law” as including “comparative analysis of law”, observes Gutteridge, “has become so firmly established that it must be accepted, even if it is misleading”<sup>49</sup> However, I beg to differ with this stand which uses “comparative law” and “comparative analysis of law” as synonyms or argues in favour of using them interchangeably. They represent two different domains. While “comparative law”, as will be highlighted below, is a “legal science”, “comparative analysis of law” reflects the application or practice of the same. In this sense we should think of “comparative analysis of law” as a “verb”.

---

46 A large number of scholars use “comparative study of law” rather than “comparative analysis of law”. I have deliberately used the term “analysis” rather than “study” because using “study” reflects that such activity is restricted only to research point of view. While as if we use the term “analysis” it will include using such activity from “judicial” point of view as well.

47 FRANK, Daniel J., 2007, *Constitutional Interpretation Revisited: The Effects of a Delicate Supreme Court Balance on the Inclusion of Foreign Law in American Jurisprudence*, 92 Iowa Law Review 1037; MELISSA 2007, Supra 44; MSAYDA, Jaro, 1953, *The Value of Studying Foreign Law*, Wisconsin Law Review 635, 647; GLENSY, Rex D., 2011, *The Use of International Law in U.S. Constitutional Adjudication*, 25 Emory International Law Review 197.

48 KAMBA, W. J., 1974, *Comparative Law: A Theoretical Framework*, 23 International & Comparative Law Quarterly 485 [Hereinafter Kamba].

49 GUTTERIDGE, H., 1949, *Comparative Law* in Kamba 1974, *Ibid.*, at 487.



In this regard, a broad term like “jurocomparatology” can be used to define a subject which would cover all the above aspects generally associated with comparative law. It should be used as a term under which “comparative law” and “comparative analysis of law” (and other associated aspects) could be brought together to mean different things. Such terminology can be used as an umbrella definition to cluster various aspects of “comparative law” under one head. Keeping this in mind and speaking epistemologically, following definition of “jurocomparatology” is proposed:

*“Jurocomparatology may be defined as the science of ‘comparative law’, the practice of engaging in ‘comparative analysis of laws’ and the practice of using ‘international law for domestic purposes’. For this purpose, ‘comparative law’ includes (but is not be restricted to) analysis, conceptualization and theorization of reasons as to why members of legal fraternity can or cannot (or should or should not) engage in legal comparison (both for research and practical purposes), determination of who can or cannot (or should or should not) engage in such comparison, defining what can or cannot (or should or should not) be the subject-matter of such comparison, identifying jurisdiction with whom such comparison can or cannot (or should or should not) take place, identification and rationalisation of legal and philosophical problems associated with the same, identification of methodological problems associated with such activity, and the development of a standard methodology for engaging in the same. Moreover, ‘comparative analysis of law’ would mean the actual act of engaging in comparison.”*

## **1.2. Jurocomparatology: Defining the Nature and Scope**

The above definition of jurocomparatology can give us a way out of the confusing labyrinth in which comparative legal scholarship is wedged as far as “conceptualising and theorizing” the nature and scope of comparative law or comparative analysis of law is concerned. Therefore, jurocomparatology, which includes comparative law as well as comparative analysis of laws, qualifies both as a “legal science” as well as a “legal methodology”. “Comparative law” refers to “legal science” in the same manner as jurisprudence and criminology<sup>50</sup> while as “comparative analysis of law” refers to the actual practice of engaging in a

---

50 EWALD, William, 1994-1995, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 University of Pennsylvania Law Review 1898, 1961-90; EWALD, William, 1998, *The Jurisprudential Approach to Comparative Law: A Field Guide to “Rats”*, 46 American Journal of Comparative Law 701; VALOKE,

comparative analysis. In this sense “comparative law”, like jurisprudence, is concerned about “why is” rather than “what is”. Like criminology, which tries to study and theorise the reasons as to “why” people commit crime, comparative law (as part of jurocomparatology) tries to study and theorise the reasons as to “why” members of legal fraternity refer to laws from other nations. The other aspects of comparative law may include (but is not limited to) understanding and explaining reasons for engaging in comparative studies, reasons as to why practitioners and judges prefer (or should prefer) referring to one jurisdiction over another while comparing, or in what circumstances can they (or should they) refer to international law, what should or should not be the subject-matter of comparison, why can engaging in comparative analysis of law be challenging, how can these challenges be overcome, and what is the best possible methodology to engage in the same<sup>51</sup>. Therefore, “comparative law” deals with theorising about the act and about the methodology of engaging in comparative study while as “comparative analysis of law” means the actual act of engaging in such activity using the theory and the methodology developed by comparative law. For example, “Comparative Analysis of India’s Human Rights Law” means that I am engaging in a “comparative analysis of law” and not “comparative law”. In this regard Prof. Kamba states that scholars like Levy-Ullman, Kohler, Arminjon, Nolde, and Wolff, Rabel, Bratton, Yntema, Hall and Rheinstein consider “comparative law” as “science” and treat it on the same line as “jurisprudence”<sup>52</sup>. Moreover, Rheinstein while placing comparative law in the same category as jurisprudence holds the view that comparative law belongs to the realm of the exact sciences “[because] its cultivator tries to observe, describe, classify, and investigate in their relations among themselves and to other phenomena, the phenomena of law. Comparative law in that sense is the observational and exactitude-seeking science of law in general”<sup>53</sup>.

The meaning of “comparative law” under jurocomparatology suggests that reference to the same means indication to the domestic law (irrespective of such law being formal or informal, substantive or procedural, structural/institutional or otherwise) of a foreign country. The first question that pops up is as to whether “comparative law” and “foreign law” mean (or should mean) one and the same thing? That should not be the case. There is a structural difference between

---

Catherine, 2004, *Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems*, 52 American Journal of Comparative Law 713.

51 For a better idea about the nomenclature of comparative constitutional law/studies, see TUSHNET, Mark, 2014, *Advanced Introduction to Comparative Constitutional Law* (1st ed.).

52 KAMBA 1974, *Supra* 49, at 488.

53 RHEINSTEIN, Max, 1952, *Teaching Tools in Comparative Law*, 1 American Journal of Comparative Law 95, 98.

the two. While comparative law, as highlighted above, can be classified as “legal science”, foreign law seems to be the subject-matter of such science. The difference can perhaps be made clear by reference to the difference between “criminology” and “crime/criminal”. While “Criminology” refers to a specific “legal science”, “crime/criminal” refers to the subject-matter of the same, i.e. they refer or define the “specificity” of this legal science. In the same way, “comparative law” refers to a specific “legal science” and “foreign law” refers to the subject-matter of the same, i.e. it refers to the specificity of “comparative law”. The difference is perhaps the same as between “legal theory” and “law”.

### **1.3. Jurocomparatology: Defining the Subject-Matter**

Having argued that “foreign law” reflects the subject-matter of comparative law, it becomes necessary to explain how the terms “foreign” and “law” play out for the purpose of comparative law. However, the question as to whether and why we should attempt to define these terms needs to be addressed first. Should we leave it to the individual scholars to define these terms for the purpose of their own research and to the judges to define them on the basis of the facts and circumstances of each case? Or should we have a standard definition for these terms which could be applied uniformly to all attempts which involve comparative approach? This part argues that an improper use of these terms would lead to a compromised result, both for research as well as practical purposes. Therefore, it is vital to have proper definitions of these terms. Even though this paper recognises the impossibility of having a universally accepted definition of these terms, it still considers that some degree of consensus needs to exist in relation to the meaning of these terms. In case there cannot be a universal consensus, then at least such consensus should exist at a country level. The scholars associated with jurocomparatology in India should at least discuss and decide on what should be the meaning of these terms as far as studies which originate in India should be considered. Moreover, at least for research purposes it is very important to have a certain meaning attached to these terms so as to bring a certain degree of “uniformity” in researches which involve comparative analysis of laws. If every researcher starts attaching his/her meaning to these terms, it will be difficult to have a qualitative literature regarding the same. For example, as far as using international law is concerned, some scholars consider the same as part of “foreign law” while as others put them in separate categories. In this sense if two scholars from each category decide to take up a research to see how “foreign law” has been used by Indian Supreme Court, such researches would produce conflicting results. Moreover, it is also very important to be specific as to what is “law” for the purpose of comparative research.

For example, one research may use only legislations and precedents while as others may use other legal material as well. Same is true in regards to what the courts consider as “foreign” and what they consider “law” when they engage in comparative judicial dialogue. Providing proper definition to these terms would help us to determine the nature and scope of subsequent comparative analysis, whether it be for research purpose or for the use by judges. This part would deal with the latter first. This is because the term “foreign” needs to be explained and understood in the context of the term “law”.

### 1.3.1. Law for the Purpose of Comparative Law

How do we explain “law” for the purpose of jurocomparatology? Should it only include the conventional sources of law like legislations and precedents? Or should it also include extra-legal material like governmental reports and articles written by foreign authors? One important reason for raising this issue is that the hon’ble Supreme Court has consistently uses these extra-legal materials to formulate judicial opinions. One may refer to *Shreya Singhal v. Union of India*<sup>54</sup> in this regard. The counsel for the petitioner in this case referred to House of Lords Committee 1st Report of Session 2014-2015 on Communications titled as “Social Media and Criminal Offences” in order to convince the hon’ble Supreme Court to save section 66A by using the “reasonable man test” as provided within the report<sup>55</sup>. Moreover, the scrutiny of the 38 Indian cases<sup>56</sup> cited in *Shreya Sin-*

---

54 (2013) 12 SCC 73 (India).

55 Ibid para 48.

56 A. K. Roy & Ors. v. UOI & Ors. (1982) 2 SCR. 272; A. S. Krishna v. State of Madras (1957) SCR. 399; Arun Ghosh v. State of West Bengal (1970) 3 SCR. 288; Aveek Sarkar v. State of West Bengal (2014) 4 SCC 257; Brij Bhushan & Anr. v. State of Delhi (1950) SCR. 605; Bennett Coleman & Co. & Ors. v. Union of India & Ors. (1973) SCR. 757; Chintaman Rao v. The State of Madhya Pradesh (1950) SCR. 759; Director General, Directorate General of Doordarshan v. Anand Patwardhan (2006) 8 SCC 433; Dr. Ram Manohar Lohia v. State of Bihar & Ors. (1966) 1 SCR. 709; Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte & Ors. (1996) 1 SCC 130; Dr. N. B. Khare v. State of Delhi (1950) SCR 519; Harakchand Ratanchand Banthia & Ors. v. Union of India & Ors. (1969) 2 SCC 166; Indian Express Newspapers (Bombay) Private Limited & Ors. v. Union of India & Ors. (1985) 2 SCR. 287; K. A. Abbas v. The Union of India & Anr. (1971) 2 SCR. 446; Kameshwar Prasad & Ors. v. The State of Bihar & Anr. (1962) Supp 3 SCR. 369; Kartar Singh v. State of Punjab (1994) 3 SCC 569; Kedar Nath Singh v. State of Bihar (1962) Supp. 2 SCR. 769; Madan Singh v. State of Bihar (2004) 4 SCC 622; Mohd. Faruk v. State of Madhya Pradesh & Ors. (1970) 1 SCR. 156; R. M. D. Chamarbaugwalla v. Union of India (1957) SCR 930; R. Rajagopal v. State of Tamil Nadu (1994) 6 SCC 632; Ramji Lal Modi v. State of UP (1957) SCR. 860; Ranjit Udeshi v. State of Maharashtra (1965) 1 SCR. 65; Romesh Thappar v. State of Madras (1950) SCR. 594; S. Khushboo v. Kanniamal & Anr. (2010) 5 SCC 600; S. Rangarajan v. P. Jagjivan & Ors. (1989) 2 SCC 574; Sakal Papers (P) Ltd. & Ors. v. Union of India (1962) 3 SCR. 842; State of Bihar v. Shailabala Devi (1952) SCR. 654; State of Bombay v. F. N. Balsara (1951) SCR. 682; State of Bombay v. United Motors (India) Ltd. (1953) SCR. 1069; State of Karnataka v. Appa Balu Ingale (1995) Supp. 4 SCC 469; State of Madhya Pradesh v. Baldeo Prasad (1961) 1 SCR. 970; State of Madhya Pradesh v. Kedia Leather & Liquor Limited (2003) 7 SCC 389; State of Madras v. V. G. Row (1952) SCR. 597; Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association

*ghal* case also highlights the use of these non-conventional legal authorities for interpretative purposes. A proper analysis of the reference to such authorities cited in the 38 Indian cases discussed by the hon'ble Supreme Court in *Shreya Singhal* case is provided in the following table:

S.No.	Nature	Details
1.	Foreign Books/Authors Cited	Between 40 and 50
2.	Legal Classics	<ul style="list-style-type: none"> <li>– Montesquieu's <i>Esprit De Lois</i> (1748).</li> <li>– Blackstone's <i>Commentaries on the Laws of England</i> (1765-1769).</li> <li>– Walter Begehot's <i>The English Constitution</i> (1867)</li> <li>– <i>Rottschaefer on Constitutional Law</i> (1939 edn).</li> <li>– <i>Halsbury's Law of England</i> (1907).</li> <li>– Meiklejohn's <i>Political Freedom</i> (1960).</li> <li>– HWR Wade's <i>Administrative Law</i> (1961).</li> </ul>
3.	Articles Written by Foreign Authors	15
4.	Journals Referred	<ul style="list-style-type: none"> <li>– <i>Yale Law Journal</i>.</li> <li>– <i>Harvard Law Review</i>.</li> <li>– <i>Columbia Law Review</i>.</li> <li>– <i>Modern Law Review</i>.</li> <li>– <i>International and Comparative Law Quarterly</i>.</li> <li>– <i>Law Quarterly Review</i>.</li> <li>– <i>Stanford Law Review</i>.</li> </ul>

Table No. 1

It is very important and at the same time very difficult to answer the question about what should be considered “law” for the purpose of foreign law because different jurisdictions recognise different sources of law and the value or credibility of each source would vary from one jurisdiction to another. Moreover, a comparative analysis would mean different thing to a legal researcher and to a judge. The consequences of the comparative analysis done by both would also be different. For a researcher it would perhaps mean publishing a work that provides suggestions and recommendations on the basis of comparative analysis,

---

of Bengal (1995) 2 SCC 161; *The Collector of Customs, Madras v. Nathella Sampathu Chetty & Another* (1962) 3 SCR. 786; *The Superintendent, Central Prison, Fategarh v. Ram Manohar Lohia* AIR 1960 SC 633, (1960) 2 SCR 821; *Zameer Ahmed Latifur Rehman Shiekh v. State of Maharashtra & Ors.* (2010) 5 SCC 246.

but for a judge it would mean to create a new law or a new interpretation of law on the basis of the same. Therefore, while conducting a legal research involving a comparative approach, a scholar may not necessarily restrict himself/herself to conventional sources of law like a legislation or a case-law, but may very well go beyond and use other authorities like foreign governmental reports and articles written by foreign authors. Should the judges do the same as well? The above reference to *Shreya Singhal* case and the 38 Indian cases cited therein suggests that the judges do refer to these authorities for interpretative purposes.

Foreign precedents are, like foreign statutes, foreign law; they are, therefore, not binding on a court, not even conditionally. They have only persuasive value, yet in this they enjoy greater acceptability than foreign statutes<sup>57</sup>.

### 1.3.2. Foreign for the Purpose of Comparative Law

“In multi-national states”, argues Adam Smith, “with histories of colonialism, occupation and/or influence by others, and increasing legal inter-connectedness with other countries, the line between ‘foreign’ and ‘domestic’ for concepts as intangible as ‘legal principles’ has always been imprecise and is becoming more so.”<sup>58</sup> “Moreover, does foreign truly imply extra-territorial provenance or just extra-parliamentary? Are references to tribal or indigenous law, rather than legislatively enacted codes, reliance on foreign law?”<sup>59</sup> The term foreign for the purpose of comparative law needs to be construed in the context of the term “law” or “legal authorities” as discussed above. This needs to be done so as to avoid use of a broad definition for the same. When defined in restricted manner, it would be content-specific and focused and would reduce the risk of ambiguity and vagueness when it will be applied to law. Therefore, what should be the criteria to categorise a particular legal authority as “foreign”. Should it be something that originates outside India (extra-territorial)? Or should it be decided on the basis of “institutional origin” (extra-institutional)? The “institutional origin” approach seems to be a narrow and wrong criterion. This is because in India, like elsewhere, we do not have a single “law-making” institution. And using “institutional origin” approach as a criterion would mean that we would have to consider the laws originating from different legal institutions as foreign for the purpose of each other. The constitutional scheme in India does not authorise our Parliament to claim monopoly to “law-making”. It recognises other institutions, including constitutional courts (the Supreme Court and various High Courts), as law-making bodies. Would this mean that the law made by the Legislative Assembly of one

---

57 TRIPATHI 1957, Supra 6.

58 SMITH 2006, Supra 26, at 225.

59 Ibid.

state should be treated as “foreign law” for another state? Or that the decision of the High Court of Delhi would be considered as a foreign law for other states. This is not the case. Even though decisions of different High Courts only hold persuasive value before the other High Courts and the Supreme Court, these cases play a much more important role than the foreign decisions. This also brings to the question the legal status of the judicial decisions of the Privy Council. Should these be considered “foreign” as well?

The right approach in this regard would be the “extra-territorial” approach. However, using this approach would mean that “international law” may also fall within the ambit of the same. And therefore, this approach needs to be applied with a modification. It should be utilized while expressly exempting international law from its domain. And the importance and necessity of doing so is reflected in the fact that “jurocomparatology” regards the use of international law for domestic purposes as a separate category. Therefore, as far as India is concerned, “foreign law” for a comparative research or for the use by the judges should include legal authorities whose “institution of origin” is outside the territory of India. This would include foreign legislations, foreign precedents, reports of foreign governmental and non-governmental agencies, and articles/books written by foreign authors but should exclude international law.

#### **1.4. Jurocomparatology: Justifying Use of International Law as a Separate Category**

“Comparative law” as part of Jurocomparatology does not include any reference (direct or indirect) to international law (for interpretative purposes or otherwise). This is done deliberately to highlight that “comparative law” should not be used to explain the utilization of “international law” for interpretative purposes. The necessity of doing so is entrenched in the structural and operational differences between foreign law (which is the subject matter of comparative law) and international law. The analysis of these differences will show that “international law” cannot and should not be placed within the category of “comparative law”. Moreover, “international law” cannot even be placed under “comparative analysis of law”. This is because of the nature of “comparison” as an activity. When we say “comparative analysis of law”, it means comparing “foreign law” from two different jurisdictions. And, as will be highlighted below, that is not how international law interacts with domestic law. The interaction between international law and domestic law is not a comparison *per se*.

International law, as is the common knowledge, as a matter of both principle and practice exists and works in a different manner than domestic law. Therefore, foreign law (which basically is the domestic law of a foreign nation)

and international law cannot be used for the purpose of comparison in the same sense. In fact, we cannot even say that we can use “international law” for the purpose of comparison. It therefore becomes important to clarify for the purpose of this paper that any material (empirical or otherwise) making reference to international law would mean international law in the strict sense of the term [Article 38 (1) of the ICJ Statute].

The necessity of analysing foreign law (as a subject-matter of comparative law) and international law differently is reflected in the global scholarship regarding the same and a large number of scholars have prearranged “foreign law” and “international law” into two different categories for the purpose of identifying them as non-domestic interpretative authorities<sup>60</sup>. The reasons for doing so have been attributed to the “structural” and “functional” differences between the two systems (as embedded in the monist/dualist debate). Due to the paucity of space, these differences can be briefly stated as follows:

- a. The primary structural differences between domestic law and international law include law & policy making institutions and law enforcement mechanisms. The source of international law is different from that of domestic law. Every nation has specific legal institutions for the purpose of creating and implementing law. While as no such well defined institutional set-up exists for the purpose of international law. Therefore, a legislation passed by the US parliament or a case-law decided by a US Supreme Court would not have same legal sanctity as an international convention or an ICJ decision. The institutional similarity between India and US makes it convenient for Indian courts and scholars to refer to US law (foreign law) than making reference to international law which interacts with Indian law in a different capacity. Therefore, assuming that using an international convention (for the interpretative purposes of domestic law) would be similar to using US legislation or case-law (for the same purpose) would be illogical and would not yield qualitative results. Therefore, it cannot be said that while referring to non-domestic interpretative authorities, the “foreign law” and the “international law” could be considered, compared and used in the same way.
- b. The second and much more important difference is in relation to the democratic legitimacy of domestic laws and the lack of same in international law. This in fact has raised serious concerns about using international

---

60 NEUMAN, Gerald L., 2006, *International Law as a Resource in Constitutional Interpretation*, 30 Harvard Journal of Law & Public Policy 177; GLENSY, Rex D., 2010, *Constitutional Interpretation through Global Lens*, 75 Missouri Law Review 1171; LYON, Beth, 2007-2008, *Tipping the Balance: Why Courts should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 University of Pennsylvania Journal of International Law 169; CLEVELAND 2006, Supra 10.



law for domestic purposes. The crux of this difference is that since the domestic law as well as foreign law originate in a democratic set-up, it is convenient to compare them than doing so with international law.

- c. Another difference is in relation to the subjects and the subject-matter of both systems. While the subjects of domestic law are “individuals” and “corporations”, international law governs “states” and “international organisations”. Therefore, the nature or subject-matter of both these systems in relation to rights, duties, privileges, power, immunity, disability and liability will be different and cannot be used for interpretative purposes in the same manner. While domestic law uses these concepts in relation to individuals, “international law” uses it in relation to states. Of course, there are instances where international law uses these concepts in relation to individuals as well. However, the manner in which it is done is different from that of in which domestic law does the same. International law creates obligations on the States to behave or not to behave in a certain manner in relation to other states and as in some cases in relation to their citizens. This suggests that while “foreign law” creates a “horizontal authority” (persuasive), there may be instances where international law may create “vertical authority”. Therefore, this similarity in relation to subjects and subject-matter between two different countries (like US and India) makes it convenient for courts to refer to “foreign law” rather than “international law”.
- d. This brings us to the manner of interaction of international law and foreign law with our domestic law. In this regard one may refer to the book “The Use of Foreign Precedents by Constitutional Judges”, which is an empirical study of the extent and the manner in which judges use foreign precedents in constitutional cases in more than ten jurisdictions.<sup>61</sup> It distinguishes “international law” from “foreign law” and expressly excludes “international law” from the research. While referring to why “international law” was excluded from the ambit of the book, the authors state the following:

*“The use of international law has also been excluded from the research: [...] we strongly believe that reference to international case law can divert attention from the optional and purely ‘voluntary horizontal dialogue’ between courts, by introducing elements of ‘vertical compulsory dialogue’.”*<sup>62</sup>

---

61 GROPPi, Tania, and PONTTHOREAU, Marie Claire (eds.), 2013, *The Use of Foreign Precedents by Constitutional Judges* (1st ed.).

62 Ibid 5.

Even though the term “foreign” does refer to things which originate outside one’s country and in that sense international law is also foreign or alien, however, the basis of classifying international law as a non-domestic authority should not be “territory”, it should be “authority”. And this authority is article 38 (1) of the Statue of ICJ. Unlike “foreign law”, the nature of law which falls under article 38 of the Statue of ICJ is such that it tends to interact with the domestic law and should not therefore be considered “foreign”. Let us take an example. When United States of America enacted its patent law, it had no legal affect whatsoever on other countries and for these other countries this law became “foreign law”. However, when TRIPS agreement came into being, an obligation was created (with certain exceptions) upon the member states to modify their domestic laws so as to bring them in tune with TRIPS agreement. In this sense, we cannot say that “TRIPS Agreement” is “foreign law” in the same sense as US patent law. This obligatory nature of “international law” as opposed to “foreign law” is also evident from state practice. An example in this regard is the Constitution of South Africa which states that the courts “*must*” use international law for the purpose of constitutional interpretation and they “*may*” use “foreign law” for such purposes<sup>63</sup>. All this may perhaps also explain the preferable treatment of “foreign law” over “international law” by courts in India<sup>64</sup>.

Therefore, when one looks to international law, it is more in the sense of something being obligatory or something which tends to create liability. While as, when we look at foreign law, it is persuasive for all practical purposes. Therefore, it would be correct to state that “comparison” can take place in relation to “foreign law” and not necessarily in relation to “international law”. Moreover, it should be kept in mind it is not necessary that the extent and the manner in which courts rely on “international law” will be same to that of “foreign law”. Both play a constructive role as important tools of interpretation but such role varies in degree and manner. It simply means that the manner in which the courts may use “international law” for interpretative purposes many not be same as the manner in which “foreign law is used”<sup>65</sup>. And it is for this reason that the “use of international law” is considered as a separate category under “jurocomparatology”. In

---

63 South African Constitution, s. 39

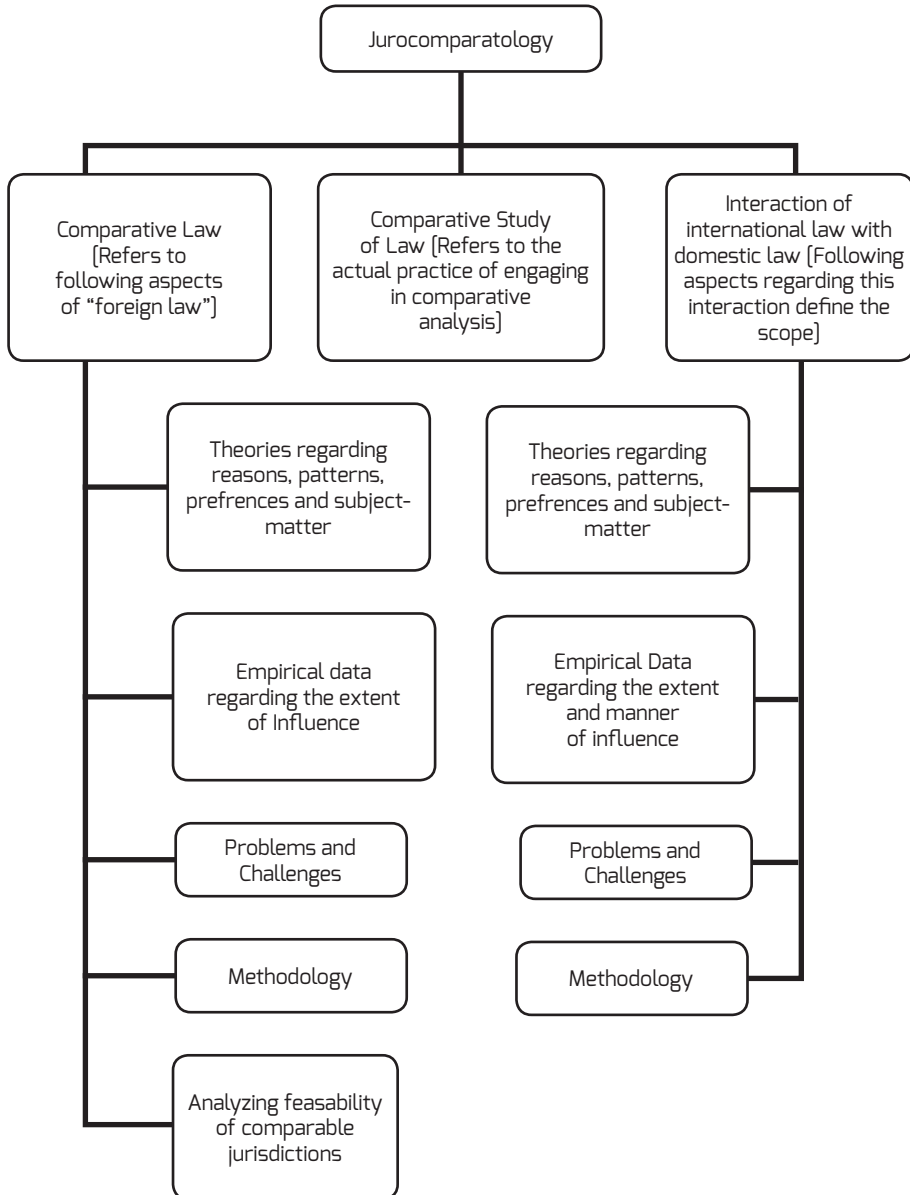
Section 39(1) of the South African Constitution states:

(1) When interpreting the Bill of Rights, a court, tribunal or forum  
(a) .....  
(b) must consider international law; and  
(c) may consider foreign law.

64 SMITH 2006, *Supra* 26.

65 In order to see the relevance of the interaction between domestic legal system and international law see WATERS, Melissa A., 2005, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Georgetown Law Journal 487.

this regard, the nature and scope of “Jurocomparatology” may be explained with the help of following diagram<sup>66</sup>



<sup>66</sup> Comments, suggestions and criticism is invited in relation to the same. Please write to me at hakimy-asir.abbas@nludelhi.ac.in.

## 2. Mapping the benefits of jurocomparatology within indian jurisprudence<sup>67</sup>

Our knowledge (information) about our own social, geo-political and cultural milieu exceeds our familiarity with that of the foreign set-ups. Being born and having grown in a specific culture, we become familiar with its' intricate realities and lies, we appreciate some aspects of it while we dislike and criticise others, and on certain occasions, we may even assume our culture to be superior to others. For the members of the legal fraternity, this mind-set also includes similar preconceptions about legal and political set-up of their respective countries. While it is good to know ones' own culture (legal or otherwise), it has been argued that acquaintance with single culture limits our understanding about a great number of things<sup>68</sup>. Exposure only to a single legal system could lead to an insulated and distorted opinion about the same and could seriously jeopardise the development of one's researching, law-making, lawyering and judging dexterity. Engaging in cross-border judicial dialogue or taking up a comparative study of laws/constitutions facilitates beneficial engagement of other patterns of thought and organization different from those we are familiar with. In this sense, jurocomparatology has long been recognized as a valuable tool for interpreting and reforming domestic law internally<sup>69</sup>, harmonizing and unifying law trans-nationally<sup>70</sup>, and interpreting and constructing international law<sup>71</sup>. It also facilitates a bottomless supply of data with which to test philosophical, economic, sociological, and anthropological theories about law, to name only a few<sup>72</sup>. By studying different legal cultures, we are exposed to different –patterns of order that shape people, institutions, and the society in a given jurisdiction<sup>73</sup>.

---

67 The benefits enlisted here are not limited to comparative constitutionalism alone. Comparative analysis in relation to ordinary statutes would also attract these benefits.

68 HOWARD 2009, Supra 8, at 40 [He draws an analogy between language and constitutional law. Referring to Johann Wolfgang von Goethe, who said that a man who has no acquaintance with foreign languages knows nothing of his own, Howard makes a similar argument about constitutional law]; SCHADBACH, Kai, 1998, *The Benefits of Comparative Law: A Continental European View*, 16 Boston University International Law Journal 331, 335 [Hereinafter Schadbach].

69 DEHOUSSE, R., 1994, *Comparing National and EC Law: The Problem of Level Analysis*, 42 American Journal of Comparative Law 761, 762-63; TALLON, 1969, *Comparative Law: Expanding Horizons*, 10 Journal of the Society of Public Teachers of Law 265, 266; MORROW, 1951, *Comparative Law in Action*, 3 Journal of Legal Education 403.

70 GORDLEY, J., 1995, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 American Journal of Comparative Law 555; SACCO, R., 1991, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 American Journal of Comparative Law 343.

71 GREEN, 1967, *Comparative Law as a Source of International Law*, 42 Tulane Law Review 52.

72 HILL, J., 1989, *Comparative Law, Law Reform and Legal Theory*, 9 Oxford Journal of Legal Studies 101, 111-13.

73 GROSSFELD, Bernhard, & EBERLE, Edward J., 2003, *Patterns of Order in Comparative Law: Discovering*

Prof. Kamba argues that the failure of legal fraternity to appreciate the functions and benefits of jurocomparatology (though he used “comparative law” instead of jurocomparatology) has seriously hampered its’ development as an effective tool of interpretation and reform<sup>74</sup>. “One of the main factors”, he argues, “that has impeded [the] progress [of] comparative legal studies [has been] the absence of a *systematic and comprehensive treatment and appreciation* of the functions of comparative law”<sup>75</sup>. He then states that “the clarification of [jurocomparatology’s] function is, therefore, necessary for an appreciation of its value and importance”<sup>76</sup>. Keeping this in mind and for the sake of convenience, this part discusses the functions and benefits of jurocomparatology under following categories:

- A. Intellectual use of jurocomparatology.
- B. Gains for methodology.
- C. Law reforms.
- D. Judicial process.
- E. Comparative method and development of international law.

## 2.1. Intellectual use of Jurocomparatology

The benefits of jurocomparatology begin with the attainment of knowledge of another legal system in order to enhance the understanding of one’s own system<sup>77</sup>. The knowledge of alternative answers to common legal problems inevitably provides novel ways to understand and solve problems in one’s own legal system<sup>78</sup>. The first achievement of comparative legal studies is the accumulation of knowledge<sup>79</sup>. Comparative study of law familiarizes law students, teachers, law makers, lawyers and judges with a global overview of law by introducing them to major legal families. This is true about India as well where majority of law schools engage in comparative study of legal systems like common law, civil law and so on. Unfortunately, my own experiences as a law student and now as a law teacher present a tale of ineffective use of comparative law as a teaching

---

*and Decoding Invisible Powers*, 38 Texas International Law Journal 291, 292.

74 KAMBA 1974, *Supra* 49, at 489.

75 *Ibid.*

76 *Ibid.*

77 SCHADBACH 1998, *Supra* 69, at 335; GRAZIADEI, Michele, 2009, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 Theoretical Inquiries in Law 693.

78 SCHADBACH 1998, *Ibid.*

79 ZWEIGERT, Konard, & KOTZ, Hein, 1998, *An Introduction to Comparative Law* (3rd ed.) in Schadbach, *Supra* 69, at 336.

tool. Kai Schadbach argues that while comparative law courses should primarily focus on teaching civil and common law system due to their dominance, the other important legal families' such as Islamic law<sup>80</sup>, East Asian law, and African law<sup>81</sup> should not be ignored<sup>82</sup>.

Learning another system not only increases the quantity of knowledge, but is a value addition qualitatively as well. Jurocomparatology challenges the lawyer's knowledge about his/her own system, forces him/her to introspect about the law under consideration as well as his/her approach and may ultimately lead to enlightenment. In analysing the underlying policies of the different systems, or the reasoning of the two approaches, the lawyer gains a more comprehensive understanding of his/her particular system<sup>83</sup> and the law in general. Furthermore, the simple awareness of alternatives enlarges the lawyer's intellectual stock, making him/her analytically better trained and more adept in dealing with complex legal questions within his/her own legal system. Distance from all-too-familiar legal system provides perspective, enabling the comparativist to gain a broader and more critical view from a higher vantage point<sup>84</sup>. In this manner, jurocomparatology enlarges the "supply of solutions" to legal problems<sup>85</sup>.

*Viskaha's* case<sup>86</sup> can serve an example here. This case involved a matter relating to sexual harassment of women at workplace. There was no statutory law to deal with such a situation<sup>87</sup> and the Supreme Court of India was faced with a challenge to ensure the protection of women at workplace. The court relied upon international law while laying down guidelines for the protection of women against sexual harassment at workplace. Recognising that such a problem was common to a number of jurisdictions, the court looked towards the efforts made to deal with the same on international level. The court then framed guidelines on the basis of the international law mechanism. The court stated as follows:

---

80 DAVID, Rene, 1983, *On the concept of "Western" Law*, 52 University of Cincinnati Law Review 126, 131; MAYER, Ann Elizabeth, 1987, *Law and Religion in the Muslim Middle East*, 35 American Journal of Comparative Law 127.

81 MATTEI, Ugo, 1997, *Three Patterns of Law: Taxonomy and the World's Legal Systems*, 45 American Journal of Comparative Law 5, 11.

82 SCHADBACH 1998, *Supra* 69, at 337-338.

83 REIMANN, Mathias, 1996, *The End of Comparative Law as an Autonomous Subject*, 11 Tulane European & Civil Law Forum 49, 59.

84 LEPAULLE, Pierre, 1921-1922, *The Function of Comparative Law – With a Critique of Sociological Jurisprudence*, 35 Harvard Law Review 838, 858.

85 JUENGER, Friedrich K., 1993, *American Jurisdiction: A Story of Comparative Neglect*, 65 University of Colorado Law Review 1; ABRAHAMSON, Shirley S., & FISCHER, Michael J., 1997, *All the World's a Courtroom: Judging in the New Millennium*, 26 Hofstra Law Review 273, 287.

86 VISHAKA, *Supra* 26.

87 The Indian Parliament has now passed "The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (No. 14 of 2013)" and it came into force on 9th December 2013.

*“In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantee.”<sup>88</sup>*

In this sense, it has been argued that comparative law studies in law schools would benefit the law students vocationally, juristically and politically<sup>89</sup>. A large number of scholars have also stated that comparative approach should be projected into the whole legal educational training, after the students have been exposed to the broad principles and backgrounds of the world’s legal systems<sup>90</sup>. In the same vein, a report of the Organizing Committee of the International Association of Comparative Law urged in 1949 that “law students should, at the end of their studies, be aware of the diversity of legal conceptions and systems in the world”<sup>91</sup>. The 1950 London Conference on Comparative Law (UNESCO) suggested very seriously the establishment in law schools of special chairs for the instruction of their faculty and students in foreign law<sup>92</sup>. The value of comparative law as part of legal education has been very well recognised in Western countries. In this regard Cappelletti states:

*“The interest in comparative studies in American law schools is a response to the increasing relevance of foreign law to the concerns of lawyers and their clients on a shrunken, interdependent globe. Both as professionals and as leaders in the public and private*

---

88 VISHAKA, *Supra* 26, at para 7.

89 MAYDA, Jaro, 1953, *The Value of Studying Foreign Law* [1953] *Wisconsin Law Review* 635, 647 [Hereinafter *Mayda*].

90 IRELAND, Gordon, 1933-1934, *The Use of Decisions by United States Students of Civil Law*, 8 *Tulane Law Review* 358; HAZARD, John N., 1951, *Comparative Law in Legal Education*, 18 *University of Chicago Law Review* 264; SCHLESINGER, Rudolf B., 1954, *Teaching Comparative Law: The Reaction of the Customer*, 3 *American Journal of Comparative Law* 492; VALCKE, Catherine, 1995, *Legal Education in a “Mixed Jurisdiction”*: *The Quebec Experience*, 10 *Tulane European & Civil Law Forum* 61; BERNABE-RIEFKOHLE, Alberto, 1995, *Tomorrow’s Law Schools: Globalization and Legal Education*, 32 *San Diego Law Review* 137.

91 MAYDA 1953, *Supra* 90, at 646.

92 *Ibid.*

*sectors, lawyers in the West participate in a continual institutional reconstruction of the relevant world. Now that their relevant world embraces both the Common Law and the Civil Law . . . a familiarity with other people's law is indispensable to an adequate legal education.*"<sup>93</sup>

In regards to the importance of jurocomparatology for legal education, Prof Kamba signifies three basic objectives of legal education and then argues that comparative legal studies in law schools would help promote these objectives<sup>94</sup>. The three objectives of legal education highlighted by Prof, Kamba are: (1) It must cultivate the attributes and skills which are needed by lawyers; (2) It must provide the student with a sound knowledge and proper understanding of the principles and techniques of national law; and (3) It must provide the student with a broad-based education<sup>95</sup>. He then states that "[jurocomparatology] is especially suited to promote these objectives. When one is confined to the study of one's own law within one's own country and, thus within one's own cultural environment, there is a strong tendency to accept without question the various aspects (norms, concepts, institutions) of one's own legal system"<sup>96</sup>.

Jurocomparatology gives the law students an opportunity to realise that the tools and techniques that they use in studying law are not the only tools and techniques. Prof. Kamba states following in this regard:

*"The discovery of other legal possibilities, not only stimulates the students' curiosity and imagination, but puts into question the solutions of his national law. The student is compelled to question the soundness of the solutions, norms and many other aspects of his own law, to inquire into the whys and wherefores of the institutions. He is prompted to question and investigate the inarticulate assumptions on which the institutions of his own law rest. All this must inevitably lead to reflection, to the development of a critical mind, and to new insights into his own legal system."*<sup>97</sup>

However, it is unfortunate to note that "comparative law" as a subject or "comparative method" as a tool of study in India is still in its nebulous stage. An

---

93 CAPPELLETTI, "Preface" in J. Merryman & D. Clark, 1978, *Comparative Law: Western European and Latin American Legal Systems* vii cited in FRANKENBERG 1985, Supra 42.

94 KAMBA 1974, Supra 49, at 491.

95 Ibid.

96 Ibid.

97 KAMBA 1974, Supra 49, at 492-93.



analysis of the curriculum of various law schools in India shows that there is no law school in India which has “comparative law” as a main/compulsory subject or even as an optional one. However, a majority of law schools use comparative method as a tool of study.

S.No.	Name of the Institution	Whether Jurocomparatology is Taught As a Separate Subject?		Comments
		Under-Graduate Course	Post-graduate Course	
1.	National Law School of India University, Bangalore	No	No	<ul style="list-style-type: none"> <li>• Graduate Course</li> </ul> <p>Comparative studies are subject-specific. It means that a comparative analysis is taught as a part of a law subject and not as a separate subject. The university website lists following subjects in which comparative technique is used. These are            Constitutional Law-II [4<sup>th</sup> Tri-Semester],            Constitutional Law-III [5<sup>th</sup> Tri-Semester],            Family Law – I [5<sup>th</sup> Tri-Semester],            Labour Law – I [11<sup>th</sup> Tri-Semester],            Administrative Law [7<sup>th</sup> Tri-Semester],            and Insurance Law [12<sup>th</sup> Semester]<sup>98</sup>.</p> <p>One significant feature in relation to comparative law is the single credit course on International and Comparative Environmental Law<sup>99</sup>. This extensive program provides opportunities for students to know the contemporary developments in various fields of environmental law.</p> <ul style="list-style-type: none"> <li>• Post-graduate Course<sup>100</sup></li> </ul> <p>The law school provides LLM in Business law and Human Rights Law. Following subjects, which involve comparative analysis and international law, are compulsory for both the groups:</p> <ol style="list-style-type: none"> <li>1. Legal System and Democratic Governance: Comparative Perspective, and</li> <li>2. Changing Conception of Justice &amp; Globalised Legal Order.</li> </ol> <p>Following subjects, which involve comparative analysis and international law, are taught to Business law group:</p> <ol style="list-style-type: none"> <li>1. International &amp; Comparative Law of IPRs, and</li> <li>2. International Trade Law.</li> </ol> <p>Following subjects, which involve comparative analysis and international law, are taught to Human Rights law group:</p> <ol style="list-style-type: none"> <li>1. Refugee and International Human Rights Law,</li> <li>2. International Criminal Law, and</li> <li>3. International Human Rights Law.</li> </ol>

2.	National Academy of Legal Studies and Research, Hyderabad	No	No	<p>The university website does not provide information about the subjects taught at the undergraduate level except that all the subjects taught at this level are the ones prescribed by Bar Council of India as mandatory subjects. No reference is made as to kind of technique adopted by the teachers while teaching these subjects<sup>101</sup>.</p> <p>However, at post-graduate level Comparative Public Law/Systems of Governance and Law and Justice in a Globalising World are taught as compulsory subjects<sup>102</sup>.</p>
3.	National Law University, Delhi	Yes	Yes	<p>Centre for Comparative Law, NLUD provides a Seminar Course on Comparative Law to graduate as well as undergraduate students<sup>103</sup>.</p> <p>At the post-graduate level, following subjects are taught as compulsory subjects:</p> <ol style="list-style-type: none"> <li>1. Comparative Public Law</li> <li>2. Law and Justice in a Globalizing World.</li> </ol> <p>The other seminar courses which involve comparative techniques and international law are as follows<sup>104</sup>:</p> <ol style="list-style-type: none"> <li>1. Comparative Constitutional Law.</li> <li>2. Comparative Rights Adjudication.</li> <li>3. Contemporary Challenges in International Human Rights Law.</li> <li>4. International Business Law.</li> <li>5. International Commercial Arbitration.</li> <li>6. International Commercial Law.</li> <li>7. International Economic Law.</li> <li>8. International Investment Law.</li> <li>9. International Taxation.</li> <li>10. Private International Law.</li> <li>11. Regulation of International Trade in Goods.</li> <li>12. Trade Remedies under International and Indian Laws.</li> </ol>
4.	National Law University, Jodhpur	No	Yes	<ul style="list-style-type: none"> <li>• Post-graduate<sup>105</sup></li> </ul> <p>Following mandatory are provided to LL.M. students irrespective of the choice of specialization:</p> <ol style="list-style-type: none"> <li>1. Comparative Public Laws/Systems of Governance.</li> <li>2. Law and Justice in a Globalising World.</li> </ol> <p>The University also has an online law journal titled "Comparative Constitutional Law and Administrative Law Quarterly"<sup>106</sup>.</p>

5.	Dr. Ram Manohar Lohiya National Law University, Lucknow	No	No	The university provides one-year LL.M. and same involves studying following subjects/ topics: Comparative Political & Civil Rights, Comparative Administrative Law, Comparative Study of Delegated Legislation, Comparative Environmental Law, International Environmental Law, International Humanitarian Law, Comparative Judicial Process, Comparative Copyrights and Patents Law and International Perspective of Human Rights <sup>107</sup> .
6.	Gujarat National Law University, Gandhinagar	Yes	No	<ul style="list-style-type: none"> <li>• Under-graduate Level</li> </ul> <p>At this level, Comparative Constitution is provided as a seminar (optional) paper<sup>108</sup>.</p> <ul style="list-style-type: none"> <li>• Post-graduate Level<sup>109</sup></li> </ul> <p>The university provides specialization in four areas:</p> <p>A) Corporate and Business Law; B) International Comparative Law; 3) Intellectual Property Laws; and 4) Constitutional and Administrative Law.</p> <p>Following subjects associated with jurocomparatology are mandatory for all groups:</p> <ol style="list-style-type: none"> <li>1. Comparative Public Laws/Systems of Governance.</li> <li>2. Law and Justice in a Globalising World.</li> </ol>
7.	National University of Juridical Sciences, Kolkata	?	?	<p>The University website does not provide any analysis of its under-graduate and post-graduate course curriculum.</p> <p>The website does make reference to the School of Private Laws &amp; Comparative Jurisprudence. However, there are no details provided regarding the same<sup>110</sup>.</p>
8.	National Law Institute University, Bhopal	No	No	<ul style="list-style-type: none"> <li>• Under-graduate level</li> </ul> <p>At the under-graduate level, the university provides following subjects which may be said to be connected to comparative law. These are Common Law in India, International Trade &amp; Finance, International Trade Law, International Criminal Law, Law and Globalisation, International Environmental Law and International Taxation Law<sup>111</sup>.</p> <p>The university also provides non-credit course on Comparative Jurisprudence, International Commercial Arbitration, and Global Terrorism<sup>112</sup>.</p>

9.	National Law University, Odisha	No	No	<p>At the under-graduate level, there is no reference to the comparative law or jurocomparatology.</p> <p>The university provides LL.M. in two subjects:</p> <ol style="list-style-type: none"> <li>1) Corporate and Commercial Law; and</li> <li>2) Constitutional and Administrative Law.</li> </ol> <p>Two subjects associated with jurocomparatology are compulsory to both groups:</p> <ol style="list-style-type: none"> <li>A) Comparative Public Law/Systems of Governance; and</li> <li>B) Law and Justice in Globalised World.</li> </ol> <p>Moreover, comparative constitutional law is one of the 10 optional subjects in the Constitutional and Administrative Law group<sup>113</sup>.</p>
----	---------------------------------	----	----	--

98 *Undergraduate Programs*, National Law School of India University Bangalore, available at [www.nls.ac.in/index.php?option=com\\_content&view=article&id=40&Itemid=25](http://www.nls.ac.in/index.php?option=com_content&view=article&id=40&Itemid=25), last seen on 23.06.2017.

99 Ibid.

100 *Postgraduate Programmes*, National Law School of India University Bangalore, available at [https://www.nls.ac.in/index.php?option=com\\_content&view=article&id=810&Itemid=38](https://www.nls.ac.in/index.php?option=com_content&view=article&id=810&Itemid=38), last seen on 23.06.2017.

101 *Undergraduate Study*, NALSAR University of Law, available at <https://www.nalsar.ac.in/undergraduate-study>, last seen on 23/06/2017.

102 *Postgraduate-Study-In-Law*, NALSAR University of Law, available at <https://www.nalsar.ac.in/post-graduate-study-law>, last seen on 23.06.2017.

103 The details regarding the Centre are based upon author's interview with Prof. M. P. Singh who is the founding professor and the present chairperson of the Centre.

104 *Optional Seminar Courses*, NLU Delhi, available at <http://www.nludelhi.ac.in/accd-osc.aspx>, last seen on 23/06/2017.

105 *Admissions*, National Law University Jodhpur, available at [http://www.nlujodhpur.ac.in/courses\\_pg.php](http://www.nlujodhpur.ac.in/courses_pg.php), last seen on 23/06/2017.

106 *Home*, Comparative Constitutional Law and Administrative Law Quarterly, available at <http://www.calq.in/>, last seen on 23/06/2017.

107 *Curriculum*, Dr. Ram Manohar Lohiya National Law University Lucknow, available at <http://www.rmlnlu.ac.in/llm.html>, last seen on 23/06/2017.

108 *Undergraduate Programme*, Gujarat National Law University, available at <http://www.gnlu.ac.in/ug-programme.php>, last seen on 23/06/2017.

109 *Postgraduate Programme*, Gujarat National Law University, available at <http://www.gnlu.ac.in/pgprogrammellm.php>, last seen on 23/06/2017.

110 *Academics*, The WB National University of Juridical Sciences, available at <http://www.nujs.edu/nujs-academics-courses.html>, last seen on 23/06/2017.

111 *List of Subjects – B.A.LL.B. (Hons.)*, The National Law Institute University Bhopal, available at <https://www.nliu.ac.in/courses/balb/subjects-balb.html>, last seen on 23/06/2017.

112 *Non Credit Courses*, The National Law Institute University Bhopal, available at <https://www.nliu.ac.in/courses/non-credit/non-credit-main.html>, last seen on 23/06/2017.

113 *LL.M. programme*, National Law University Odisha, Cuttack, available at <http://nluo.ac.in/ll-m-programme/>, last seen on 23/06/2017.

It becomes pertinent to make reference to Centre for Comparative Law at National Law University, Delhi. The Centre was started in 2013 under the chairpersonship of Prof. M. P. Singh, who teaches comparative constitutional law to the post-graduate students at NLUD. The Centre provides a Seminar Course on Comparative law to both graduate as well as undergraduate students. The *Indian Yearbook of Comparative Law* is a publication of the Centre which is taken up as yearly based project in collaboration with Oxford University Press.

## 2.2. Gains for Methodology

Research is an integral tool of legal profession. Members of legal fraternity use research to find law, to dissect it, and to ensure “constant refinement and extension of [...] knowledge of law”<sup>114</sup>. “Jurisprudence” as a law subject has a close relationship with comparative law. All schools of jurisprudence—the historical, the sociological, the philosophical, the analytical etc. – rely on comparative research as part of their practical endeavours. It is impossible to see how jurisprudence can exist without comparative law<sup>115</sup>. Every member of legal profession, be it students, teachers, lawyers, judges, NGOs etc., uses research to accomplish his/her respective task/s. In the same way, jurocomparatology is equally important to a legal scholar—be he a legal historian, legal sociologist, or social scientist seeking to discover and formulate scientific “laws” of legal evolution and development or laws about—the correlation between the law and other social phenomena, i.e., the construction of generalisations modelled after those of the natural sciences<sup>116</sup>.

## 2.3. Law Reforms<sup>117</sup>

No society is perfect. Neither are the laws which govern such societies. The dynamicity of society necessitates the enactment of new laws and the repealing or up-gradation of the old ones. New generations need new laws, which are either enacted or are simply the modified version of older laws. Moreover, in situations where the competent legislatures fail to upgrade the law, the constitutional courts step-in to fill the loopholes or vacuum created. Law reforms are one

---

114 YNTEMA, 1956, *Comparative Legal Research: Some remarks on “Looking out of the Cave”*, 54 Michigan Law Review 899.

115 PATON, 1973, *A Textbook on Jurisprudence*, 41 (4th ed.).

116 KAMBA 1974, *Supra* 49, at 494.

117 WHELAN, Darius, 1988, *The Comparative Method and Law Reform*, LL.M. thesis, National University of Ireland available at [https://www.academia.edu/1930168/The\\_Comparative\\_Method\\_and\\_Law\\_Reform?auto=download](https://www.academia.edu/1930168/The_Comparative_Method_and_Law_Reform?auto=download), Retrieved on 10/03/2016.

area where comparative law has and continues to play a very crucial role. This is particularly evident from the manner and extent to which institutions like the Law Commission of India and the National Human Rights Commission rely on foreign law and international law in their reports<sup>118</sup>. Moreover, the Supreme Court of India has extensively relied on foreign and international law to bring about a large number of reforms to our legal system.

There are a number of legal problems faced by societies all around the globe. However, such problems do not arise simultaneously in all these societies. This difference in time (as to the appearance of a problem) necessitates the effective manner in which comparative legal techniques can be used. For example, the Constitution of India came into operation almost 170 years after the Constitution of America. During these 170 years the American Constitution was amended a number of times and faced a lot of challenges. So when our Constitution makers referred to American Constitution, they only borrowed those provisions which had effectively worked in America and rejected those which they felt were controversial and created problems. The inclusion of “procedure established by law” instead of “due process” within Art. 21 of our Constitution is a perfect example. It was on the advice of Justice Frankfurter of the U.S. Supreme Court that the Indian Constituent Assembly incorporated “procedure established by law” instead of “due process” within our Constitution. In this regard, Manoj Mate argues as follows<sup>119</sup>:

*“Frankfurter had a lasting impression on Rau, who upon his return to India, became a forceful proponent for removing the due process clause, ultimately convincing the Drafting Committee*

---

118 See in particular National Human Rights Commission (NHRC) Annual Report 2002-2003, Retrieved from <http://nhrc.nic.in/Documents/AR/AR02-03ENG.pdf> on 10/07/2016; National Human Rights Commission Annual Report 2003-2004, Retrieved from <http://nhrc.nic.in/documents/ar/ar03-04eng.pdf> on 10/07/2016; National Human Rights Commission Annual Report 2004-2005, Retrieved from <http://nhrc.nic.in/Documents/AR/AR04-05ENG.pdf> on 10/07/2016; National Human Rights Commission Annual Report 2005-2006, Retrieved from <http://nhrc.nic.in/Documents/AR/Annual%20Report%205-6.pdf> on 10/07/2016; National Human Rights Commission Annual Report 2006-2007, Retrieved from <http://nhrc.nic.in/Documents/AR/Annual%20Report%2006-07.pdf> on 10/07/2016; National Human Rights Commission Report 2007-2008, Retrieved from <http://nhrc.nic.in/Documents/AR/NHRC-AR-ENG07-08.pdf> on 10/07/2016; National Human Rights Commission Report 2008-2009, Retrieved from <http://nhrc.nic.in/Documents/AR/Final%20Annual%20Report-2008-2009%20in%20English.pdf> on 10/07/2016; National Human Rights Commission Report 2009-2010, Retrieved from [http://nhrc.nic.in/Documents/AR/NHRC\\_Annual\\_Report-09-10\\_Eng.pdf](http://nhrc.nic.in/Documents/AR/NHRC_Annual_Report-09-10_Eng.pdf) on 10/07/2016; National Human Rights Commission Report 2010 – 2011, Retrieved from <http://nhrc.nic.in/Documents/AR/NHRC%20FINAL%20English%20Annual%20Report-2010-2011.pdf> on 10/07/2016; National Human Rights Commission Report 2011-2012, Retrieved from [http://nhrc.nic.in/Documents/AR/NHRC\\_FINAL\\_English\\_Annual\\_Report\\_2011\\_2012.pdf](http://nhrc.nic.in/Documents/AR/NHRC_FINAL_English_Annual_Report_2011_2012.pdf) on 10/07/2016.

119 MATE, Manoj, 2010, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 Berkeley Journal of International Law 216 [Hereinafter Mate].

*to reconsider the language of draft Article 15 (now Article 21) in January 1948. In these meetings Rau apparently was able to convince Ayyar, the crucial swing vote on the committee, of the potential pitfalls associated with substantive interpretation of due process, which Frankfurter had discussed extensively with Rau. Ayyar, in ultimately upholding the new position on the floor of the Assembly in December 1948, supported removing the due process clause on the grounds that substantive due process could 'impede social legislation'. With the switch in Ayyar's vote, the Drafting Committee endorsed Rau's new preferred language-replacing the due process clause with the phrase 'according to the procedure established by law', which was apparently borrowed from the Japanese Constitution."<sup>120</sup>*

This clearly shows that over a period of 170 years certain issues arose in regards to the operation of “due process clause” in America. However, we subsequently saw the Supreme Court of India incorporating “due process” within Indian constitutional jurisprudence<sup>121</sup>.

In relation to enacting new laws and modifying old ones, comparative law assists the legislators in the following ways:

- Firstly, since comparative law involves the study of another society along with its laws, same helps the legislator to look at the domestic problem from a different prospective.
- It then helps the legislator to understand how the law was used by another country as a tool to deal with the problem. In this regard, the legislator will also understand the effectiveness of law as a tool of social engineering.
- Since legal drafting is different from drafting in general and requires special skills, comparative study of laws will help the legislator in the drafting of new law as well.
- Comparative legal study will also help the legislator to understand the reaction that the law may face from ordinary public and will help them to make necessary arrangements.

Professor Kamba has classified the above into three categories: (1) Use of Comparative law in the creation of new rules and solutions or modifying or abolishing existing ones; (2) Employment of comparative legal study and research in

---

120 Ibid. at 222.

121 GANDHI, Maneka, 1978, Supra 31.

legislation and law reform in regard to the technique of drafting or formulation of legislation; and (3) Use of comparative technique to understand the question of practicability and enforceability of the proposed law<sup>122</sup>. Comparing legal systems facilitates implementation and prospects of success for legal reforms<sup>123</sup>. In this regard, Maine has declared: “The chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of the law.”<sup>124</sup> Legislators need not base their judgment on uncertain predictions. The comparativist can communicate the experiences of other countries with similar socio-economic environments, and can decide whether and how the amended or new regulations influenced public behaviour. This approach not only lowers the risk of misplaced statutory activity (including the view that fewer regulations often lead to a better result among the people who are otherwise addressed by the statute), but also puts a minority in a legislative body in such a persuasive position that it increases its chances of gaining the majority. Comparative law cannot be only used to make or amend laws to deal with general problems. It can also be used as a tool to understand and improvise the existing legal institutions for effective administration of justice. A comparative study of the structure of Supreme Court of India and that of U.S.A, to analyse the effect of such set-ups on the outcome of dispute, by Nick Robinson is a classy example of how comparative study can help us better understand our own legal institutions<sup>125</sup>.

#### **2.4. Judicial Process**

One of the reasons that the courts engage in comparative practices is because often times the law under consideration before them is created using comparative techniques. In such cases, it is only reasonable to use comparative interpretation methodology to interpret the law involved. Other than this, the “acquaintance with the law and practice of foreign courts to fill up gaps [...] can be of great assistance”<sup>126</sup>. Moreover, comparative law is an invaluable tool for the elucidation, understanding and intelligent application in domestic courts of the institutions which originated in other systems of law<sup>127</sup>. “[T]he problem presents itself retrospectively to the lawyer or judge”, states Schlesinger, “who

---

122 KAMBA 1974, Supra 49, at 496-497.

123 ZAPHIRIOU, George A., 1982, *Use of Comparative Law by the Legislator*, 30 American Journal of Comparative Law 71 (Supp.).

124 MAINE, *Village Communitiee*, 4 (1871) in KAMBA 1974, Supra 49, at 496.

125 ROBINSON, Nick, 2013, *Structure Matters: The impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 American Journal of Comparative Law 173.

126 KAMBA 1974, Supra 49, at 499.

127 Ibid.



in applying existing law discovers that the pertinent rule is an imported one, and who thus may be compelled to trace its foreign antecedents"<sup>128</sup>. One of the impacts of globalization on legal process is that the courts cannot leave out foreign law anymore. In this sense, there has been a paradigm shift, both, in the role of the courts as well as tools they use for interpretation. The role of the courts has changed from institutions that solved domestic matters to institutions that solve cross-jurisdictional matters. And in this process, the courts have moved from conventional tools of interpretation to more sophisticated tools. One of such tools is comparative interpretation-ism which has also been invaluable in matters which come before the national courts under the Conflict of Laws.

## 2.5. Comparative Method and Development of International Law<sup>129</sup>

Modern world is plagued with issues/problems which are common to majority of nations<sup>130</sup>. The universality of these issues makes them a matter of global concern, necessitating efforts at global level to deal with the same<sup>131</sup>. International law, which basically is the by-product of these efforts, is one of the important ways by which the international community tries to deal with these international issues. An essential part of this process is the employment of comparative method to understand how the nations use their domestic legal system to deal with these problems, what problems they encounter while enforcing these rules, and how these rules could be developed into universal standards/rules to deal with such issues. The creation of WTO and its many missions and treaties, such as the TRIPS agreement, can be used as an example to explain the same. Prior to this agreement different countries had different domestic IPR regimes. However, globalisation rendered these domestic IPR mechanisms useless because protection of IPRs became an international issue. This resulted in the enactment of TRIPS Agreement. Now all the members of WTO are required to upgrade their domestic laws and bring them in consonance with the minimum standards laid down in TRIPS Agreement. Comparative law plays a crucial role in finding these common rules and principles and then combing them to make international law. Another example is the codification of human rights law at the international level.

---

128 SCHLESINGER, *Comparative Law Cases-Text Materials* in KAMBA 1974, Supra 49.

129 PICKER, Colin B., 2008, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 Vanderbilt Journal of Transnational Law 1083.

130 Issues like terrorism, corruption, poverty, environmental pollution and climate change are found in all the nations and being matters of global concern, they can only be solved when efforts are made globally. See DIBADJ, Reza, *Panglossian Transnationalism*, 44 Stanford Journal of International Law 253.

131 In this regard we can refer to SAARC as a regional organization which has made a large number of efforts to identify and deal with issues specific to South Asia.

The Universal Declaration of Human Rights is a living document which is considered to be a direct source of law.<sup>132</sup> In this regard, Sompong Sucharitkul states:

*“[w]e can find the notion of human rights in all societies and at all times, in Europe as well as in Asia and Africa, in antique as well as in modern Chinese philosophy, in Hinduism, Buddhism, Christianity, Judaism, and Islam. The idea of human dignity is common to all these concepts, which emphasize different values according to the different conditions and diverse societies in which the human beings happen to be living. Human dignity and tolerance constitute the basic core of human rights.”*<sup>133</sup>

Once comparative law technique is used to formulate international law, this law is used by members of international society in the interpretation of municipal law. In *Oyama v. California*<sup>134</sup> the United States Supreme Court held that the Alien Land Law was contrary to the 14<sup>th</sup> Amendment, at least in so far as it forbade American born children of Japanese parents ineligible to naturalization to hold land purchased for them by parents. Four of the nine Justices experiment the opinion that the provision violated not only the 14th Amendment but also the United States obligation under the United Nations Charter. Justices Murphy and Rutledge JJ, in their concurring opinion stated as follows:

*“This nation has recently pledged itself through the United Nations Charter to promote respect for and observation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The Alien Land Law stands is barrier to that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the US, is but one more reason why the statute must be condemned.”*<sup>135</sup>

Black and Douglas JJ, in their concurring opinion added as follows:

*“There are additional reasons why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to*

---

132 SUBRAMANYA, T. R., 1984, *The Rights and Status of Individual in International Law* 121 (1st ed.).

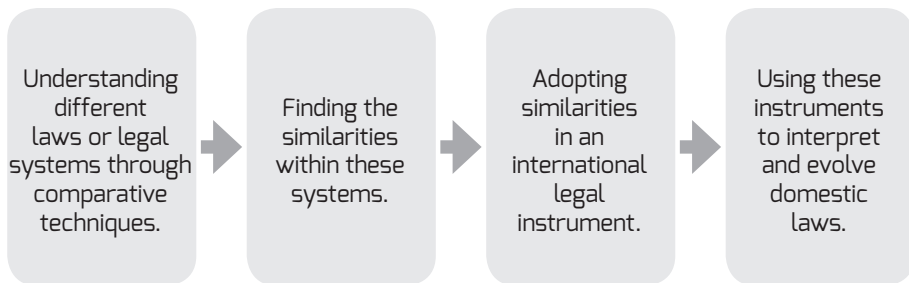
133 SUCHARITKUL, Sompong, 1986-1987, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 *Notre Dame Law Review* 305, 306.

134 *Oyama v. California*, 332 U.S. 633 (1948, Supreme Court of the United States).

135 *Ibid* 673.

*co-operate with the United Nations to promote.....universal respect for and observation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. How can this nation be faithful to this international pledge if state laws which bar land ownership and occupation by aliens on account of race are permitted to be enforced?"*<sup>136</sup>

In relation to international human rights law, Justice Kirby writes, “[I]t is important to recognize that it is the overwhelming genetic commonality of the human species that stamps upon the discourse of human rights its search for universal principles”<sup>137</sup>. He is aware that certain areas of law “present quandaries which are common to societies at roughly the same stage of economic and social development”<sup>138</sup>. Similarly, the courts in Germany, Italy<sup>139</sup>, Netherlands, Tanzania<sup>140</sup>, Chile, Philippines and India<sup>141</sup> have referred to and relied upon the Universal Declaration of Human Rights. The following explanation will make this clear.



136 Ibid 649-650.

137 KIRBY, Michael D., 2000, *The New Biology and International Sharing: Lessons from the Life and Work of George P. Smith II*, 7 *Indiana Journal of Global Legal Studies* 425, 434.

138 KIRBY, Michael D., 1995, *International Commentaries: A Patient's Right of Access to Medical Records*, 12 *Journal of Contemporary Health Law and Policy* 93, 93.

139 Ministry of Home Affairs v. Kemali, [Judgment of 1st February 1962] (Court of Cassation, Italy) reprinted in 40 *ILR* 191-95

140 Ephrahim v. Pastory and Kaizilege, (2001) *AHRLR* 236 (High Court of Tanzania) reprinted in 87 *ILR* 106-110.

141 CHAIRMAN, Railway Board and Ors. v. Mrs. Chandrimadas, (2000) 1 *SCC* 265 [The Supreme Court stated that the UDHR has the international recognition as the “moral code of conduct”, having being adopted by the General Assembly of the United Nations, the applicability of the UDHR and the principles thereof may have to be read, if need be, into the domestic jurisprudence].

Moreover, Article 38 of the Statute of ICJ recognises general principles of law recognised by civilised nations' as one of the sources of international law. Therefore in an international dispute before the ICJ, a State which relies on this source of international law to put forth an argument needs to satisfy the burden of proof that such law is a general principle of law recognised by civilised nations. However, such burden can only be discharged by engaging in a comparative study<sup>142</sup>.

"Private law rules and analogies would seem to be destined to play a considerable part in the future development of Public International Law and in the settlement of international disputes, more particularly in view of Article 38 of the Statute of the Permanent Court of International Justice which directs that Court to apply, among other rules, 'the general principles of law recognised by civilised nations'. This means that general principles recognised by the main systems of private law may be applicable in the future to international disputes, and that such principles must be ascertained by comparative study."<sup>143</sup> Moreover, the international forums have also used comparative method to formulate their opinions<sup>144</sup>. Also, a large number of scholars have argued about globalisation of legal principles like "rule of law" and employ the same for international law purposes<sup>145</sup>.

---

142 ZAJTAY, Imre, 1974, *Aims and Methods of Comparative Law*, 7 Comparative & International Law Journal of South Africa 321, 325 [According to the assumption in article 38 (1) (c) of the Statute of the Statute of the International Court of Justice, the aim of the application of comparative law is evident: in fact, in order to establish "the general principles of law recognised by civilised nations" it is indispensable for a judge-to go on to a comparative examination of the different national laws. It is true that the scope for the application of the said provision is limited, since article 38 only applies to the International Court of Justice, *Ibid*].

143 GUTTERIDGE, H. C., 1931, *The Value of Comparative Law*, Journal of Society of Public Teachers of Law 26, 29; See also VESPAZIANI, Alberto, 2008, *Comparison, Translation and the Making of a Common European Constitutional Culture*, 9 German Law Journal 547, 558.

144 KAKOURIS, C. N., 1994, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 Pace International Law Review 267.

145 SEIPP 2006, *Supra* 11; PHILLIPS, Lord, "The Rule of Law in a Global Context", The Qatar Law Forum, 30 May 2009, available at <[http://www.qatarconferences.org/qatarlaw2009/english/speeches/philips\\_en1.pdf](http://www.qatarconferences.org/qatarlaw2009/english/speeches/philips_en1.pdf)> last seen on 20/07/2016; KERSCH, Ken, 2004, *The Globalized Judiciary and the Rule of Law*, 13 The Good Society 17; MARTINEZ, Jenny S., 2003, *Towards an International judicial System*, 56 Stanford Law Review 429.

### 3. Conclusion

A proper consideration of comparative law's definitional predicament requires a suitable place within any discussion on jurocomparatology. If not a universal solution, the predicament at least requires an answer at national level. Ignoring the same could seriously jeopardise the quality of research or practical application of jurocomparatology by judges and lawyers. Jurocomparatology is a legal reality and the manner in which courts, particularly constitutional courts, have engaged with the same has been haphazard, subjective, and without any proper methodology. The courts should therefore develop proper methodology to engage with jurocomparatology. The functional importance of jurocomparatology and its operation within Indian legal set-up is a factual certainty. Jurocomparatology has played an important role in the development of Indian legal jurisprudence, particularly constitutional law. However, very little research is available when it comes to determining the extent, the true nature and the methodology employed by the Indian courts while engaging in the same. The lack of such research creates ambiguity and uncertainty about the legal, philosophical and methodological issues related to cross-border judicial dialogue by Indian constitutional courts and seriously compromises the quality of such engagement.

# Things We Lost In The Fire: EU Constitutionalism After Brexit

## Patrícia Fragoso Martins

Professora Auxiliar da Escola de Lisboa da Faculdade de Direito  
da Universidade Católica Portuguesa

---

### SUMMARY

1. Introduction: Things We Lost in the Fire
2. The Possibility of Leaving the EU: Before and After Article 50 TEU
3. EU Constitutionalism After Brexit
4. Concluding Remarks

## 1. Introduction: Things We Lost in the Fire

It is undeniable that the withdrawal of the United Kingdom (UK) from the European Union (EU) represents the most significant institutional challenge for the European project to this date. Such a challenge is felt at different levels and has been at the centre of attentions of the legal community. In this context, the focus has so far been put on the difficulties posed by the UK's constitutional arrangements underlying the triggering of Article 50 TEU<sup>1</sup>. The famous *Miller*<sup>2</sup> litigation has worked as an important test tube to understand the nature of the “decision to withdraw from the Union in accordance with [the withdrawing state] constitutional requirements” mentioned in Article 50(1) TEU. This is, however, mostly an internal matter that must be settled by each Member State who eventually decides to leave.

From the standpoint of EU law, scholars have here and there questioned the scope of withdrawal and its impact on the nature of the EU legal order. It is feared that Brexit radically changes the nature of European integration in so far as it demonstrates that the EU project is not definitive and can be reverted<sup>3</sup>. In this context, attention has been drawn to what Europe has lost with the triggering of Article 50 TEU.

In reality, despite the fact that it was generally expected that Article 50 TEU would never be implemented in practice, from a conceptual point of view, its mere presence in the Treaties is generally considered to be a manifestation of the intergovernmental dimension underlying to EU cooperation, contrasting with the trend towards a more perfect form of federal integration<sup>4</sup>. In this light, the actual triggering of Article 50 TEU by a Member State would mean going backwards to a more *imperfect* form of cooperation between the Member States and would represent a setback in the process of integration. To a certain extent, the withdrawal provision, somehow echoing the subjection of EU law to International law, could be seen as a kind of “Trojan horse” holding the potential to, from the inside, put an end to the conquests of EU constitutionalism.

---

1 GORDON, Michael, 2016, “Brexit: a Challenge for the UK Constitution, of the UK Constitution?”, in *European Constitutional Law Review*, 12, pp. 409-444, referring to Brexit as “the prompt for a potentially remarkable recalibration of the UK constitution which was neither expected nor prepared for”.

2 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

3 It is significant that Brexit has been referred to the “most selfish decision ever made since Winston Churchill saved Europe with the blood, sweat and tears of the English”, Speech by MEP Esteban González Pons before the European Parliament on the 60th anniversary of the Treaties of Rome.

4 See e.g., MESQUITA, Maria José Rangel, 2005, “Forças e fraquezas do Tratado que estabelece uma Constituição para a Europa: cinco breves tópicos de reflexão”, in *O Direito*, 137, IV-V, p. 820, speaking of a clear concession to intergovernmentalism and interstatehood.

To this assumed conceptual nature of Article 50 TEU, one must add the symbolism Brexit necessarily entails. In fact, it is clear that withdrawal of the UK from the EU involves more than the loss of one Member State. The trust on an ever-growing project grounded on the so-called “spill-over” effect appears compromised. In what Europe enshrines of a never-ending process, of hope in a united Europe, and of an optimistic trust in the future, Brexit represents its lowest moment. This symbolic dimension is not legally irrelevant. On the contrary, it is emblematically mentioned in the Treaties pursuant to which the Member States, “in view of *further* steps to be taken in order to *advance* European integration”<sup>5</sup> solemnly established among themselves the European Union, “marking a *new stage* in the *process* of creating an *ever closer* union among the peoples of Europe”<sup>6</sup>.

Also, it is also unquestionable that Brexit puts us far from the precedents and of the so-called two-speed Europe that has served to limit the degree of participation of the UK in EU policies through opt outs, enhanced cooperation mechanisms and other *ad hoc* arrangements. On the one hand, Brexit does not involve a mere adjustment to the geographic scope of application of the Treaties. Membership of the EU is inherently and definitely affected. Constitutional amendment will be necessary, notably to Articles 52 TEU and 355 TFEU, and Protocols no. 15, 20, 30 and 31, to name the most obvious provisions. On the other hand, although the framework of the future relations between the EU and the UK is yet to be determined, it is clear that whatever solution is reached, the UK will be excluded from the vast majority of the EU fields of action, and what is currently the exception will become the rule.

However, although it is clear that something has been lost along the way, it is important not to forget that the UK is leaving a constitutional polity. In this light, the purpose of this paper is to highlight the need to understand Brexit in the wider context of EU constitutionalism, by (i) demonstrating that withdrawal from federal organisations is not unprecedented, and does not necessarily reflect the intergovernmental nature of European integration, and by (ii) pointing out how exiting the EU may, on the contrary, contribute to reinforce the constitutional nature of the Union under whose lens it necessarily needs to be assessed and negotiated.

---

5 See Preamble of the TEU.

6 Cf. Article 1 TEU. It is not a coincidence that one of DAVID CAMERON’s demands on the eve of the Brexit referendum was the withdrawal by the UK of the expression “an ever closer union among the peoples of Europe”, enshrined in the Treaties.



## 2. The Possibility of Leaving the EU: Before and After Article 50 TEU

I. Before the entry into force of the Lisbon Treaty, in the absence of an express provision, it was not clear whether a Member State could withdraw from the Union<sup>7</sup>. In 1982, HILL noted that several authorities adhered “to the view that the treaties establishing the European Communities have placed Europe in an irreversible process of European integration”<sup>8</sup>. This was consistent with the goal expressed in the Treaty’s preamble to strive for “an ever closer union among the European peoples”, which necessarily excluded the right of a Member State to withdraw. Also, the Court of Justice of the European Union (CJEU) stated in *Costa*<sup>9</sup> that the States had created “a Community of unlimited duration”, limiting their sovereignty through a transfer of powers and establishing “an independent legal order”, thus suggesting that withdrawal was not legally possible.

However, several scholars noted that such possibility existed. Despite the constitutional nature of the EU and of its autonomous legal order, authors considered that there was a fundamental right to withdraw based either on the Vienna Convention on the Law of the Treaties of 1969<sup>10</sup>, either on customary international law<sup>11</sup>. In fact, the CJEU’s statements for in of themselves were not sufficient to exclude the right to withdraw from the EEC. It could be argued that *Costa* did not address the issue at all, as one thing is the duration of the Treaty (which in contrast, for instance, with the ECSC Treaty was and is still not pre-determined), while another is the possibility of exiting the Community/Union, which would subsist if one of the States decided to leave. Thus, the unlimited duration of the Treaty would not preclude the possibility of terminating the project if the contracting parties so wished. Also, *Costa* dealt mostly with the principle of supremacy which in itself does not exhaust the constitutional difficulties involved in the European project. It is clear that the latter are not restricted to the legal relationship between national law and EU law, but go to the heart of sovereignty

---

7 In Portugal, the issue has been addressed, a.o., by DUARTE, Maria Luísa, 2005, *Estudos de Direito da União e das Comunidades Europeias II*, Coimbra, Coimbra Editora; MESQUITA, Maria José Rangel, “Forças e fraquezas do Tratado que estabelece uma Constituição para a Europa”, pp. 807-836; PATRÃO, Afonso, 2010, “O Direito de abandonar a União Europeia à luz do Tratado de Lisboa: a extinção do direito de livremente abandonar a União?”, in M. Costa Andrada, M. João Antunes and Susana A. Sousa (org.) *Studia Juridica*, Vol. IV, Coimbra, Coimbra Editora, pp. 755-794.

8 HILL, John, 1982, “The European Economic Community: the Right of Member State Withdrawal”, in *Journal of International and Comparative Law*, 12, p. 338.

9 Case 6/64, *Costa v. ENEL*, ECR 1964, p. 1195.

10 See e.g., PATRÃO, Afonso, “O Direito de abandonar a União Europeia à luz do Tratado de Lisboa”, p. 782, basing the right to withdraw on Article 56(1)(b) of the Vienna Convention on the Law of the Treaties.

11 See e.g., HILL, John, *The European Economic Community*, pp. 344 seq.

and the right to self-determination of the peoples of Europe (even if the scope of this right is controversial in of itself).

In light of the above, no Member State protested against the UK right to withdraw when the Labour government was elected in 1974, with a manifesto to pledge to hold a referendum on the issue. Although the issue was not tested at the time, as a large majority voted in favour of staying in the EEC, it was assumed that Britain could have left if she so wished<sup>12</sup>.

In addition, it is customary to mention in this ambit the cases of Algeria, Greenland and Saint Barthélemy as precedents of withdrawing communities. Algeria left the EEC when it gained independence from France although withdrawal did not result in any revision of France's level of participation in the Communities. Greenland left the EEC in the early 1980s, assuming the status of Overseas Countries and Territories (OCT) list country, determining a change in the geographic scope of the Treaties but not in Denmark's membership of the EU<sup>13</sup>. The same happened with Saint Barths when the island voted to secede from Guadeloupe, and the local government called on France to review the island's relationship with the EU. Saint Barthélemy became an OCT as of 2012.

Thus, before Article 50 TEU, although the issue was long discussed, there were sufficient bases to argue for the possibility of leaving the EU based either on history, legal arguments, political outcomes<sup>14</sup>, or mere factual considerations. DOUGAN noted that "even though the current Treaties have been concluded for an indefinite period and contain no express provisions permitting a Member State to exit the Union, it is beyond doubt that – politically and legally – nothing can prevent a country from seceding should it wish to do so"<sup>15</sup>. In practice, the EU would hardly have ways to prevent withdrawal. Notwithstanding, there was also strong evidence suggesting that withdrawal would not be done in a legal *vacuum* and that it would have to be implemented in a negotiated manner<sup>16</sup>.

---

12 The UK threatened to leave the EU at least two times before. Additionally to the 1974 election, in 1981, the Labour Party promised that if it was elected it would withdraw from the EEC without even holding a referendum.

13 See e.g., WEISS, Friedl, 1985, "Greenland's withdrawal from the European Communities", in *European Law Review*, 10(3), pp. 173-185.

14 HILL discussed the possibility of Germany exercising the right to withdraw which it had previously reserved in case of reunification and the hypothesis of a Member State turning into a form of communist government. See HILL, John, *The European Economic Community*, p. 355.

15 DOUGAN, Michael, 2008, "The Treaty of Lisbon 2007: Winning Minds, not Hearts", in *Common Market Law Review*, 45(3), p. 668.

16 BERGLUNG, Sara, 2006, "Prison or Voluntary Cooperation? The Possibility of Withdrawal from the European Union", in *Scandinavian Political Studies*, 29 (2), pp. 147-167.

In light of the above, neither the inclusion of Article 50 in the TEU nor its triggering by the UK represent in of themselves a loss in the process of European integration. The possibility of exiting the Union had been on the table before, and had been politically discussed and partially implemented.

II. Commenting on Article 50 TEU on occasion of the entry into force of the Lisbon Treaty, ALLAN TATHAM suggested that it was best not to mention divorce at the wedding<sup>17</sup>. This may explain why the possibility of leaving the EU has only been introduced in the last amendment to the Treaties. Legal silence would discourage Member States to leave or even consider leaving the EU, in so far as the uncertainties surrounding the exiting process began with the discussion on its mere possibility. *Sub silentio*, it was arguable that Member States simply could not leave the EU.

Hence, the anxieties caused by the inclusion of a withdrawal mechanism in the Lisbon Treaty were only compensated by the conviction and sincere hope that said mechanism would never be used<sup>18</sup>. That conviction may also explain the incomplete nature of Article 50 TEU and the doubts surrounding its current application resulting therefrom.

In any case, although it may be wise not to discuss separation when committing to a “happily-ever-after-union”, it is common that couples, as well as institutions, anticipate the possibility of things not working out as initially planned, thereby providing for exit solutions. That is, for instance, in the marital context, the role of prenuptial agreements in case of divorce.

The legal basis for leaving the EU originates from the works of the Convention for the Future of Europe, which prepared the draft Constitutional Treaty (CT) later signed and at the end rejected by the States<sup>19</sup>. The provision was included in the CT in light of the fact that the UK disagreed with the political aspiration of a closer union that the CT set in motion<sup>20</sup>. Within the works of the Convention three basic models were discussed:

---

17 TATHAM, Allan F., 2012, “Don’t Mention Divorce at the Wedding, Darling’ EU Accession and Withdrawal after Lisbon”, in A. Biondi, O. Eeckhout and S. Ripley (eds.), *EU Law after Lisbon*, New York, Oxford University Press, p. 128.

18 In Portugal, for instance, AFONSO PATRÃO, stated that it was not believable that a Member State would ever decide to withdraw from the EU considering the positive results achieved by European integration and the degree of economic, social and political inter-dependence between the states meanwhile generated. See PATRÃO, Afonso, “O Direito de abandonar a União Europeia à luz do Tratado de Lisboa”, p. 789.

19 It corresponded to Article 60-I of the CT.

20 See List of Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, “Part I of the Constitution: Article 59”, <<http://europeanconvention.europa.eu/docs/Treaty/pdf/46/global46.pdf>>.

- (i) *state primacy*: where a Member State would have the absolute, unconditional and unilateral right to withdraw from the Union;
- (ii) *federal primacy*: where there would be a prohibition of withdrawing based on the premise that once a Member State always a Member State; and,
- (iii) *federal control*: where Member States would retain the sovereign right to leave the Union, but subject to negotiations and approval by the remaining States.

Article 50 TEU intends to reflect the latter option. Thus, pursuant to said provision any Member State may freely decide to withdraw from the Union in accordance with its own constitutional requirements. A Member State which decides to withdraw must notify the European Council of its intention. The European Council will then provide the guidelines that shall base the negotiations of the withdrawal agreement taking account of the framework for its future relationship with the Union. Said agreement will be negotiated pursuant to Article 218(3) TFEU and will be concluded on behalf of the Union by the Council of the EU, acting by a qualified majority, after obtaining the consent of the European Parliament.

Thus, although the triggering of Article 50 TEU is not dependent upon any substantive conditions for leaving the EU, it is subject to a strict procedure of negotiations involving both the states and the institutions<sup>21</sup>. Nonetheless, pursuant to Article 50(3) TEU, withdrawal will occur regardless of the existence of an agreement between the Union and the withdrawing state. Indeed, the Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the withdrawal notification, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period<sup>22</sup>.

III. Regardless of its obvious major political and legal impact, withdrawal from the Union tells us very little on the legal nature of the EU as a constitutional project. Even though the unilateral right of a Member State to withdraw is said to be typical of international treaties and not of state's constitutions, there are in reality all sorts of solutions.

---

21 See also HOFMEISTER, Hannes, 2010, "Should I Stay or Should I Go?: A Critical Analysis of the Right to Withdraw from the EU", in *European Law Journal*, 16(5), p. 592; MALATHOUNI, Eliza, 2008, "Should I Stay or Should I go: The Sunset Clause as Self-Confidence or Suicide", in *Maastricht Journal of European and Comparative Law*, 15, p. 115.

22 Criticizing the two-year period provided for in the Treaties see e.g., HERBST, Jochen, "Observations on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?", in Dann P., Rynkowski M. (eds.) *The Unity of the European Constitution. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Vol. 186. Springer, Berlin, Heidelberg, 2006, p. 1758.

Hence, whereas for instance the Treaty establishing the League of Nations included the possibility of withdrawal, as happens also with the International Monetary Fund and the GATTs, the United Nations Charter does not include such possibility. On the other hand, it is true that usually state constitutions' do not provide for exiting mechanisms. Hence, in the USA war was fought over the issue and the national constitution does not seem to allow for secession<sup>23</sup>. In *Texas v White*<sup>24</sup>, the US Supreme Court accepted the doctrine of a perpetual and indissoluble union between the states where there is no place for reconsideration or revocation, except through revolution or consent<sup>25</sup>. Thus, in the USA, which paradoxically emerged from the "first formal secession proclamation in world history"<sup>26</sup> – withdrawal does not seem to be realistic. More recently, the Supreme Court of Alaska considered secession to be clearly unconstitutional<sup>27</sup>.

In Spain, the unilateral secession of Catalonia was also considered to be unconstitutional on the basis of national sovereignty. The latter is said to lie exclusively with the Spanish people: "*unidad ideal de imputación del poder constituyente y, como tal, fundamento de la Constitución y del Ordenamiento jurídico y origen de cualquier poder político*"<sup>28</sup>. According to the Spanish Constitutional

---

23 LINCOLN's words in his message to Congress in July 4, 1861, are famous: "[a]nd this issue [the dissolution of the Union] embraces more than the fate of these United States. It presents to the whole family of man the question whether a constitutional republic or democracy a government of the people, by the same people can, or cannot, maintain its territorial integrity against its own domestic foes. It presents the question whether discontented individuals, too few in numbers to control administration according to organic law, in any case, can always... break up their Government, and thus practically put an end to free government upon the earth. It forces us to ask: 'Is there, in all republics, this inherent, and fatal weakness?' 'Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?'"

24 *Texas v White* 74 US 700, 725.

25 Hence, "[w]hen Texas became one of the United States, she entered into an indissoluble relation. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States."

26 RYAN, Erin, 2017, "Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society", in *Oregon Law Review*, Vol. 96; FSU College of Law, Public Law Research Paper No. 806, available at SSRN: <https://ssrn.com/abstract=2775377>, p. 8. It is also noticeable that at the subnational level, there are several examples of peaceful secession in the U.S.A., as happened for instance with the Carolinas and the Dakotas.

27 *Scott Kohlhaas v. State of Alaska*, Office of the Lieutenant Governor, No. S-11866, November 17, 2006. Quoting *Texas v. White*, the Alaskan Supreme Court affirmed that "the act which consummated her admission to the Union was something more than a compact; it was the *incorporation* of a new member into the political body" and "it was final". As such, "when the forty-nine flag was first raised at Juneau, [the] Alaskans committed [themselves] to that *indestructible* Union for good or ill, in *perpetuity*. To suggest otherwise would 'disparage the republican character of the National Government'".

28 Author's translation: "*ideal unity to which the constituent power is imputable, and therefore the foundation of the Constitution and of the Legal Order and origin of any political power*". See Spanish Constitutional Court Decision no. 42/2014, 25th March 2014, available here: <http://hj.tribunalconstitucional.es/en/Resolucion/Show/23861>.

Court, under the current constitutional arrangements only the Spanish people is sovereign, and it is so in an exclusive and indivisible manner, so that no fraction of the people can claim said quality and have the right to break what the constitution considers “*la indisoluble unidad de la Nación española*”<sup>29</sup>. Notwithstanding, the Court acknowledged Catalonia’s constitutional right to decide its own fate (“*derecho a decidir de los ciudadanos de Cataluña*”). However, such right is not considered to be a manifestation of self-determination or regional sovereignty, but a political aspiration, in so far as it is exercised in a manner consistent with the national constitution, with respect to the principles of democracy, pluralism, legality, transparency, Europeism, the role of Parliament, participation and dialogue.

Curiously, the Spanish Constitutional Court considered that its verdict was similar to the one reached by the Canadian Supreme Court in its ruling of 1998 on the secession of Québec<sup>30</sup>, although both courts in reality came to different decisions. In fact, the Canadian Supreme Court has accepted that secession from the federal Union corresponds to an inherent right of the states, founded on the principle of democracy<sup>31</sup>. However, as the Court pointed out, democracy “means more than simple majority rule” as it “exists in the larger context of other constitutional values”<sup>32</sup>. In the Canadian experience, those values include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would necessarily put those relationships at risk. Thus, as the Constitution vouchsafes order and stability, secession of a province “under the Constitution” could not be achieved unilaterally, that is, without *principled negotiation* with other participants in the Confederation within the existing constitutional framework. In this light, the Court considered that Québec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. “Democratic rights under the Constitution cannot be divorced from constitutional obligations”<sup>33</sup>. On the one hand, “the continued existence and operation of the Canadian constitutional order could

---

29 Author’s translation: “the indissoluble unity of the Spanish nation”. As a consequence, a regional community cannot unilaterally initiate a referendum to decide its integration in Spain.

30 Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

31 Following the Supreme Court’s Decision, the Parliament of Canada passed the Clarity Act (*Loi sur la clarté référendaire*) establishing the conditions under which the Government of Canada would enter into negotiations that might lead to secession following such a vote by one of the provinces. Two days after the Clarity Act had been introduced in the Canadian House of Commons, the *Parti Québécois* government passed an Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State in the National Assembly of Québec.

32 Para. 149.

33 Para. 151.

not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada”<sup>34</sup>. Therefore, the other provinces and the federal government would have no basis to deny the right of the government of Québec to pursue secession. However, on the other hand, that would be so true only if, so long as in doing so, Québec respects the rights of others<sup>35</sup>.

In light of the above, it becomes clear that the possibility to withdraw is neither typical of nor limited to intergovernmental organisations and does not necessarily compromise federalism or constitutionalism. In particular, the Canadian experience makes clear that withdrawal from a constitutional polity can be pursued within the framework of its constitutional values and principles.

Hence, it is submitted that Article 50 TEU in itself does not threaten the constitutional nature of the European legal order. Things go the other way around: withdrawal from the EU must be understood against the backdrop of EU constitutionalism. This means that, from a conceptual point of view, withdrawal from the EU cannot be assessed under the lens of intergovernmental cooperation, calling for the application of International law rules and principles. On the contrary, leaving the EU needs to be assessed and negotiated from the standpoint of European constitutionalism, with respect to the core values on which the EU is based. In this conception, the key to understanding and implementing Brexit lies not in *Costa* but in *Les Verts*<sup>36</sup>, where the CJEU firstly acknowledged the European Treaties as the constitutional charter of a Community/Union based on the rule of law.

### 3. EU Constitutionalism After Brexit

Hence, although it does not amount to a typical example of secession – in the sense that secession involves the effort of group or section of a state with a view to achieving statehood on the international plane – Brexit cannot be discussed from the perspective of International law but of constitutional law. It would be a serious misapprehension of the European project to discuss the details of withdrawal from the standpoint of International law. Leaving the EU is not merely ceasing a classical form of international cooperation. Withdrawal from the EU must be grasped and implemented in the framework of the constitutional

---

34 Para. 151.

35 Para. 151. The Court acknowledges that the negotiations that followed a vote to withdraw would have to address the potential act of secession as well as its possible terms. They would need to address the interests of the other provinces, the federal government, Québec and indeed the rights of all Canadians both within and outside Québec, and specifically the rights of minorities. Cf. para. 152 *seq.*

36 Case 294/83, *Les Verts/Parliament*, ECR 1986, p. 1339.

compound that binds the States to each other and to the Union, and of the duties Member States undertook when they accepted to be part of a EU based on the rule of law. In this sense, Brexit is as much a challenge to the UK constitution as it is to the European one.

The consequences of this view are twofold. On the one hand, EU fundamental principles and values must guide withdrawing negotiations. On the other hand, they must be fully respected in the course of the withdrawing process. Said fundamental principles and values stem clearly from the wording of the Treaties. At the outset, Article 2 TEU mentions the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are said to be common to the Member States in “a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. Taking into account the constitutional experience of the EU, it is possible to try to assess some of the legal and political implications of the above mentioned principles in the context of Brexit negotiations.

*Freedom, Democracy and Equality.* To begin with, the possibility of exiting the EU tests the essence of self-government which is at the core of European liberal democracies. The discussion on whether the decision to leave the Union can be justified on the grounds of the right to self-determination under International law is, in this context, futile. Membership of a project founded on democracy must entail the acknowledgement of the possibility to leave. In its deepest routes, democracy lies with the freedom of choice, and thus the freedom to join and the freedom to leave. Article 50 TEU must be interpreted against this background.

Also, in its core, democracy means consent by majoritarian decision-making. To a certain extent, this principle is reflected on Article 50 TEU pursuant to which the Council of the EU decides by qualified majority. Notwithstanding, more importantly, understanding withdrawal through the lens of democracy means accepting that negotiations must account for the interests of the 28th democratic majorities in the EU. The withdrawing process involves in reality a multilateral negotiation. Although Article 50 TEU provides for the Council of the EU and Commission to be the frontrunners of the negotiations, it is important not to lose sight that there are 28th democratic majorities whose interests must be taken into consideration in the process.

Democracy also means the need for debate and deliberation and consequently the duty to engage in constructive discussions to address the concerns of dissenting voices. The duty to negotiate is also a consequence of the degree of interdependence between the States resulting from participation in the EU. In this light, it is clear that exit conditions cannot be unilaterally dictated by the



withdrawing state. It is noticeable that in the prior case of Greenland, Denmark did not attempt at a unilateral withdrawal, but looked rather for a negotiated way-out. Thus, without surprise, Article 50 TEU provides that the Union shall conclude an agreement with the withdrawing State which must be negotiated pursuant to the common Treaty provisions.

Also, it is unquestionable that negotiations must be carried out in good faith. This obligation is enshrined in the Treaties, flowing from the well-known principle of loyal cooperation. In particular, the second paragraph of Article 4(3) TEU provides that Member States are under the obligation “to take *any appropriate measure*, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”. These constitutional obligations go well beyond the general duties of good faith imposed on states when negotiating or withdrawing from international treaties, notably under Articles 18 or 65 of the Vienna Convention on the Law of the Treaties. In this respect, the CJEU has expanded significantly the scope of the obligations resulting from the principle of loyal cooperation, and has not hesitated to intervene when such a breach was found to have been committed either by the States or the EU institutions<sup>37</sup>.

Additionally, although democracy also helps to explain why the seceding state MEPs’ may still take part in the deliberation regarding withdrawal<sup>38</sup>, the solution regarding the state’s representative in the Council of the EU may be more difficult to understand<sup>39</sup>. In fact, pursuant to Article 50 TEU, with the exception of the withdrawing decision, the withdrawing state representative in the Council of the EU continues to participate in the Council’s meetings, discussions and decisions. This solution may create disruptions with regard to the adoption of legal acts and their respective financial consequences destined to produce effect after Brexit is fully implemented. Democracy demands cautious in the scope of participation of the UK ministers in the Council of the EU and in the exercise of the right to vote in decisions which will not be applicable to the UK in due time.

Lastly, the possibility of revocation of Brexit must also be assessed under the principles of freedom, democracy and equality between the States. On the one hand, if Member States are committed to integration, the group of the 27

---

37 See e.g., Case C-246/07 *Commission/Sweden* (PFOS), ECR 2010 p. I-3317.

38 DOUGAN is critical of this solution, arguing that once a Member State has exercised its unilateral and unconditional right to withdraw from the Union, “there is no good reason to offer its MEPs the right to exercise any influence (yet alone a potentially decisive one) over the agreement which will determine the future relations between that country and the Union”. See DOUGAN, Michael, “The Treaty of Lisbon 2007”, p. 688. We respectfully disagree. Also with regard to the judges of the CJEU it seems clear that they should maintain their positions until withdrawal effectively occurs.

39 See FRIEL, Raymond Y., 2004, “Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution”, in *International and Comparative Law Quarterly*, 53(2), p. 426.

must accept the possibility of the UK to revoke its decision to withdraw<sup>40</sup>. On the other hand, if the UK revokes its withdrawal decision it must be prepared to accept the consequences resulting from the frustration of expectations created on both the other States and on the EU institutions, and its possible impact on non-withdrawal conditions<sup>41</sup>.

*Rule of law and fundamental rights.* It has been noted that Article 50 TEU does not in itself render fundamental rights applicable as a matter of EU law nugatory during the process of removal from the EU<sup>42</sup>. On the contrary, EU constitutionalism requires that priority is given to the rights of EU citizens *during* and *after* Brexit. Without surprise, from the very beginning, the European Council guidelines prioritized the issue<sup>43</sup>. The need to provide as much clarity and legal certainty as possible to citizens is also reflected in the Council of the EU and Commission's documents on Brexit<sup>44</sup>. Indeed, the rule of law imposes that disentanglement of a Member State from the Union is not done in a scenario of chaos or anarchy, which LINCOLN in his time considered as inevitable<sup>45</sup>. Thus, all European institutions have consistently called for an "orderly withdrawal" of the UK from the EU. In this ambit, the Commission has proposed to prolong the status of EU citizenship for those who have shaped their lives under EU law. This entails protecting living EU citizens in the UK and UK citizens in the EU at several levels as if Brexit would not take place<sup>46</sup>.

---

40 See also EECKHOUT, Piet, FRANTZIOU, Eleni, "Brexit and Article 50 TEU: A Constitutional Reading" (December 23, 2016), available at SSRN: <https://ssrn.com/abstract=2889254>, p. 41, considering that unilateral revocation of the decision to withdraw should be possible provided that it is done in good faith.

41 See SARI, Aurel, "Biting the Bullet: Why the UK is Free to Revoke its Withdrawal Notification under Article 50 TEU", available at <https://ukconstitutionalaw.org/2016/10/17/aurel-sari-biting-the-bullet-why-the-uk-is-free-to-revoke-its-withdrawal-notification-under-article-50-teu/>.

42 See EECKHOUT, Piet, FRANTZIOU, ELENI, "Brexit and Article 50 TEU", p. 21.

43 The European Council noted that "[t]he right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union. Along with other rights provided under EU law, it has shaped the lives and choices of millions of people. Agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority for the negotiations. Such guarantees must be effective, enforceable, non-discriminatory and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence. Citizens should be able to exercise their rights through smooth and simple administrative procedures." See European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU.

44 All available at [https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom\\_en](https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en).

45 In his First Inaugural Address on March 4, 1861 Lincoln affirmed that "[p]lainly, the central idea of secession is the essence of anarchy".

46 See e.g., Working paper "Essential Principles on Citizens' Rights", TF50 (2017) 1 Commission to EU27; Position paper on "Essential Principles on Citizens' Rights", TF50 (2017) 1/2 – Commission to UK.

The obligation to respect individual rights applies to the UK as well. It is significant that before the official notification to the EU, the House of Lords urged the UK government to proceed with a unilateral guarantee of the rights of EU citizens in the UK.

It must be highlighted that even where fundamental rights are not at stake, any arbitrary form of regression of any vested rights can be “constitutionally destabilising, to the extent that they are prejudicial to the principles of legal certainty and legitimate expectations”<sup>47</sup>. These principles are part of the EU constitutional order, and they entail important consequences at the level of publication of the results of the negotiations, adequate notice periods to those who may be individually affected<sup>48</sup>, and more importantly the adoption of provisional rules and transitional periods<sup>49</sup>.

Lastly, the loss of EU citizenship of UK citizens deserves some consideration, especially with regard to those citizens who have not consented to it. It is settled EU law that citizenship of the Union tends to be the “fundamental status” of nationals of the Member States<sup>50</sup>. The CJEU considers that “by reason of its nature and consequences” the loss of EU citizenship falls within the jurisdiction of the CJEU<sup>51</sup>. According to the Court, even though EU law does not compromise the principle of International law pursuant to which acquisition and loss of nationality is a matter of national competence, the exercise of that power in respect to citizens of the Union is amenable to judicial review under EU law. In particular, “having regard to the *importance* which primary law attaches to the status of citizen of the Union”, a decision to withdraw naturalisation “must take into account the *consequences* that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the *loss of the rights enjoyed by every citizen of the Union*”<sup>52</sup>. In light of this case-law, and despite of being a necessary consequence of withdrawal, it is clear that the legality of the process of losing EU citizenship triggers EU constitutional guarantees and may merit oversight by domestic courts and the CJEU itself.

*Separation of Powers and Federalism.* Separation of powers in the EU materializes at different levels. At the outset there is a division of competences between the States and the Union based on the principle of conferral. The latter constitutes the essence of federalist systems aimed at accommodating diversity

---

47 EECKHOUT, Piet, FRANTZIOU, Eleni, “Brexit and Article 50 TEU”, p. 20.

48 *Ibidem*.

49 In this respect, it is interesting to note that in the period post-independence, EEC Law continued to apply temporarily in Algeria.

50 Case C-184/99 *Grzelczyk* ECR 2001, I-6193, para. 31.

51 Case C-135/08, *Rottmann*, ECR 2010, p. I-1449, para. 42.

52 Para. 56.

in unity. In this ambit, it is important to recall that EU federalism is not merely designed to protect and accommodate local cultures and traditions, or autonomous decision making by local communities. EU federalism accounts for national identities reflected in the constitutional structures of each Member State<sup>53</sup>. This protection ranges to the nuclear identity of the European peoples and the way the latter conceive themselves *vis-à-vis* the other groups and communities. This finding entails a two-sided consequence. On the one hand, withdrawal from the Union cannot ignore the constitutional difficulties and concerns of the withdrawing state. On the other hand, constitutional requirements of the remaining Member States may have to be accounted for in the withdrawing process. This means that negotiations may lead to different solutions regarding concrete Member States, with Ireland, Spain and Cyprus being the most obvious candidates.

EU federalism and the principle of conferral are also key to understanding the legal consequences surrounding the adoption of the agreement governing the future UK-EU relations. It is common for international agreements concluded by the EU to have more than one provision in the EU Treaties as their legal basis, depending on their scope and object. Thus, for instance, if the future relationship between the UK and the EU is confined to trade matters, Article 207 TFEU will constitute the relevant provision. If, however, the future relationship includes a range of EU policies, the conclusion of an association agreement under Article 217 TFEU may have to be considered. In this context, EECKHOUT and FRANTZIOU have noted that there seems not to be any compelling legal reasons for requiring the UK to withdraw from the EU first, before negotiating a new agreement on its future relationship<sup>54</sup>.

Also in this respect, it is unclear whether the future relationship between the EU and the UK requires the conclusion of a mixed agreement, *i.e.* an international agreement concluded by the EU and its Member States. If it is clear that regarding withdrawal the Member States have conferred their powers exclusively to the EU, it is unclear whether they have done so with regard to their future relationship with the exiting state<sup>55</sup>.

Additionally, separation of powers in the EU federal system also occurs at the level of EU institutions. In fact, the Treaties “set up a system for distributing powers among the different [Union] institutions, assigning to each institution its

---

53 Cf. Article 4(2) TEU.

54 See EECKHOUT, Piet, FRANTZIOU, Eleni, “Brexit and Article 50 TEU”, p. 25.

55 See also EECKHOUT, Piet, FRANTZIOU, Eleni, “Brexit and Article 50 TEU”, p. 25. It should be noted that, in the past, Greenland’s withdrawal was combined with the introduction of new arrangements that allowed for the maintenance of close and lasting links between the EU and Greenland. The Greenland Treaty, signed in Brussels on 13 March 1984, was concluded by the Member States of the EU as it consisted of a Treaty amending, with regard to Greenland, the Treaties establishing the European Communities.

own role in the institutional structure of the [Union] and the accomplishment of the tasks entrusted to the [Union]”<sup>56</sup>. In this ambit, the CJEU has clarified that the EU institutions are bound by the so-called principle of the institutional balance which “means that each of the institutions must exercise its powers with due regard for the powers of the other institutions” and requires “that it should be possible to penalize any breach of that rule which may occur”<sup>57</sup>. Therefore, it is pivotal that the each EU institution is aware of the interests it represents and its role *vis-à-vis* the other institutions. The need to comply with this principle may explain why in the case of Greenland, the Council of the EU sought the opinion of Parliament, although it was not obliged to do so. In the current context, the solutions provided for in Article 50 TEU may leave room for doubts in the course of withdrawing negotiations. The multiplication of the number of actors leading the withdrawal process may bolster conflicts over the pace and contents of the negotiations, and it is not to be excluded that the institutions come to a point where they do not see eye to eye with regard to every withdrawal detail.

Likewise, understanding the EU as a federal project may contribute to solve one of the most difficult issues surrounding the exiting process, *i.e.*, the financial settlement. At this point it is yet unclear whether the UK must continue to pay contributions to the EU budget or reimburse monies to the Union. It is submitted that the solutions to the institutional and budgetary issues surrounding withdrawal should be grasped under the lens of EU federalism, notably by taking into consideration both the degree of mutual trust and interdependence created by European integration and the burden sharing inherent to EU membership.

*Justiciability and the role of the CJEU.* It is not to be excluded that the CJEU comes to be involved in the withdrawing process. In so far as it implies the conclusion of international agreement(s) (either the withdrawal agreement and the agreement governing the future UK-EU relations, or a combination of both), the Court may be called to issue an opinion pursuant to Article 218(11) TFEU. It cannot also be left out that, during or after Brexit, either an action for infringement or an action for annulment is brought before the CJEU regarding the legality of the negotiation decisions. With regard to the role of courts in respect of secession, the Canadian Supreme Court adopted a conservative approach. Considering that the content and process of the negotiations would be essentially for the political actors to settle, the Supreme Court considered that “the reconciliation of the various legitimate constitutional interests [would be] necessarily committed

---

56 Case 70/88, *Parliament/Council*, ECR 1990, p. I-2041, para. 21.

57 The CJEU added: “[t]he Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament’s prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve”. See Case 70/88, *Parliament/Council*, ECR 1990 p. I-2041, para. 23.

to the political rather than the judicial realm precisely because that reconciliation [could] only be achieved through the give and take the negotiation process”<sup>58</sup>. Hence, echoing a type of “political-questions doctrine”, the Supreme Court in Canada considered that to the extent that issues addressed in the course of negotiations “are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties”<sup>59</sup>. Although judicial self-restraint is not unknown to the CJEU – which very often applies the so-called margin of appreciation doctrine – there are other instances where the Court has not hesitated to oversee the legality of delicate political matters<sup>60</sup>. As such, Brexit may also pose a challenge to the CJEU providing it with yet another opportunity to rethink its role and position as an adjudicator in EU politics.

#### 4. Concluding Remarks

If there were doubts surrounding the possibility of a Member State leaving the EU, they have been addressed by the inclusion of Article 50 TEU in the Treaties. Also, if there were doubts on the likelihood of a Member State actually leaving the EU they were solved by the decision of the British people to do so, and the subsequent triggering of said provision.

The importance of the UK leaving the EU must not be underestimated. In its “White paper on the Future of Europe” the European Commission has recently referred to it as one of the greatest challenges Europe is currently facing, together with the global financial crisis, the refugee crisis, terrorist attacks and the emergence of new global powers<sup>61</sup>. At the institutional level, Brexit is without any doubt “the most delicate of European projects”<sup>62</sup>, and it is evident that it will entail significant consequences at multiple levels. Some of them have already been anticipated and are mentioned in the documents which for the moment serve as basis for the negotiations. In any case, much more will appear and many unforeseeable questions will arise.

So far, the legal debate on Brexit has focused mostly on what constitutes a valid triggering decision for purposes of Article 50 TEU, in particular in light of the internal difficulties posed by parliamentary sovereignty v. prerogative powers

---

58 Para. 101.

59 Para. 101.

60 The issue has been discussed in several cases. See e.g., the Opinions of the Advocates-General in Case C-120/94, *Commission/Hellenic Republic*, [1996] ECR I-1513 and Joined Cases C-402 and-415/05 P, *Kadi and Al Barakaat International Foundation/Council and Commission*, [2008] ECR I-6351.

61 White paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025, p. 6.

62 GORDON, Michael, “Brexit: a challenge for the UK constitution, of the UK constitution?”, p. 410.

within the UK's constitutional legal order<sup>63</sup>. In this respect, it has been defended that Brexit should not cause one to reject the UK's political constitutionalist model and that one must look within the UK constitution for solutions<sup>64</sup>.

The same thing could be said with regard to EU constitutionalism. In fact, Article 50 TEU raises equally important constitutional concerns for the EU legal order and its constitutional identity. The argument underlying this paper is the following: withdrawal from the EU cannot be interpreted from the perspective of International law thus entailing a setback in EU integration; it must be understood and executed against the backdrop of EU constitutional principles. Brexit brought to light what was already fairly clear: that the EU is not destined to be "one Union, under god, indivisible". The EU can be reverted and it is unclear whether it will endure as the institutional setting of the "organized world of tomorrow"<sup>65</sup>. Therefore, withdrawal from the EU must be seen not only as a practical solution for democratic challenges but also as an opportunity to test and apply what the EU taught Europeans best: democracy and the rule of law. As a consequence, even though the concrete contents of the negotiations are for political actors to define, the exit procedure, the conduct of the parties therein and the material outcomes must respect the core principles on which the EU is based.

"Things we lost in the fire" is a fairly well-known Hollywood movie from 2007 that contrary to what the title suggests is not about depression and loss, but about coping and surviving in the face of tragedy and the things that matter most in life. This is precisely the way Brexit should be faced: with the focus not on what we have lost with the unwanted triggering of Article 50 TEU, but on what we have learnt and construed as Europeans for the last 60 years. As the European Commission has put it, "the Union has often been built on the back of crises and false starts" and "has always been at a crossroads and has always adapted and evolved"<sup>66</sup>. Already in his memoirs, JEAN MONNET wrote that the roots of the Community were "strong" and "deep in the soil of Europe. They have survived some hard seasons, and can survive more"<sup>67</sup>. The withdrawal of the UK from the EU is one more of those seasons, and yet another opportunity, certainly an historical one, "to renew our vows"<sup>68</sup>, holding fast "to the fixed principles that have guided us since the beginning"<sup>69</sup>.

---

63 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

64 GORDON, Michael, "Brexit: a challenge for the UK constitution, of the UK constitution?", p. 444.

65 MONNET, Jean, *Memoirs*, Doubleday&Company Inc., Garden City, New York, 1978, p. 524.

66 White paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025, p. 6.

67 MONNET, Jean, *Memoirs*, p. 523.

68 White paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025, p. 26.

69 MONNET, Jean, *Memoirs*, p. 523.

# Yet another prying eye

## Surveillance as a consented cultural phenomenon?

**Ricardo Rodrigues de Oliveira<sup>\*</sup>**

PhD researcher at the European University Institute, Florence

---

### SUMMARY

Introduction  
A normal day  
IT surveillance in the public discourse  
Nothing-to-hide  
In the private sector we trust  
Are we consenting to be surveilled?  
Concluding remarks  
Bibliography

---

\* PhD researcher at the European University Institute (EUI), Florence. Assistant Researcher to Professor Deirdre Curtin and Researcher of the Centro de Investigação em Direito Público (CIDP-ICJP) of the University of Lisbon School of Law (FDUL) and of Jurisnova of the New University of Lisbon School of Law (FDUNL). The section “A normal day” was originally presented in the seminar “Information Technologies and Fundamental Rights through the Cases”, organized by professors Deirdre Curtin and Giovanni Sartor, that took place in the Spring semester of 2017, at the EUI. This is the consolidated paper developed after the presentation of the draft work at the Católica Graduate Legal Research Conference 2017 “Law in the Era of Technological Change”, that took place on the 21 and 22 September 2017, at the Lisbon Campus of the Portuguese Catholic University School of Law. My warm regards to the convener of the event, Isabel Teixeira Duarte, to the sharp yet friendly commentator of my paper, Catarina Santos Botelho, and to the reviewers of this text.

Closed Circuit Television (CCTV); Court of Justice of the European Union (CJEU); Global Positioning System (GPS); Internet Protocol (IP); Information Technology (IT); North-American National Security Agency (NSA); United Nations (UN).



“We live in an everyday that is saturated with surveillance. It is a major shift from an earlier era where surveillance was something one experienced in specific places and under the gaze of one person or thing.”<sup>1</sup>

## Introduction

Just like Nayar described it, surveillance is no longer concentrated to very contained spaces under the watchful eye of a handful of people. Surveillance is no longer limited to a panopticon-like tower – it is a true “surveilling assemblage”. The model suggested by Jeremy Bentham no longer describes the surveillance *status quo* because it’s too neat and straightforward. Two traces that seem absent in the processing of personal information in modern times, where blurred mass surveillance reaches everyone and everything.

Nonetheless, the United Nations (UN) have systematically affirmed<sup>2</sup> that a person’s right to privacy forbids arbitrary or unlawful interference. Any violation should be sanctioned by law, in line with Articles 12 of the Universal Declaration of Human Rights<sup>3</sup> and 17 of the International Covenant on Civil and Political Rights<sup>4</sup>.

This can strike an external onlooker as rather odd. In this clash between muddled surveillance and the forthright resolutions of the UN, what prevails? Considering that most surveillance systems, formal or informal, are effective more by the “lingering threat” that individuals might be under their gaze rather than being actually monitored<sup>5</sup>, modern technologies can threaten the exercise of every individual right and freedom.

---

1 NAYAR (2015), p. 6.

2 It was most recently included in the first articles of the UN’s Resolution of the General Assembly A/RES/71/199, adopted on 19 December 2016 (65<sup>th</sup> plenary meeting), and of the Resolution of the Human Rights Council A/HRC/RES/34/7, adopted on 23 March 2017 (56<sup>th</sup> meeting). This is a renewal of prior texts, namely the Resolutions of the General Assembly A/RES/69/166, adopted on 18 December 2014 (73<sup>rd</sup> plenary meeting), A/RES/68/167, adopted on 18 December 2013 (70<sup>th</sup> plenary meeting), and A/RES/2450 (XXIII), adopted on 19 December 1968 (1748<sup>th</sup> plenary meeting). It had also been addressed in the Resolutions of the Human Rights Council A/HRC/RES/31/7, adopted on 23 March 2016 (62<sup>nd</sup> meeting), A/HRC/RES/28/16, adopted on 26 March 2015 (28<sup>th</sup> session), and A/HRC/RES/26/13, adopted on 26 June 2014 (38<sup>th</sup> meeting).

3 Which reads that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”, according to the Resolution A/RES/3/217 A (III), adopted on 10 December 1948 (183<sup>rd</sup> plenary meeting).

4 This Article, part of the annex of the Resolution A/RES/21/2200 (XXI), adopted on 16 December 1966 (1496<sup>th</sup> plenary meeting), copies the text of the Universal Declaration.

5 IRION (2015), p. 81.

Watchful technologies seem to be creeping into our daily lives. They are becoming a part of what it means to live in cities and to interact with others. They are turning into an element of our modern cultures and we can no longer live without them. However, most of us seem “intolerant” to them when we realize how much a random day can be populated by technologies that monitor and register our movements. There is a difficult appeal to compromise here. This paper addresses the notion of consent as key to understand our social behaviors, thus explaining the phenomenon we are experiencing.

This research aims precisely at reflecting on what’s happening regarding surveillance from a composite standpoint: it puts together legal analysis with technological and sociological reasoning. It is not aiming at solving problems – it is up to authorities and agencies to ponder on the ideas presented here and turn them into action. As such, there are two main goals in this paper, besides clarifying the modern “surveillance reality”. The first is to explain how and why surveillance is crawling (and not even on tiptoes) into every aspect of existence, from governmental programs to personal affairs. Through the concept of consent, seldom used in related literature, this paper will probably come closer to more accurate answers. The second, shaped as the main conclusion, is a suggestion for a brighter future. Considering that certain facts will remain regardless we like them, it is through introducing surveillance techniques in the sustainable development discourse that we can arrive at a better social environment. This does not amount to confusing matters, namely hard and human sciences; because sustainable development has a social side and surveillance, data protection, privacy, and the use of technology are very much key elements in our societal modern lives. Accountability, transparency, and preemptive scrutiny are just some of the components that will make present and future surveillance apparatuses sustainable in our communities.

This work is divided in 5 sections. It begins by illustrating a random day to make the reader grasp the perspective guiding the argument. Then it engages with the concept of surveillance and introduces some reasoning of using monitoring apparatuses in the public discourse. The following part tries to briefly deconstruct the persistent nothing-to-hide argument and makes the bridge to the private use of surveillance, a section which highlights some of the perils of trusting and consenting to commercial policies. Finally, my research into consent becoming a cultural feature of modernity is dealt with in the last segment. The main argument, as mentioned before, is that surveillance is not an inevitability but a useful tool that should be wielded sustainably. In fact, sustainability is the “unexpected” answer in a project that started looking only at the problem but that later aspired to move further towards a solution.

## A normal day

In our daily lives, it's hard to avoid being under the prying eye of any technological gadget<sup>6</sup>. Just like in Stephen King's *Under the Dome* novel of 2009, the idea of an "omniscient eye of the Supreme Being" is present in the form of technical surveillance in the 21<sup>st</sup> century because human beings have an obsession for watching and spying one another<sup>7</sup>. As I am writing this text, I am well aware that the internal camera on my computer is pointing directly to my face. Its silent gaze menacingly remembering me that someone can be watching behind that little dark circle, almost imperceptible in the black framing of the desktop. In fact, its invisibility is almost a cynical metaphor for what might be happening in the shadows of the electronic circuits connecting my MacBook to someone sitting halfway across the globe in Cupertino, California. And I suspect it's not only when this dot prickles to life that they might see me. Whoever *they* may be.

Let's picture a random day to get a sense of some Information Technologies (ITs) that can be used to trace our steps daily – just to put things in context and with no intention of exhaustion. You wake up and snooze the alarm clock of your smartphone – this is one of the most obvious tracking devices that comes to mind as we can no longer live without these tiny computers. Smartphones are incorporated with a Global Positioning System (GPS) microchip that is constantly active, even if the device is disconnected. Some systems allow for the disabling of the location caching<sup>8</sup>, but other don't. Or make it harder. Numerous web forums discuss the relentless quest for GPS service by some apps, even if not directly concerned with navigation functions. From weather forecasts to restaurant hints, the fact is that sooner or later you're bound to turn your location system on again, making big brother resume its faithful activity of being on to you.

Phones have normally inset also both a camera and a microphone, used so often for vocally WhatsApp – an app like so many others that have requirements for proper functioning, like checking your location or connecting to a mailing account. Either way, whenever you move or log in, the system will know and the information will go to a main server. All these technologies can tell you, and someone else, where you are, what you see, and what you say. And you haven't even showered yet.

While taking breakfast you probably have the television on to check the morning news. The most recent TVs can be (optionally) connected to the

---

6 A futuristic and more unsettling account than the one described here can be found in the engaging lines of TUDGE (2010), pp. 11 ff.

7 NAYAR (2015), p. 2.

8 GORDON (2011).

internet. Your provider will know you turned it on and what you decided to watch to make a commercial profile and draft a channel audience share. This enables the company to personalize your newsletter to specific needs, either yours or theirs. Live monitoring through the “idiot box” can also happen when you have a model with an embedded camera and microphone.

Certain people tape every piece of hardware to block unwanted viewers and muffle sound-recording. The rate of success is, obviously, unknown and unaccountable. Computers are some of the best examples of this; they are obvious devices when it comes to e-surveillance. Practically everything we do related to study, businesses, or social life involves computers and phones. You will turn your computer on during the day and be sure to leave a record behind you. Even if you delete it regularly, some programs remember your every keystroke, keep your passwords, and report on technical errors — but some will unsuspectedly and politely ask you first.

If you use your company or university’s device, there will be an IT guy potentially surveilling or controlling it from an ethereal room hardly anyone has paid a visit to. You will remember him only when the system crashes but he will know what you do whenever he feels like it. When using an institutional card, the data administrators/controllers will also know where and when you’ve been and if you have the right to open this or that door. But it’s not only at your workplace these cards exist: at the gym, the swimming pool, or the unsuspected supermarket.

To withdraw money from an automatic machine, you need clearance and approval from your Bank. It will obviously know when you need some extra funds in your pocket or decide to pay anything with a card. The banking and automat-ed teller machine systems will generate a response to your request according to the account settings and other conditions. Usually, a Closed Circuit Television (CCTV) resembling the little circle on my computer or in the shape of mirror-like metals is placed on every machine for your safety and security. Remember to smile as someone might be smiling back.

Public (and more and more private) enclosed systems for surveilling through video cameras are the most visible means of monitoring. They are usually at the core of fora on public security policies. CCTV exists since 1942<sup>9</sup>. Today, it is the prototype of technologically organized monitoring<sup>10</sup>, being widely spread in every metropolis, whether inside<sup>11</sup>, at the doors of buildings, or in the streets.

---

9 TUDGE (2010), p. 83.

10 LEMAN-LANGLAIS & LARIVIÈRE-BÉLANGER (2011), p. 157.

11 There is yet little empirical evidence on surveillance in certain mixed (both private and public) areas such as schools but, according to TAYLOR (2012), pp. 228-229, the few studies conducted on surveillance there have shown it “undermines privacy, erodes trust, makes pupils feel criminalized and can have a ‘chilling effect’ on creativity and interaction”.

Depending on where you live, your days can be reconstructed based on digital images recorded by CCTV alone. London is the most “spied-on city in the world”, topping New York and Beijing, with approximately 51,000 cameras, mostly located at the entry points of the capital’s core<sup>12</sup>.

Getting home can be an exercise in surveillance as well. Apart from cameras in public buildings, hotels, shopping areas, stadiums, museums, banks, main avenues and squares, public transportation are required to have inbuilt cameras. If they don’t, your monthly pass has a microchip that can be used to trace your whereabouts<sup>13</sup>. And if you walk home, you can get caught in anecdotal ways. Imagine Google Maps is updating their data or a drone is flying by to make a breathtaking video for some advertisement. Be careful not to be in the wrong place at the wrong time.

At home, you go online through your highly-suspicious (yet taped) computer. The only real guaranty when accessing the internet is probably e-surveillance. Facebook, for instance, declares that they “are passionate about creating engaging and customized experiences for people”, *i.e.*, looking what you are up to. For that, they collect: *i*) things you do and information you provide; *ii*) things others do and info they provide; *iii*) your networks and connections; *iv*) intelligence about payments; *v*) device data, namely attributes, location, and connection; *vi*) input from websites and apps that use their services; *vii*) info from third-party partners; and *viii*) something else from their own companies. As the Nespresso ad goes, what else?<sup>14</sup>

If you decide to go on a short trip to get away from all these meddling ITs, big brother will go along<sup>15</sup>. To make it simple, you decide to check flights online

---

12 World Atlas (2017). According to LLOYD (2011), p. 6, there are about 4.2 million CCTVs operating in the United Kingdom, about a quarter of global installations, which makes an average of about one camera per 14 inhabitants, and it is estimated that a person can be “caught” on camera about 300 times a day. For an account on the growth of CCTV in the UK and other countries in Europe, see NORRIS (2012), pp. 252 ff.

13 According to LLOYD (2011), pp. 3-4, London’s “Oyster cards” have been one of the main sources of information for law enforcement agents in this metropolitan area, particularly for the long time-span of eight weeks during which the commuters’ journeys are recorded and the fact that some of these passes carry the user’s personal identification. To make people adhere to this data-collector system, the transport authorities even raised the price of paper tickets and lowered that of such cards, creating a true monopoly of access to public transportation in the city [TUDGE (2010), pp. 89-90].

14 According to THELWALL (2013), p. 75, internet content can be less ephemeral than first thought regarding personal information and communication as much online material is copied into the Internet Archive, available at [archive.org](http://archive.org) (11.10.2017), or similar databases, namely those created by the website owners or administrators. Facebook, for instance, stores deleted profiles and retains them as suspended until activation by the user for, allegedly, marketing purposes.

15 A barely novel yet still controversial technology that can also come along are radio frequency identification structures. These consist of implanting nano-microchips under the skin or in personal belongings containing personal data and a tracking system. Some can transmit a radio frequency, while others need scanning to be read. They are widely used most for geo-locating shipping orders but debates have arisen when they become mandatory for certain populations. See TUDGE (2010), p. 89.

from aggregating platforms or directly from carriers' websites. Obviously, the point of departure is automatically filled because *they* suspect the airport you will be using, either from previous trips or because it's the closest to your actual location. Perhaps the prices are still a little too expensive and you create an e-alert to know when they will lower. You don't even pay attention and end up signing to the website's newsletter.

Five minutes later you check in on Facebook again to see what someone else is up to. And to leave some transient trace that will, somehow, be made permanent<sup>16</sup> without your awareness. What will you get on the right-side column? The one with the advertising... The analysis of a person's connections to other people, goods, and services permits software to make inferences about attitudes, taste, desires, and aspirations. As expected, what you get is "virtual nudging" about that trip you're planning. Because someone knows you want to go somewhere, someday.

## IT surveillance in the public discourse

Surveillance – to "watch over" from its original French – is a routine attention to specific features for influence and control<sup>17</sup>. It involves collecting data, processing it, and interpreting the results. Nowadays, usually big data<sup>18</sup>. IT surveillance refers specifically to monitoring by means of electronic devices. In the arrangement of physical, physiological, and data surveillance<sup>19</sup>, technological monitoring would be an example of this last group. Surveillance does not depend on technology, unlike Tudge (2010), p. 83, claims, but technological apparatuses are more and more being used in monitoring routines and surveillance is increasingly becoming associated with technology.

Technology is expanding and blurring the boundaries of surveillance. So, perhaps an updated and useful distinction would also be between direct (targeted)

---

16 One of the many "troubles" of social media surveillance, for TROTIER (2012), p. 7.

17 LYON (2007), p. 13. Elsewhere, LYON (2001), p. 56.

18 Big data is not only the clutching together of large quantities of information. LYON (2015), p. 69, argues that it's also a way of managing data, as well as the twists and turns they may go through. How big databases are arranged, and how they are used and consulted, is different from smaller catalogues. The idea of big brother is associated with this novel manner of looking at data and metadata for the conclusions that can be drawn from the immense variety of links, even if only speculative, connecting the thousands of entries – it's certainly a new trend in the configuration of power. Also, in general, Ho, et al., (2017).

19 LLOYD (2011), p. 4.

surveillance<sup>20</sup> and the “more general, all pervasive surveillance which permeates all our lives without being specifically directed at any particular purpose”<sup>21</sup>.

Different tools and agents are tasked with the several sections of the surveillance process. The collection of data is the most visible facet of the chain of information – the scrutiny that makes citizens feel they’re losing privacy<sup>22</sup>. The other two typically remain “hidden” and abide by technical criteria that “secretly” conduct a form of social sorting. This can be of a general nature – the random monitoring by just looking at individuals’ external traits – or follow precise guidelines. On the latter, Lloyd mentions the city council installation on London’s borough of Newham aiming specifically at matching passersby with databases of known offenders. Apparently, there is a rate of 75% accuracy, with some claiming this system to be sophisticated enough to overcome most attempts of facial and identity concealment. The next step in these CCTVs has been the programmed testing for behavioral patterns that might be found suspicious.

The author alerts, however, for the devious side of such systems and the mindset behind them, well embedded in the “normalization” of spying<sup>23</sup>. It is very hard to measure or quantify how ITs affect individuals personally. Yet, the underlying problem is not exactly that one particular citizen was filmed but that everyone might be surveilled “indiscriminately and without a pre-established reason”<sup>24</sup>. The installation of technology must be proportionate, especially as it is freely accessible worldwide. Political activism has sometimes preferred aggressive measures to make public, visible, statements in the fight against crime and terrorism.<sup>25</sup> Times of insecurity often lead to the radicalization of preventive responses, trumping civil liberties under (stagnant) public concerns. The system in Newham, for instance, relied on no less than 150 cameras, making a large percentage of innocent citizens suspect and systematically run against police databases<sup>26</sup>.

---

20 LYON (2015), p. 70.

21 LLOYD (2011), p. 5.

22 Literature on intelligence and privacy sees collection activities as a first “battling ground” for data protection discussions. For a specific analysis on the debate concerning counter-terrorism and surveillance in international law and human rights, see CHESTERMAN (2014), pp. 454 ff.

23 TUDGE (2010), p. 15. The author illustrates the idea with “intitucionalized” shadow networks of espionage, such as the North-American National Security Agency (NSA), which was only publicly known in the 70s, or the British MI5 and MI6, “unmentionables until the 1990s, with recruitment involving Oxbridge undergraduates being ‘sniffed at by wolves’”.

24 SLOOT (2017), p. 156.

25 Surveillance studies usually divide their research interests among the different “surveillance sites”, the political and social “areas of intervention” requiring monitoring mechanisms. See, LYON (2007), pp. 25 ff. Also, TROTTIER (2012), pp. 17 ff.

26 LLOYD (2011), p. 7.

The processing of data no longer depends primarily on human agents in some cases<sup>27</sup>. Speed radars automatically process the information retrieved from the license plates of vehicles, verify it against police databases, and flag any violation of the area's speed limit or the emergence of suspect cars. Nevertheless, (so far) there has always been the need for a human intermediary looking at the data, correcting anomalies, verifying the info and the automatic orders, and generally bridging the gaps in terms of profiling. The replacement of humans by fully-automated modules is also an issue on the surveillance debates, particularly those concerned with the accountability of the parties.

Surveillance is a pressing issue in every legal order, as well as in the international sphere<sup>28</sup>. In the global fight against terrorism, IT surveillance has been an all-to-common “weapon” for political ideologies and actors to twist what we consider to be “lawful interception”. This has been done by more and more means of formal and informal preemptive monitoring through the retention of bulk data<sup>29</sup>. Can we think of any contemporary city without surveillance? Nonetheless, this is not a new or exclusive phenomenon of modernity. It has happened since there was need to watch and control disruptive forces in the society. Surveillance has met different resistances but one thing is certain now: it's a global condition. A condition *sine qua non* to inhabit cities<sup>30</sup>. A condition to engage in social affairs in the urban landscape. A condition to e-interact – something that is done more and more in urban settings with the development of societies<sup>31</sup>. So, the novelty aspect is that it's no longer just a simple gathering of data for “positive” effects, like law enforcement to check on criminals or for permitting health services to find the best solutions for patients. Commonplace beliefs of surveillance associate it with power and dominion<sup>32</sup>, with big data being extracted from citizens, retained in large catalogues, and processed through unknown information systems for the control and tracing of individuals by authorities or corporate bodies. *Is this accurate?*

Although the state has always been inclined to see privacy differently from people, the problem nowadays is that it finally has the tools to enforce its view. Moreover, surveillance is no longer concentrated but dispersed through numerous locations from where data can be collected. And can often be accessed

---

27 OGIJRA (2006), p. 280.

28 For a study on data protection and informational privacy in international law, jurisprudence, and state practice (through a human rights-based comparative assessment) see, *inter alia*, RENGEL (2013), pp. 145 ff.

29 IRION (2015), p. 80.

30 FUSSEY & COAFFEE (2012), p. 201.

31 LYON (2001), p. 51.

32 NAVAR (2015), p. 5.



by multiple agencies<sup>33</sup> as intelligence is scattered throughout records and data-banks – from employment to medical histories, as well as in the form of users’ cards, check-ins, or Internet Protocol (IP) addresses. Naturally, the entities collecting and processing such information are multiple. Even if the state was the only harvester, the truth is that it gathers much more and diverse information than it did a couple of decades ago<sup>34</sup>.

An interesting dimension of how surveillance is undertaken is precisely the fractioning of the “self-surveilled”. There is no single “big brother” anymore. There is an assemblage of private and public, big, and perhaps not so big, brothers and sisters. The expansion of surveillance has led to the specialization of monitoring purposes. The individual can be monitored as a customer, worker<sup>35</sup>, consumer, passenger, internet user, cash withdrawer, patient, etc<sup>36</sup>. Even some of these at the same time: imagine going to a shopping center. There are security guards and CCTV that see you as a visitor. The retail shops as a consumer. If you go to a travel agency, they will perceive you as a prospective passenger, as well as a consumer and cash payer. All in the same space but all linked to different centrals of command and processing systems. Getting the data from all these means of surveillance creates a diffuse puzzle made of fragments of a person’s whereabouts and undertakings. But the moment it is put together, the image created will have a high degree of accuracy, bringing circumstances, metadata<sup>37</sup>, and data into one (big) file extremely useful for tracing.

It might seem harder to trace someone’s steps this way but fragmentation means more information. The pieces can be put together and a chronology depict an identity with far more precision. Law enforcement can prove or disprove an alibi in a much more detailed manner than without diffused surveillance. Yet, in times of legitimacy crisis, mass surveillance can easily slide to mass movement control, for political reasons or other. In fact, surveillance by ITs is “the most versatile system from crime control to political management of the population,

---

33 A reality worsened by conflicting competences between law enforcement agents and intelligence services in certain countries [CHESTERMAN (2014), pp. 458 ff.].

34 NAYAR (2015), p. 6.

35 For a hypothetical model of an “omniscient organization”, see MARX (2016), pp. 180 ff. The relations between employers and employees have provided important experimental evidence regarding the effects of systematic monitoring practices, which can have a profound negative impact in productivity rates. Drug testing, alongside technological lurking, is a good example, particularly in the US. Curiously, however, most corporations end up not gathering related statistical evidence to demonstrate the benefits of such regular testing on staff wellbeing, defeating the very purpose of such monitoring.

36 NAYAR (2015), p. 7.

37 LYON (2015), pp. 73 ff.

as CCTV on the streets as a technology of crime control is easily converted into surveillance of demonstrators on the street”<sup>38</sup>.

Surveillance is one side of our social relations<sup>39/40</sup>. CCTV links people and the relations established between watchers and watched are something of a trade. A trade in power. This apparently grim depiction of life cannot be underestimated. It can even come to affect democracy. Surveillance in public spaces shifts the balance of speech and the potential exercise of rights in numerous occasions, like on parliaments. It can tilt the balance towards more accountability of people holding official duties but it can also curtail participation in the power processes<sup>41</sup>. Visibility is usually positive for the enforcement of legal and constitutional principles, like transparency, certainty, and security. It reveals corruption, bringing light to opaque procedures. Exposure positively turns the public into the watcher of the state, but one should be cautious about phenomena like Wiki-Leaks, which might not altogether be beneficial for states’ affairs and diplomacy, even on behalf of the security and welfare of citizens.

The way surveillance is implemented is also relevant in the shaping of how we deal with technologies. “Draconian” surveillance, especially if introduced in a top-down approach, tends to meet higher resistance. This term can describe surveillance that surprises subjects because it was not expected or because it was introduced without their participation. On the other hand, it can also relate to a degree of intrusion. The workplace is a good sandbox. There are no work environments that can do without some form of monitoring. Technological surveillance is becoming more and more the norm, with debates nowadays falling on e-mail monitoring and video cameras in “unusual” places, such as working spaces or even locker areas, not to mention toilets<sup>42</sup>.

Although monitoring is necessary to maintain order and productivity rates<sup>43</sup>, this kind of surveillance in public and private spaces can seriously unsettle individuals, which come to believe their superiors don’t trust them. And the fact is that even if there is a stable work environment, surveillance can become itself a disruptive force, breaking the bonds of trust under a layer of suspicion.

---

38 OGIURA (2006), p. 289.

39 NAYAR (2015), p. 3.

40 THELWALL (2013), p. 68, asks relevant questions on the balance of social interactions on and offline such as “[d]o people expect more from a life partner met via the large databases of online dating agencies? Are distant relationships easier to maintain over time with Facebook? Do migrants retain closer connections with the birth country if they share family videos on YouTube?”.

41 NAYAR (2015), p. 10.

42 MARX (2016) p. 194.

43 Even as a general benefit by registering unlawful or devious behavior and making people accountable. It’s not uncommon the use of video records as evidence in cases of sexual harassment or theft, for example.

Excessive surveillance triggers precisely some of the behaviors it aimed to halt, like material and “time theft”, absenteeism, or production inefficiency. Also, it tends to overpower the feeling of the self<sup>44</sup>. When the watched cannot watch the watchers, these become dangerously unregulated<sup>45</sup>. And those who do not know when and if they’re being monitored cannot point the finger at the watcher if he does something wrong himself – or if he is not paying careful attention<sup>46</sup>. Certain feelings tend to grow *viz.* excessive surveillance mechanisms<sup>47</sup>, like demoralization, disrespect, or anger. And the more draconian, *i.e.*, the more intrusive and surprising, the more this sense of dehumanization will develop.

## Nothing-to-hide

A common response to counter-balance privacy is the nothing-to-hide argument. Or slogan<sup>48</sup>. For the advocates of “borderless” truth, the complexity of modern life prevents enforcing the rule of law unless individuals are made “transparent”. Stripping the individual of clothes, secrets, or possessions, and laying him in the “open” is, for them, the only way in which preemptive security can operate to a full efficiency degree. And if the person has nothing to hide, it won’t matter because her privacy will be restored as soon as possible. Or convenient.

Although barely reasonable from a human rights’ perspective, this need to put up with private and public meddling still strikes many as plausible. In fact, counter-terrorism strategies used to ignore human rights<sup>49</sup> and data protection commitments. The main issue here, however, can be demonstrated by a simple

---

44 Most services provided online demand personal information or are somehow linked to services and tools that feed them with users’ data. That’s why it can be an interesting exercise to go on “vanity searches”, *i.e.*, to Google yourself, and perhaps your family and friends. This is the price of access to knowledge: to provide our own knowledge to others, even if we’re not a public figure – and there lies the root of the trade in power. This “dark side” is illustrated by the most-used research tool online: Google and Google-owned software register digitalized data and locate it online through our IP addresses or, in the case of dynamic IPs, through our browser details listed by websites’ cookies. See GUARDA (2009), pp. 250-251.

45 TUDGE (2010), p. 86.

46 Plus, the possible scenario of bad, outdated, or broken systems that sometimes do not help identifying the perpetrators at all.

47 MARX (2016), p. 194, mentions an empirical research by SMITH, *et al.*, 1992, among others, that are quite revealing of the average greater stress and dissatisfaction levels felt by employees under monitoring when opposed to non-monitored workers.

48 In general, SOLOVE (2013).

49 Even at the UN level, only in 2005 was established the mandate of a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. This was pushed through by the Resolution of the Commission on Human Rights 2005/80, adopted on 21 April 2005 (60<sup>th</sup> meeting), which later would lead to the UN’s Resolution of the General Assembly A/RES/60/288, adopted on 8 September 2006 (60<sup>th</sup> session). See SCHEININ (2013), p. 582.

understanding of privacy as a core legal value. The right to privacy has a negative side, which, broadly, consists of keeping people outside of one's personal business. For the full enjoyment of this right, all it takes is a quiet *erga omnes* daily experience of...being left alone. In fact, a fundamental right should never be perceived as a permanent defense that the individual must wield constantly to demonstrate being on the right side of the law.

Embedded in the very fabric of every legal system based on sound principles is the straightforward presumption of innocence. Any democracy would be perverted if the citizen had to demonstrate his innocence and not the accusers his wrongdoing. To ask for considerable exposure under the idea that, otherwise, he or she has something to hide, makes suspicion preclude privacy. Saying that people will only be innocent if they have nothing to hide shifts the focus of law and principle from one's inherent human rights to mechanical and malicious suspicion, to an ever-present doubt that displaces the human being from the center of the legal system. In the end, this would most likely turn into a *carte blanche* to (more) aggressive governmental surveillance. To inconceivable control. To less-than-democratic oppression.

This reasoning is preoccupying not only in the public space. In the workplace, paranoid employers would be tempted to find "disloyalties" from their staff, preemptively jeopardizing privacy by abusively intruding into people's lives. And the "meme 'nothing to hide, nothing to fear' might then be applied to them, leaving them suspected of anything from a drug habit to an affair"<sup>50</sup> – which are outside-of-the-job behaviors that should not be used to endanger the work position of any employee, except in very specific circumstances. In fact, workplace surveillance is big business but not necessarily also good for business<sup>51</sup>. If this is yet not convincing enough, picture yourself getting arrested on the street<sup>52</sup> or doing some less-than-social behavior like peeing outside. Now, picture this while getting caught on a 360.° panoramic Google Street View update. Have you nothing to hide then?

Data and metadata can be equally menacing in the context of this nothing-to-hide idea. Most times, both types generated by individual and corporate use – just like the historic I am leaving behind of bibliographic references available online to assemble this piece of writing – are "inconsequential, even beneficial". But if they are freely accessible in the hands of security agencies, there's not only

---

50 TUDGE (2010), p. 19.

51 Differently, *idem*, pp. 107 ff.

52 STYLIANOU (2011), p. 51. Although the author then considers that the technological effect on monitoring might render itself "practically innocuous" because, outside these clear violations of privacy which would strongly hold up in court, most individual information collected is just "lost in translation" among the numerous frames caught with other people's data.

the downside of having an undesirable someone snooping around our personal stuff. There's also the possibility that the kind of associations they make are wrong or false. They are not immune to misidentification, corruption, or fraud. As Lyon puts it, connecting fragments of unconnected data is often “based on stereotypical assumptions about people from particular backgrounds [and] may create apparently incriminating profiles that are readily seized upon by those taught to think that citizens-in-general may be masquerading as terrorists. People with no criminal record, who have done no wrong and have nothing to hide may yet have much to fear”<sup>53</sup>.

Besides qualitatively violating several fundamental rights, the argument fails to convince also for a sort of quantitative defect: its multiplication requirement. The number of times one could hypothetically end up having to prove his “innocence”, *i.e.*, that he had nothing *bad*, legally wrong, to hide from public view or law enforcement, makes the argument quite harmful in practice.

Every time an individual faces any monitoring apparatus, he must display part of his identity, of himself, to others. Based on the argument, one could go as far as to say that, provided he has nothing embarrassing to tell the authorities (or private companies!), then he should submit and be scrutinized repeatedly, every time they pleased, with no right to keep his affairs secret or private. Otherwise, he could immediately be suspect of trying to hide something criminal, even if – and there would be no room for contradictory, in a very much *kafkian* logic – he was only attempting to conceal his own assemblage of the self from prying eyes. Truly, agreeing with the argument could lead to a “slippery slope” of allowing for the multiplication<sup>54</sup> of monitoring systems with a wider and denser capacity of surveillance and barely any limits. What counter-argument could then be used to deter monitoring? If law-abiding citizens have nothing to hide, they won't mind intrusion and so there are no restrictions, namely of checks and balances, to surveillance.

One could argue that this is nothing short to hypothetical. That this robust surveillance attitude doesn't happen in democracy and that arguing based on abstract ever-present monitoring systems is absurd. Democracies have, nonetheless, been smothered for less.

---

53 LYON (2015), pp. 75-76.

54 “Institutionalization” of data use multiplies the effects of gathering information, especially when there's an almost “professionalization” of the searching and collecting methods. See RULE (2007), p. 195.

## In the private sector we trust

The state is no longer the sole owner of surveillance mechanisms. It has dominion only over regulations on the use and licensing. Although governments are becoming more aware of their citizens' personal data, the private sector is now the dominant force in collection. Public services rely on identification, CCTV, and specific info contained in health or financial records and they produce an important bulk of material on citizens. But private companies usually access, retain, and process much more, with modern computing permitting the circulation of data at a massive level<sup>55</sup>.

Consumers are usually willing to give far more information online than on physical formats. Some businesses approach their customers by asking for data optionally and even provide cards for future purchases. Most, however, either create a commercial profile on their systems or prefer the client to follow a specific link to their websites to register there. Individuals enroll to access the benefits the company seems to "altruistically" provide them<sup>56</sup>. The amount of personal data quickly becomes nothing more than a stone in the shoe of having a profile and thus enjoying the new "personal relation" with the company. Like it was a sort of status that made that client special, different. And, in the end, who will suspect of the mailshotted questionnaire with a chance to win an appealing prize provided you freely disclose all manner of personal data?

Public services, on the other hand, seldom relinquish a physical act that gives a degree of solemnity, public certainty, and legal bond to the interaction between the citizen and the administration. It enables the latter to know who is the former, or his legal representative, and better guarantees that someone is not pretending to be someone else while interacting with the executive. In fact, an important difference between digital and physical interactions, transposable to the private vs public relations, derives from the distinction between privacy<sup>57</sup> and anonymity. Unlike individuals feel, the private sector seldom cares about exactly who sits on the terminal end of their network or joins their freely-accessible loyalty services. While e-government rests on information about an individual because of who he is, the anonymity of commercial requests is less to do "about the person per se,

---

55 ANGWIN (2014), p. 30.

56 As STYLIANOY (2011), p. 51, argues, "privacy is likely overestimated, often because we fail to put the loss of privacy in perspective thereby exaggerating the potential – but rarely realizable – dangers, and that even when the dangers are real, people are often willing to compromise their privacy for the benefits a given technology has to offer".

57 The different definitions and debates around the concept of privacy will not be discussed here. For the purposes of this text, it was adopted the notion of "informational privacy", i.e., the extent to which someone can control the disclosure of his personal data. It involves the right to be free from prying eyes and the actual control over the intelligence once it reaches third parties, according to LLOYD (2011), p. 11.

but their behavioural patterns...for wider profiling purposes”<sup>58</sup>. Private entities set commercial reports to profit from numbers. They look at personality traces in an economics perspective, not a political one. Their “interest” is not aiming at either friendliness or ensuring citizens pay their debts. It’s purposely-driven in a blank and massive way that leads to consumption of their products.

Surveillance defines aspects of the interactions between people; also between the state and its citizens. Nayar says that “surveillance is a form of *governance* not only by the state but by non-state actors as well”<sup>59</sup>. The problem, nonetheless, is that we trust (more) private actors because we usually don’t feel their governing pressure. And also because we imagine the readers of our uploaded contents to be as distant as the internet itself, often leading us to forget basic rules of behavior and that an “offline comeback” might be a serious impending threat<sup>60</sup>.

Unlike when it comes to public surveillance, a common user won’t fully realize or mind most private apparatuses. Knowing the surfing whereabouts, the number of clicks, the time spent on webpages, or with the mouse pointer over certain contents is somehow different from being monitored by police cameras on poles. Nevertheless, the personal consequences can be just as serious. Insurance companies can snoop around for undisclosed details of personal life, universities and corporations can verify the background and current activities of staff and students, and private secret services’ job are made much easier as they can outline a profile with just a few clicks. On the other hand, while some online tools permit users to delete or edit information provided, thus making them have a certain degree of control, others are quite reticent to do it. Google, for instance, has been under the spotlight for hanging on to (too much) information<sup>61</sup>. Although sometimes the record left behind linking IP addresses and searched keywords can have positive outcomes<sup>62</sup>, having a permanent history of your online activities in the hands of usually unaccountable private corporations should have a “chilling effect”, even if you are not planning to do anything unlawful.

Citizens should realize that everyday monitoring by private parties means that ordinary people – not secret services or accountable public officials; or, at least, not only – are checking, gathering, processing, and storing their personal data with barely any limits. Adding this to privacy options that can make your e-mail contents searchable for meaningful advertising and your cell phone a

---

58 *Idem*, p. 6.

59 NAYAR (2015), p. 3.

60 TUDGE (2010), p. 16.

61 Court of Justice of the European Union (CJEU) ruling C131/12, *Google Spain and Google*, 13 May 2014.

62 See the criminal case illustrated in TUDGE (2010), p. 18.

permanent GPS tracker<sup>63</sup>, makes trusting the private sector something like mice trusting cats. Not to speak of the fact that almost any website is susceptible of hacking<sup>64</sup>.

When it comes to online contracts, for instance, the fact that they are “shielded” by legal guarantees, even if we don’t read them, gives the appearance of safety and security concerning our data and how it will be handled. But the fact remains that private monitoring can be just as systematic and intrusive as public monitoring. The thickening of data retrieved by corporations can reflect legal demands that allow and “encourage” for the piling of clients’ personal information. For instance, years ago telephone companies used to collect only basic metadata – things like the duration of calls, when they took place, and the location of the connecting devices. Nowadays, phone invoices detail everything about our conversations, except the content. Businesses are required to supply all this intelligence so that clients know what exactly they’re paying for and can control their usage figures<sup>65</sup>. This way, companies are not only encouraged but obliged to have enormous databases and often their contracts with third-parties (sub-contractors) to manage the data severely jeopardize privacy. As Lord Hoffmann put it, “the right to keep oneself to oneself, to tell other people that certain things are none of their business, is under technological threat”<sup>66</sup>.

Acceptance towards self-surveillance (through exposing our personal lives on social networks) and informal surveillance, *i.e.*, by creating commercial profiles, add up to state surveillance in the filling of the gaps of information. It’s important to keep in mind that a good deal of the intelligence states gather comes from private agents in the marketplace, usually from purchasing goods and asking for an invoice. We know there is an “invisible chain” connecting private networks and public databases but we don’t link any of them to the idea of surveillance, thus trusting the non-state sector when it obviously depends, relies, and passes information to governments. And while most people worry about their information ending up in public records, they forget that most private CCTV operators are not properly scrutinized, for instance, to comply with the right of access to the data<sup>67</sup>.

The phenomenon of decentralization of surveillance through public and private forms of observation<sup>68</sup> can lead to a culture of suspicion but also to a culture

---

63 TUDGE (2010), p. 18.

64 *Idem*, p. 17, gives the example of the 2005 hacking of Facebook where two students of the Massachusetts Institute of Technology downloaded data from 70,000 profiles for a research project.

65 LLOYD (2011), p. 8.

66 *Idem*, p. 9.

67 BERG (2015).

68 NAVAR (2015), p. 4.



of “neighborhood knowledge”. Although physical surveillance is as old as society itself<sup>69</sup>, we want to know more and more about what other people do, say, think, and even eat – specially those closest to us, the neighbor behind the lace curtains. Talk shows, soap operas, and human interest stories are apparently innocent examples of how individuals know about others, either real or fictitious. But this “convergence” generates blurred surveillance, mixing different aims and roles, actors, and processes<sup>70</sup>.

One could then ask whether new technologies creeping on most aspects of modern life can damage the quality of our consent to this way of things. Consent here will be used in a broad fashion, ranging from the general consent to be part of the social contract to more limited ways, such as acceptance, implicit or express, to engage in legal contracts online. The traditional idea of consent to contract rests on the assumption that the interested parties know the full scope of the bonds – they are not only aware of the new legal norms befalling on their particular relations but they usually are part of the process of drafting such rules, which gives a degree of commitment to the contract *per se* and, specifically, to how they shall enforce it. And even if they haven’t been part in the making, they must, at least, have all the necessary data to accept and comply with the rules that apply. This happens in obviously different ways, as alluded, if one’s talking about formal contracts or in the context of the so-called social contract.

By trusting the need to be surveilled and accepting monitoring from different entities through contracting, we pile up “moments of consent” that end up making us agree, *i.e.*, consent, to be surveilled in almost all moments of our digital lives. In the end, they come to change the social contract – that invisible agreement that makes us irresistibly part of the political society – by adding extra layers of “tiny” self-surveillance here and there.

## Are we consenting to be surveilled?

Some literature sees surveillance as a mechanism for social sorting<sup>71</sup> but I agree with Nayar when he considers it to be more of a “phenomenological element that informs, influences and inflects even our interiority”<sup>72</sup>. Surveillance is not necessarily a bad thing *per se*<sup>73</sup> and it appears to be embedded in our citizenship, like part of the ever-present and ever-renewed social contract of

---

69 LLOYD (2011), p. 15.

70 NAYAR (2015), p. 4.

71 For example, GOOS, *et al.* (2015), pp. 51 ff.

72 NAYAR (2015), p. 2.

73 ANGWIN (2014), p. 37.

modern times. In an unsettling perspective, we could redo René Descartes' most known quote to "I am surveilled therefore I am"<sup>74</sup>.

Users' consent<sup>75</sup> is at the core of attempts from the judiciary<sup>76</sup> to shield privacy and keep high standards of data protection regarding personal information. Like most social interactions in life, accessing virtual communities or agreeing to contracting online depends on consent. But in the e-space, the quality of consent can be tainted. We are witnessing that more and more individuals are not aware that their personal information is being collected or, at least, how it will be used<sup>77</sup>. This way, they have no opportunity to consent or withhold consent in a meaningful and timely manner. Consent is thus a key principle of any data protection regulation but how to "solidify" that consent has been a debatable matter, specially *viz.* the global dissemination of data by online tools that no data subject can ever fully grasp, let alone control<sup>78</sup>.

The "massification" of contractual operations (joining a social network, shipping orders, etc.), particularly undertaken by younger generations, can begin to explain how little time we devote to read online (legal) documents. Hardly anyone truly weights the pros and cons of ticking the box as that would amount to reading 20 or more pages of tiny lettering with a profusion of obscure legal terms. Why bother when you can just scroll down or skip ahead and click on the box next to the "I understand the terms and conditions" phrase? Is not like anyone reads it. And it's not like anyone is watching over your shoulder and making a disapproving nod at you. Right?

---

74 NAYAR (2015), p. 2.

75 A trace of the principle of collection in data privacy regulations. See, *inter alia*, Article 7 of the Organization for Economic Co-operation and Development Guidelines on the protection of privacy and transborder flows of personal data, Doc. C(80)58/FINAL, adopted on 23 September 1980, which reads that "[t]here should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject". Also, GREENLEAF (2013), p. 237.

76 For instance, in the judgments on the merits delivered by the Grand Chamber of the European Court of Human Rights *Bărbulescu vs Romania*, no. 61496/08, 5 September 2017, *Satakunnan Markkinapörssi Oy and Satamedia Oy vs Finland*, no. 931/13, 27 June 2017, *Roman Zakharov vs Russia*, no. 47143/06, 4 December 2015; the case law of the CJEU C-73/16, *Peter Puškár vs Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy*, 27 September 2017, C-203/15 and C-698/15, *Tele2 Sverige AB vs Post- och telestyrelsen and Secretary of State for the Home Department vs Tom Watson and Others*, 21 December 2016, C-582/14, *Patrick Breyer vs Bundesrepublik Deutschland*, 19 October 2016, C-362/14, *Maximillian Schrems vs Data Protection Commissioner*, 6 October 2015, C-293/12 and C-594/12, *Digital Rights Ireland Ltd vs Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, 8 April 2014, C-524/09, *Ville de Lyon vs Caisse des dépôts et consignations*, 22 December 2010; or the ruling of the General Court of the European Union T-343/13, *CN vs European Parliament*, 3 December 2015.

77 See the balance between benefits and harms in EDWARDS (2013), pp. 315 ff.

78 TUDGE (2010), p. 15.

The smooth way in which one can skip ahead of reading the details of e-contracts should be worrying in terms of their legal validity, in terms of the consent given and the strength of acceptance of all the terms, perks, downsides, and conditions of engaging into contracts in the virtual milieu. Some websites make sure that, at least, the contract is viewed in full by blocking the following steps until the user has reached the bottommost line. But does this suffice? These are scenarios where the pressure of signature, that is, of having a pack of pages with a contract in one's hands and having to sign it in the end (and perhaps also rubricating each of the previous pages), is, for all its worth, absent.

Let's take a small step back and breathe in. Surveillance is not necessarily opposed to any sentiment of privacy. They are flexible concepts and, just like most legal interests and rights, they have ambiguous borders. In some respects, it could be said that the degree of privacy is still maintained when the personal data provided is accessible only to a select group of people with proper access codes. There are policies that entities can implement to restrict the viewers of databases, like those based on hierarchy. The concern deepens, however, when individuals are driven to hand out information on a regular basis and there are little or no guarantees of who will handle it. They can ask for privacy on a general basis but, from an external onlooker, it would seem most people do "little to protect themselves"<sup>79</sup>. Thousands of individuals join communities that share intelligence every day, not to mention what goes on at the retail level. As Tudge put it, hyper-exhibitionism online has just taken a step further, from glamour to the banal<sup>80</sup>. And for marketing purposes, it's very hard to make sure there is only a few people with access rights that read the data. A customer's file can go back and forth between the several departments of a corporation, be copied multiple times, processed in several computers, and analyzed by many different white collars. And we are not talking about secret services or top-level state departments. We're talking about normal, private, businesses with normal, private, human resources policies.

There is not yet a new balance, both in the mindsets as well as in legal writing, in terms of new meanings for data protection, privacy, secrecy, or consent in current times. The US are more "advanced" in terms of surveillance schemes, governmental or corporate, while Europe still struggles – perhaps positively – with keeping the core of human and fundamental rights safe from prying eyes. But in both sides of the Atlantic, in an almost anecdotal way, peeping through the keyhole of a bathroom is instinctively perceived as a privacy violation, while being under the radar of inter-connected surveillance mechanisms in a mall or

---

79 LLOYD (2011), p. 11.

80 TUDGE (2010), p. 15.

an airport, ranging from CCTV to biometrics, is... well, not. Airport facilities are, in fact, the “epitome of surveillance-oriented” societies<sup>81</sup>, denying the anonymity of passengers while increasing the identification of travelers in a *quasi*-direct proportion from the entrance to the boarding gate. They, sometimes literally, strip you down<sup>82</sup>. There operate several entities with different agendas and monitoring devices, from the private sector to governmental immigration bureaus, in a sort of “ecosystem of integrated surveillance”. As Ogura argues, technology permits surveillance of the individual to go well beyond the confined space of the airport as the processing of data in the electronic microchips of passports and of visual and sound material from CCTV and cooperative mechanisms is usually not done exclusively through data systems located inside its physical space. Data can even travel somewhere outside the host country with little technical restriction. In such an “oppressive” context, it seems “we have no other choice but to sacrifice our privacy rights”<sup>83</sup> – which renders any notion of individual consent from the surveilled parties irrelevant. And we’re not even talking about online users in these examples.

Irion makes an interesting argument when stating that a handicap in finding this new balance is that constitutional and legal checks and balances to counter unlimited surveillance have developed in the framework of targeted surveillance. Safeguards that are thus appropriate to direct and limited monitoring performed with strict oversight and usually in the context of criminal investigations are naturally insufficient to refrain mass surveillance. However, there has been no significant legal adjustment in many countries to create or update (or upgrade, truth be told) such arrangements to mass surveillance. And the fact is that “preemptive and systemic surveillance exceeds qualitatively and quantitatively the situation of targeted surveillance”<sup>84</sup> by far.

A U-turn where strong and traditional privacy and data protection concerns prevent the flow of data between legal orders and deter private and public access to citizens’ personal information does not seem a likely scenario. Commerce depends on trade, namely trade of information of the people involved in the transactions. It’s a form of building trust. A form of getting to know the other side, especially *viz.* the fact that most companies display their institutional and organizational features to the public on their webpages but don’t know much about the buyers of their products when they first come to shop. But it’s arguably a form of using knowledge to make profit.

---

81 OGUERA (2006), p. 281.

82 See the case studies on airport and CCTV present in NEYLAND (2009), pp. 30 ff.

83 OGUERA (2006), p. 281.

84 IRION (2015), p. 82.

Surveillance is bound to evolve with the concept of society in Western democracies. Nayar is sharp when instigating us to “start thinking about surveillance not simply as technological mechanisms of control...but as a cultural phenomenon”<sup>85</sup>. However, the development of this “phenomenon” should be halted when “distrust becomes normalized, repackaged and marketed as a proper (and profitable) state of mind”<sup>86</sup>. CCTV, above all, empowers the hierarchical division of power in the system of those who watch and those who are watched and its fast development is now capable of turning an anonymous face, a John Doe, into a concrete individual in a matter of hours, or much less. From facial recognition to tax revenues, the interoperability of databases enables watchers with a sufficient access level to quickly grasp indexes of personal and sensitive data faster than ever before. What does this imply in terms of the “anonymous public”? What does it do the idea of preserving one’s personal data, other than our own face, among the throngs of fellow by passers? Also, it’s interesting to dwell on the possibility of local communities accepting or rejecting these intruders – is there such an option at all?

Although many consider surveillance to enable a better, safer, society, most people are powerless to say whether they would prefer to be surveilled or not. This becomes a serious concern when most surveillance dragnets go beyond our previous notions of traditional surveillance, being “suspicionless, computerized, impersonal, and vast in scope”<sup>87</sup>. They create a sort of “shadow surveillance”, which could potentially turn modern, even robust, democracies into police states. There is a real concern that a slippery slope may appear when these powerful data gathering and mining tools are used for increasingly pettier needs until societies are smothered under a “veil” of constant surveillance and are thus unable to (re)organize themselves without surveillance gears.

For Nayar, a line can be drawn between those who are surveilled regardless of their will (like commuters on public transportation) and those who opt to be surveilled by adhering to self-surveilling mechanisms, such as social networks. As the author says, a line between compulsory and voluntary sharing of data, which apparently leads to a stark difference in terms of ontological data subjects<sup>88</sup>. But is it *that* simple?

---

85 NAYAR (2015), p. 5.

86 TUDGE (2010), p. 159.

87 ANGWIN (2014), p. 37.

88 NAYAR (2015), p. 31.

The problem of consent<sup>89</sup> has many nuances and it might not be entirely accurate simply to say that people can choose not to have an account on a social network or that they could refuse to adhere to loyalty cards. Even setting aside the leakage effect, *i.e.*, the passing of data to third-parties (the core of cookies' debates) – and which are often outside the knowledge and control of the data subject –, the fact is that these so-called voluntary transfers of personal data may not be that *voluntary*, in a way. In some less-surveilled cities, where surveillance isn't almost impossible to avoid, one could say that the individual could diminish his exposure by taking some "precautions", like driving a personal vehicle instead of taking a public transport, avoiding areas where he knows there is a CCTV system installed, and so on. This way, compulsory surveillance would look like voluntary surveillance, in some situations, and the individual would be shielded against certain prying eyes. However, wouldn't this end up by being an erratic behavior, defeating basic common sense or any sustainable way of living? It would make the life of the individual far more complicated, impossible perhaps in the long run, not least for economic reasons.

In a similar fashion, avoiding the perks of loyalty cards, frequent flyer miles, or, in less obvious manners, having an account on Facebook<sup>90</sup>, could lower the quality of life of individuals. These are advantages of modern life that come with a price. Advantages that most people can live without – at least some people, for now – but that are becoming normal, everyday, stuff and rapidly looking less and less like advantages or whims. This "voluntary consent" to be surveilled in such cases might not be so voluntary after all because the services and goods provided are more and more part of what it means to live in the present times. And this is why even those fully aware of the potential monitoring shadow of certain (online) activities and of the consequent social control, seldom modify their behavior. Those services are embedded into the fabric of our current social existence, transforming themselves, sooner or later, into compulsory facilities.

In fact, "as well as being a commodity in its own right, data is the motor and fuel which drives the information society"<sup>91</sup>. Already having a loyalty card in a supermarket that offers discounts in future purchases hardly seems an advantage most people can (easily) live without. What about travelling? For some people, it's a necessity. For others, a commodity. It's a borderline scenario where voluntary and mandatory consent are quite hard to untangle – and one should

---

89 Unlike argued by RULE (2007), p. 170, people often choose and thus consent to provide personal data and have their privacy violated, in several different ways. The nuances of the concept focus precisely on the type of consent for each type of data collection. People have been relinquishing – and the issue lies at the heart of their knowledge to consent – to secrecy of their data to get something in return, which depends on the context, from the direct scale of user-social network to the indirect of public-CCTV, for instance.

90 All examples present in NAYAR (2015), p. 31.

91 LLOYD (2011), p. 15.

not only consider “surveillance-overloaded” airports as there are CCTV and other forms of surveillance in most bus and train stations. And what about when consent is virtually inexistent, like when a satellite photographs you to update an online map? Are you tacitly consenting when you’re...walking outside?

Removing those “perks” is certainly not that easy or straightforward for most people and in most sectors of economic activity. New economic sectors beyond the traditional three-party division depend heavily on modern technologies. If the tertiary sector, composed of service-based activities, already relies on some surveillance-based equipment (computers above all), the quaternary and the quinary exist because there are supporting technologies. The former consists on knowledge-based activities and the latter on intellectually-based activities at a macro level. The quaternary is concerned with the “non-physical” organization of the society, comprising government, research, cultural programs, IT itself – like services providing information, such as computing, ICT, or consultancy –, and education. The fifth level is similar to this one but only bridges top (senior) management levels. Both are developments of the tertiary group that have sprung from the computerizing of society and the inherent exchange of data that keeps it running.

Modern society, particularly in Western countries, comes indeed with a surveillance “price tag”. It’s like a parasite latching onto modern technologies and growing fatter as they themselves expand. If you think about it, computers didn’t have cameras in their beginnings in the 1960s. Nonetheless, today they are one of the prime tools for checking on an individual. Research, development, and widespread use have followed the path of information sharing because that’s the funny logic of using technologies – to enable us to get in contact with each other, not physically but through a parallel world. It’s only natural that we feel slightly bothered by having someone snooping over our shoulder 24/7. But, in the end of the day, we are the ones who have invited him, aren’t we? As modern societies are computerized societies, the technological advances that make our lives easier should not be perceived as something to be purged – it’s even hard to picture a 21st century day with no technology apart from some small communities that have somehow resisted the passing of time in remote areas of the world. And we can instantly detect how living without it would make us feel uncomfortable, to say the least. Technological leaps are advantages and they are necessary and an integrated part of our idea of society, of living together in a community.

So, the difference between the “genuinely disempowered and placed under surveillance and those who *opt*”<sup>92</sup> is a more complex issue than meets the eye.

---

92 NAYAR (2015), p. 31.

The internet supports most of the daily activities of steadfastly increasing fractions of the global population<sup>93</sup>. In fact, technological communications permeate literally every aspect of modern, contemporary, life because they satisfy “human’s need to socialize and connect with others”<sup>94</sup>. And online activities also affect offline behaviors<sup>95</sup>. Deep down, our consent derives from the safety and sense of protection that monitoring provides – from the legislator down to your regular by passer. And anything that makes us feel secure, that broadly advertises serving to catch the “bad guys”, is usually seen as a good thing. The more we believe CCTV should be used to monitor our movements and thus deter crime<sup>96</sup>, the more surveillance will be embedded in our social selves. We surveil and are surveilled – after all, it’s for everyone’s benefit. But we share information with corporations not because there is a monitoring system in place. We do not answer questionnaires because we really want someone to know what we bought and when. We consent to those “little” trade-offs of having our personal information depart our private sphere because we have come to believe it’s all needed, that it should be like that, perhaps even for some sort of greater good. Nevertheless, sometimes this preventive surveillance<sup>97</sup> is based on little evidence that the balance of interests at play is adequate, necessary, and proportional.

Public ignorance regarding the full scope of surveillance<sup>98</sup> (and to whether there is someone actually sitting on the other side of the prying eye) or simply our willingness to obey the rules can lead to the curious effect of public acceptance, consent, provoking good inner feelings. When we grow aware of our consent to surveil and be surveilled (like “accepting” to go through biometric identification), and we start playing along with the system, we often let our vulnerability be transformed into compliance, tolerance, and adaptation. And then we feel law-abiding citizens, accepting surveillance and our “duties” under someone else’s gaze. We let ourselves be engulfed by the culture of surveillance and then

---

93 THELWALL (2013), p. 69.

94 IRION (2015), p. 79.

95 THELWALL (2013), p. 70. Also, in general, NARDI (2010).

96 Usually based on the fallacious idea of the “rational offender”. For NORRIS (2012), p. 256, this consists on the assumption that non-offenders, are “aware of the presence of the cameras...Second...that, even if the offender is aware of the cameras, [he has] factored them in to a rational calculation...Third...that, while the rational offender is deterred, the same offender appears not rational enough merely to commit the crime in a different place, or choose to commit a different type of crime less susceptible to camera surveillance. Finally, it assumes that, if the offender is aware of the cameras, [he] will be deterred...[Nonetheless, research] with street robbers, burglars, shop thieves and card fraudsters has revealed that few indicated that the presence of cameras made any difference as to whether they would commit a crime or not”. Is it then that only the law-abiding fear CCTV?

97 NAYAR (2015), p. 7.

98 TUDGE (2010), p. 85.



there is little more than “*fashion* ourselves as surveilled citizens...performing in particular ways in front of the camera”<sup>99</sup>.

The presence of surveillance mechanisms tends to modify our way of interacting. It can produce no visible effects on human behavior but it usually does. At least, from the moment the surveilled realize they’re being surveilled. As Nayar argues, IT changes not only how we interact among ourselves but the permanence of a surveillance gear in a place, specially indoors<sup>100</sup>, changes how we come to deal with it, not the least on the long run. Even if we do not become exemplar citizens like suggested above, we get accustomed to do things in a way, perhaps even turning us into a better version of ourselves under that familiar gaze to which we might get used to. In fact, it’s very hard to effectively reject surveillance once the public as a body accepts to be under the technical prying eye.

Surveillance is needed, particularly in times of insecurity. That should not be realistically denied. But too much surveillance can lead to too much suspicion and boost bad sentiments towards living in community. It can trigger emotions and anxiety that lead people to become less rational in their social interactions. The “culture of insecurity”, especially when it is exacerbated before the real threats and dangers of the modern world, makes vulnerable subjects out of users, nationals, neighbors, and friends. And then surveillance is used as a token for freedom – the common-place of a “small” price to pay against insecurity, vulnerability<sup>101</sup>, and fear.

The main consequential problem with this culture is its multiplying effect. A culture of surveillance tends to generate “culturally-surveilled” subjects, that is, people who don’t strive or see the need to question the surveillance mechanisms – silent consenters. Some simply won’t care and others will actively instigate it. All perpetuate this culture, the latter perhaps even taking a step further in the subtle oppression. Not only a top-down oppression but a worst kind: an oppression from all sides. Even from within, from ourselves, the data subjects. This way, cameras will remain in their poles and, sooner or later, more will join them. Perhaps cameras won’t even be our major concern but instead our own attitude towards surveillance and towards others.

Given this scenario, it could be argued that surveillance becomes a “culturally accepted and culturally legible process”<sup>102</sup>. In the end, a culture of insecurity leads to a culture of surveillance, or surveillance-oriented<sup>103</sup>. And so forth: we

---

99 NAYAR (2015), p. 33.

100 For a comparison between different surveillance tests, both in and outside buildings, see ANGWIN (2014), pp. 45-46.

101 NAYAR (2015), p. 5.

102 *Idem*, p. 6.

103 OGUJRA (2006), p. 280.

truly become surveilled citizens<sup>104</sup>. Plus, we want to belong to the many offers of society, to adhere to consumption models, to be part of travelling plans. And there is nothing wrong about the plentiful offers modern society has to provide, so long as they can be understood and apprehended rationally. As this culture of belonging<sup>105</sup> comes with precautionary, often preemptive, surveillance, we, as individuals and as citizens, should be aware of becoming surveilled (political) animals by our own consent. A consent that can either have thin legal grounds and be recklessly exercised or that can be refrained, tamed, educated, and nurtured. It's not necessarily the "fault" of others the immense surveillance we are embedded in – consent and accountability should be the base for "harvesting personal information", translated into purpose limitation, non-disclosure policies, and a controlled retention rationale<sup>106</sup>. A healthy, informed, consent and a surveillance attitude balanced by reasonable security and privacy concerns (which are both democratic interests)<sup>107</sup> are only possible with a shared commitment by all relevant parties – citizens, governments, corporations, and (especially) security and intelligence agencies<sup>108</sup> – of checking and balancing each other.

Technologies have evolved to permit surveillance from a distance and to permit the collection of material without the presence of the person, especially when information systems are interoperable, *i.e.*, able to communicate in a quick and effective way without loss or damage of data. A consented surveillance culture

---

104 Particularly seen as groups and less as random individuals. It's interesting the idea of change in the *ratione personae* paradigm with the new technologies of mass surveillance in SLOOT (2017), p. 75.

105 NAVAR (2015), p. 8.

106 LYON (2001), p. 129.

107 LYON (2015), pp. 98 ff. Although questioning the consistency of mass surveillance and democracy further in pp. 107 ff. The author also stresses that not many really see mass surveillance as a peril to democracy, facing its growth "more as necessary than negative". As long as there are thousands of bureaucrats and systems' analysts sitting in desks at computer terminals managing someone else's data and metadata, there might be a risk of a sort of "corporate Holocaust", an updated and perhaps much more terrifying version of Hannah Arendt's banality of evil. And it's true that security can trump politics when fear settles in. Nonetheless, as he comes to recognize as well, "in some respects democracy depends on surveillance".

108 Data collectors must change their "default position" (in a social-organisational sense, not a technical one) from deciding to collect to trying not to collect information, in the words of BROWN & KORFF (2010), p. 12. Both governmental and private policies should pay lip service to the principle of no surveillance "without meaningful individual consent or legislative authorization" [RULE (2007), pp. 195-196]. As the author continues, "taking privacy seriously...would amount to a revolutionary overthrow of practices now prevailing in the United States, and to a lesser degree elsewhere [and] entail that any commercialization of personal data, either from government files or private-sector records, would require active assent from the individual concerned. In the jargon of privacy-watchers, 'opt in' would be the rule". And perhaps this can be taken beyond commerce. In fact, the author's definition of commerce – "activities aimed at creating value for institutional decision making on the people concerned" – seems to accommodate areas where there is no actual commercialization but where, nonetheless, personal data is used in other meaningful ways, such as state surveillance. Although an important shift in action but also in mentality, this "individual veto power" is crucial to the sustainable development of surveillance practices and to raise awareness to the full implications of consent. See also, GREENLEAF (2013), p. 247.

appears to be one of the prices of cosmopolitanism, of globalization. However, just like any (social) phenomenon, it should develop in a sustainable way. This is a complicated proposal as many factors influence the creation and spread of surveillance apparatuses. But if advocates and political agents focus policy and law-making on consent and accountability as an inseparable pair of the surveillance framework, any “free ride” (or free fall) monitoring can surely be slowed down and be made sustainable.

## Concluding remarks

Unlike what happens in some papers, it is hardly conceivable a one-size-fits-all solution here for what can be the sustainable evolution of mass surveillance in times to come. Nowadays, there are different degrees of integration of peoples and societies in the electronic world. Sooner or later, however, all communities will be online. This moment will mark an unparalleled cut with the time before computational technologies. Their lives and their culture will change. Culture is the result of human interactions, the product of human activity, rites, and traditions. Technological development is too powerful, too useful, and too helpful to be ignored in the design of human societies and their respective cultures. Perhaps even in the design of what it means to be human in the contemporary world of today and tomorrow.

What must be borne in mind is that surveillance is a political and social choice. Big data collection and general monitoring practices that reverse the order of police suspicion and gathering of evidence<sup>109</sup> to a system of extracting every kind of intelligence and making everyone a person of interest first is also a choice. Surveillance<sup>110</sup> is not an inevitability or a disgrace that cannot be controlled, tamed, or even made transparent and accountable. It is true that some “surveillance systems have a life of their own – they creep into new areas, absorb more powers. The danger is that we are creating a world built on distrust in which there will be literally no escape from those who are watching us”<sup>111</sup> – one of the many, quite real, risks ITs present<sup>112</sup>. But even if it becomes embedded into how we perceive the world from a young age and if we no longer can live without

---

109 LYON (2015), p. 77.

110 Or “dataveillance”. See curious references in some literature, namely LYON (2015), p. 76; Goos, *et al.* (2015), p. 72, mentioning the coinage of the term by Roger Clarke in the 1980s; RAAB (2015), pp. 260 ff; or FUSSEY & COAFFEE (2012), p. 207.

111 TUDGE (2010), p. 146.

112 For an account of nine risks (nightmares) that fictional literature has presented in the last century to human rights, see SARTOR (2013), pp. 14 ff.

these silent prying eyes, surveillance operations – regardless of their form, size, or shape (but particularly within large-scale programs) – can, should, and must depend on clear and informative processes; with the possibility of making the data accessible; and with watchers legally accountable, both internally and externally, in due processes and through reasonable means in the hands of the surveilled individuals or their representatives. It is important to come back to ground notions, such as secrecy, discretionary powers, or security exceptions, and to re-think them through a careful balance of the interests at play. Especially when we can have glimpses of grimmer times and envisage a future of almost absolute monitoring – we are not treading (totally)<sup>113</sup> in the dark here. We know where and how to go forward and so we only need to be intelligent about it.

A “free riding” surveillance attitude, either from governmental agencies or private parties, should be questioned at the local, regional, national, and even inter-state (international) level. Opinions will always diverge on this matter but the fact is that surveillance is bound to grow and expand with the evolution of technology. If this fact is a given – and it is, be sure of that – legislators and governments must tackle the issue keeping up with times and not pretending to deter the healthy development of technology.

Law-making will never keep pace with technological progress or surveillance techniques<sup>114</sup>, especially while they are still perceived in a traditional and targeted way. As such, this must be approached by tying the legitimacy of electronic surveillance to accountability of the monitoring parties<sup>115</sup>. In the surveillance discourse, the preference should be for: *i*) quantitative and qualitative limitations of surveilling mechanisms; *ii*) a constant reminder to citizens of vigilance demands in any given area; *iii*) informing individuals when their data is retrieved and granting them access to the collected information under serious penalties; *iv*) transparency of all processes – in itself a “prerequisite of accountability”<sup>116</sup>; *v*) legal and constitutional justification of the intrusion tied to *de iure* and *de facto* liability of the watchers; and *vi*) preemptive scrutiny by independent boards. This last criterion is nothing extraordinary and would involve very similar requirements to independent regulatory agencies, such as those operating in the banking, energy, and environmental sectors.

All these demands are opposed to currently “tolerated” situations of indiscriminate surveillance, unjustified vigilance, staged militant political activism,

---

113 SARTOR (2013), p. 19.

114 For a careful assessment of the European legal standards in technological development, with a special focus on the surveillance programs by the British Government Communications Headquarters or the NSA, see BIGO, *et al.* (2013).

115 IRION (2015), p. 82.

116 *Idem*, p. 83.

or disproportionate scrutinizing under misplaced counter-terrorism and fight against crime. As Irion put it, the “knowledge about the mere existence of blanket surveillance schemes is not equally as compromising as it would be for targeted actions. To the contrary, democratic societies should rethink the contours of secrecy, because the public sacrifice to national security must be transparent to its constituency”<sup>117</sup>. There are many dangers lurking from covert surveillance programs, particularly the persistence of social and racial ghettos by drafting inaccurate images of the “other”<sup>118</sup>.

In the end, states are responsible for surveillance as they set the boundaries for what is permissible<sup>119</sup>. No private or public monitoring should be permitted without public administrations being aware of it. This should extend as far as considering that foreign monitoring through private companies must never be unknown to host governments. And there ought to be legally binding international and regional commitments to the accountability of the parties and surveillance powers, not only political ones. However, as surveillance is part of the idea of (constant) democratic accountability, governments should not be accountable only in electoral moments. No surveillance operation should be (absolutely) covered against public, democratic, and transparent legal scrutiny in due time and by the appropriate agencies. Otherwise, there is a serious risk of erosion of the very democracy it is supposed to defend.

---

117 *Idem*, p. 84.

118 SKOCZYŃSKI (2017), pp. 119 ff.

119 An interesting “permissible limitations test” suggested by SCHEININ (2013), p. 588, would help maintaining the inner core, or *forum internum*, of the rights to privacy and data protection within the logic of surveillance programs. Although the author is referring to international human rights law, it could easily be mimicked at the regional and national levels.

## Bibliography

- AAV, 1992, "Employee stress and health complaints in jobs with and without electronic performance monitoring", *Applied Ergonomics*, vol. 23, number 1, pp. 17-27.
- AAV, 2013, "Mass surveillance of personal data by EU member states and its compatibility with EU law", *CEPS Paper in Liberty and Security in Europe*, issue 61.
- AAV, 2015, "The co-evolution of surveillance technologies and surveillance practices", in *Surveillance in Europe*, David Wright & Reinhard Kreissl (eds.), Routledge, London, pp. 51-100.
- AAV, 2017, "Big data and local performance management. The experience of Kansas City, Missouri", in *Routledge handbook on information technology in government*, Yu-Che Chen & Michael Ahn (eds.), Routledge, New York, pp. 95-107.
- ANGWIN, Julia, 2014, *Dragnet nation. A quest for privacy, security, and freedom in a world of relentless surveillance*, Henry Holt and Company, New York.
- BERG, Nate (2015), *What happens when you ask to see CCTV footage?*, in <https://www.theguardian.com/cities/2015/sep/22/cctv-cameras-capture-almost-every-move-on-city-streets-what-happens-when-you-ask-to-see-the-footage> (29.07.2017).
- BROWN, Ian & KORFF, Douwe (2010), *Final report of the comparative study on different approaches to new privacy challenges, in particular in the light of technological developments*, in [http://ec.europa.eu/justice/policies/privacy/docs/studies/new\\_privacy\\_challenges/final\\_report\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/studies/new_privacy_challenges/final_report_en.pdf) (13.10.2017).
- CHESTERMAN, Simon, 2014, "Terrorism, surveillance and privacy", in *Research handbook on international law and terrorism*, Ben Saul (ed.), Edward Elgar, Cheltenham, pp. 453-469.
- EDWARDS, Lilian, 2013, "Privacy, law, code and social networking sites", in *Research handbook on governance of the internet*, Ian Brown (ed.), Edward Elgar, Cheltenham, pp. 309-352.
- FUSSEY, Pete & COAFFEE, Jon, 2012, "Urban spaces of surveillance", in *Routledge handbook of surveillance studies*, Kirstie Ball, Kevin Haggerty & David Lyon (eds.), Routledge, Abingdon, pp. 201-208.
- GORDON, Whitson (2011), *How to stop your smartphone from constantly tracking your location*, in <https://lifehacker.com/5854315/how-to-stop-your-smartphone-from-tracking-your-every-move> (21.08.2017).
- GREENLEAF, Graham, 2013, "Data protection in a globalised network", in *Research handbook on governance of the internet*, Ian Brown (ed.), Edward Elgar, Cheltenham, pp. 221-254.

- GUARDA, Paolo, 2009, "The myth of Odin's eye: Privacy vs. knowledge", in *Law and technology: Looking into the future. Selected essays*, AAWV (eds.), European Press Academic Publishing, pp. 243-254.
- IRION, Kristina, 2015, "Accountability unchained: Bulk data retention, preemptive surveillance, and transatlantic data protection", in *Privacy in the modern age. The search for solutions*, Marc Rotenberg, Julia Horwitz & Jeremy Scott (eds.), The New Press, New York, pp. 78-92.
- LEMAN-LANGLAIS, Stéphane & LARIMÈRE-BÉLANGER, Gabriel, 2011, "Les modes de contrôle visuel des infrastructures urbaines", in *Sphères de surveillance*, Stéphane Lemain-Langlois (ed.), Presses de l'Université de Montréal, Montréal, pp. 157-175.
- LLOYD, Ian, 2011, *Information technology law*, 6th ed., Oxford University Press, Oxford.
- LYON, David, 2001, *Surveillance society: Monitoring everyday life*, Open University Press, Buckingham.
- , 2007, *Surveillance studies: An overview*, Polity, Cambridge.
- , 2015, *Surveillance after Snowden*, Polity, Cambridge.
- MARX, Gary, 2016, *Windows into the soul. Surveillance and society in an age of high technology*, The University of Chicago Press, Chicago.
- NARDI, Bonnie, 2010, *My life as a night elf priest: An anthropological account of World of Warcraft*, University of Michigan Press, Michigan.
- NAYAR, Pramod, 2015, *Citizenship and identity in the age of surveillance*, Cambridge University Press, Delhi.
- NEYLAND, Daniel, 2009, "Mundane terror and the threat of everyday objects", in *Technologies of insecurity: The surveillance of everyday life*, Katja Aas, Helene Gundhus & Heidi Lomeli (eds.), Routledge-Cavendish, Abingdon, pp. 21-41.
- NORRIS, Clive, 2012, "The success of failure. Accounting for the global growth of CCTV", in *Routledge handbook of surveillance studies*, Kirstie Ball, Kevin Haggerty & David Lyon (eds.), Routledge, Abingdon, pp. 251-258.
- OGURA, Toshimaru, 2006, "Electronic government and surveillance-oriented society", in *Theorizing surveillance. The panopticon and beyond*, David Lyon (ed.), Willan Publishing, Devon, pp. 270-295.
- RAAB, Charles, 2015, "Effects of surveillance on civil liberties and fundamental rights in Europe", *Surveillance in Europe*, David Wright & Reinhard Kreissl (eds.), Routledge, London, pp. 259-318.
- RENGEL, Alexandra, 2013, *Privacy in the 21st century*, Martinus Nijhoff Publishers, Leiden.
- RULE, James, 2007, *Privacy in peril*, Oxford University Press, Oxford.
- SARTOR, Giovanni, 2013, "Human rights in the information society: Utopias, dys-

- topias and human values”, in *New technologies and human rights: Challenges to regulation*, AAVV (eds.), Ashgate, Farnham, pp. 11-26.
- SCHEININ, Martin, 2013, “Counter-terrorism and human rights”, in *Routledge handbook of international human rights law*, Scott Sheeran & Nigel Rodley (eds.), Routledge, New York, pp. 581-595.
- SKOCZYLIUS, Joshua, 2017, “Counterterrorism and society: The contradiction of the surveillance state – Understanding the relationship among communities, state authorities, and society”, in *The Palgrave handbook of global counterterrorism policy*, AAVV (eds.), Palgrave Macmillan, London, pp. 117-134.
- SLOOT, Bart, 2017, *Privacy as virtue: Moving beyond the individual in the age of big data*, Intersentia, Cambridge.
- SOLOVE, Daniel, 2013, *Nothing to hide. The false tradeoff between privacy and security*, Yale University Press, New Haven.
- STYLIANOY, Kostantinos, 2011, “Hasta la vista privacy, or how technology terminated privacy”, *Personal data privacy and protection in a surveillance era: Technologies and practices*, Christina Akrivopoulou & Athanasios Psygkas (eds.), Information Science Reference, Hershey, pp. 44-57.
- TAYLOR, Emmeline, 2012, “The rise of the surveillance school”, in *Routledge handbook of surveillance studies*, Kirstie Ball, Kevin Haggerty & David Lyon (eds.), Routledge, Abingdon, pp. 225-231.
- THELWALL, Mike, 2013, “Society on the web”, in *The Oxford handbook of internet studies*, William Dutton (ed.), Oxford University Press, Oxford, pp. 69-85.
- TROTTIER, Daniel, 2012, *Social media as surveillance: Rethinking visibility in a converging world*, Ashgate, Farnham.
- TUDGE, Robin, 2010, *The no-nonsense guide to global surveillance*, New Internationalist, Oxford.
- WORLD ATLAS (2017), *The most spied upon cities in the world*, in <http://www.worldatlas.com/articles/most-spied-on-cities-in-the-world.html> (21.08.2017).





*The Foundations and Traditions of  
Constitutional Amendment*

Hart Publishing, 2017. P. 399. ISBN: 978-1509908257

Richard Albert, Xenophon Contiades & Alkmene  
Fotaidou (eds.).

**Catarina Santos Botelho**

Professora Auxiliar da Escola do Porto da Faculdade de Direito  
da Universidade Católica Portuguesa

---

*Foundations and Traditions of Constitutional Amendment* is undoubtedly a thought-provoking book edited by Richard Albert (Boston College Law School), Xenophon Contiades (Panteion University of Social and Political Sciences; Centre for European Constitutional Law) and Alkmene Fotaidou (Centre for European Constitutional Law).

To better understand what a book is, it is sometimes important to point out what a book is not. Hence, this book is not an ungainly *bricolage* of random papers, but rather the most accomplished project of comparative constitutional amendment of the past few years. The embryonic stage of the book can be traced to a reflection about Comparative Constitutional Amendment, held in May 2015 at Boston College Law School. The discussion continued outside the workshop and resulted in 20 fascinating essays, which offer a solid and comprehensive inquiry into the historical evolution and the current challenges of amendment rules.

The *vexata quaestio* of how to balance an old constitutional text with new historical, societal and political scenarios has occupied the mind of legal and philosophic scholars for decades. One can remember how Karl Löwenstein, in his famous book *Verfassungslehre*, tried to discover the “magic formula” of a lasting Constitution. Löwenstein’s perception of how a constitutional text can lack normative content and have no strength to block the violation of fundamental rights encouraged him to develop the theory of the normative force of the Constitution.

However, nowadays, the possibilities and limitations of constitutional design may be broader than in the last century. These motivate us to reflect upon the Constitution and its essential values. Although informal amendment has received substantial attention, there is an upsetting lack of profound studies on formal amendment and its implications (David Kenny, Kate Glover, Lael K. Weis, Richard Albert and Oran Doyle). One of the many merits of this volume is precisely a far-reaching commitment to formal amendment possibilities and limitations.

Another merit is the voice given to new comparator legal systems, which gives attention to a sometimes hidden cross-border interaction between either new or well-established jurisdictions. As Laurence Tribe eloquently wrote in *The Invisible Constitution*: “the long-run costs of wearing global blinders – and even of pretending to wear them while in fact peeking across the seas (...) – would outweigh the short-term tactical gains of mollifying those who fear that such glances at other lands are but the harbingers of an abandonment of our sovereignty and of our exceptionalism”. In confirmation, Otto-Brum Bryde, former Justice at the German Federal Constitutional Court, held that even jurisdictions from consolidated democracies and with highly respected constitutional courts should benefit from legal comparison.

The fact that the editors have explicitly chosen to trace relevant developments in comparative public law regardless of the State's constitutional popularity (if one may even use that expression) is a form of intellectual humbleness that must be praised and pursued.

The book is divided into two parts: Part I: The Foundations of Constitutional Amendment; Part II: The Traditions of Constitutional Amendment. The first part develops the underpinning elements of constitutionalism. The second part explores the traditions of constitutional amendment, by means of several comparative studies.

An endogenous feature of Law is that its object tends to focus on a limited time horizon: the near past, the present and the immediate future. As Peter Häberle and António Castanheira Neves once described, this temporal trait is especially evident in constitutional lawmaking, since constitutions share static and dynamic characteristics. In a retrospective view, the Constitution aims to maintain historical heritage. In a prospective look, the normative force of the Constitution has an umbilical connection with its openness to adapt to the evolution of the constitutional reality.

For this reason, constitutional-makers should try to undertake a task of *actio in distans*, seeking to concentrate their normative efforts not only on their foreseeable "people", but also keeping in mind the future generations. Still and echoing Gianluigi Palombella concern, the main question remains unanswered: why are present and future generations bound to comply with rules dictated by "a dead people"?

If, in fact, as Thomas Jefferson famously observed, "the earth belongs to the living", then one should not be surprised that constitutions as intergenerational pacts struggle with inevitable asymmetrical ponderation. Like other legislative acts, constitutions also reflect the endogenous day-to-day reasoning that characterises democratically approved laws. Democracy is a *pro tempore* phenomenon which envisions the possibility of political, idiosyncratic or societal change. At the same time, constitutional design is not immune to synchronic reasoning, therefore favouring present generations, to the detriment of future ones.

As Xenophon Contiades and Alkmene Fotiadou very eloquently wrote, "the fragile balance between constitutionalism and democracy is constantly reassessed through constitutional amendment, which is an ongoing attempt to reconcile the two". Sofia Ranchordás argues that the "legitimacy of this inter-temporal binding" will depend on the willingness of the constituent power to dialogue with the future generations. One possibility that should not be immediately rejected is the contribution of sunrise clauses, which allow constitutional contingency.

The seminal distinction between primary and secondary constituent power is revisited (Luisa Fernanda García López, Thomaz Pereira and Zoran Oklopcic).

In response to the democratic paradox of unamendability, it is stressed that neither the Constitution nor the unamendability clauses themselves can block the primary constituent power and its sovereignty (Joshua Braver, Mark Tushnet and Yaniv Rosnai). Despite the “seduction of constitutionalism” (Juliano Zaiden Benvindo), the constitution is not just a precious piece of paper and should also be perceived through tridimensional lenses, which include constitutional reality and constitutional values as well.

Furthermore, the paradox of constitutionalism ought to be seen as a (semi) conscious rejection of “alternatives to the vocabulary of peoplehood” (Zoran Oklopčič) and attention should be given to the extent to which constitutional constraints disempower current majorities in favour of former generations (Oran Doyle). Keeping in mind the idea of “the people”, Jean-Phillipe Derosier suggests a distinction between the social people and the legal people.

Yet this puzzling constitutional challenge lies in the definition of “the people” and in the fact that the ethereal and mythical concept of “people” asks for some palpable content. A potential dialogue between the real people and the imaginary people can be achieved through inclusive participatory mechanisms (Jurgen Goossens and Yaniv Rosnai).

In an innovative perspective, Yaniv Rosnai states that constitutional amendment powers should not be regarded in a binary perception (limited or unlimited), but as a spectrum of scope: the more/less the democratic traits of the amendment power resemble those of the primary constituent power, the less the democratic power should be bound by limitations. Thus, the democratic consistency of primary constituent power is inversely related to the breadth of legislative constraints and judicial scrutiny.

Xenophon Contiades and Alkmene Fotiadou sustain that empirical studies and the use of metrics in the field of constitutional amendment should be interpreted *cum grano salis* and attention should be given to the specific constitutional culture. For this reason, constitutional quality cannot be measured simply by its low amendment rate, frugality or even by its duration.

Adopting a different perspective, James E. Fleming argues that the goal of constitutional amendment is to correct imperfections of a given Constitution. In this sense, a frequently amended Constitution is far from being a good one. In many African States, constitutional amendments were instrumentalised for securing an immediate political advantage (Duncan Okubasu). In an interesting study about the Commonwealth Caribbean, Derek O’Brien stresses the relevance of culture as resistance to constitutional change.

Concerning aspirational constitutions, characterised for having a generous and exhaustive fundamental rights’ catalogue, this kind of prolixity can lead to restriction of governments’ freedom of action or to an uncontrolled judicial

activism. If the constitutional text is a kind of *totem* which regulates everything until exhaustion, it is the Constitution itself that is at stake. We can, thus, infer that the normative force of the Constitution is intrinsically related to the idea of essentiality.

To conclude, we agree with Richard Albert's clairvoyant observation that constitutional amendment scholarship should be equally devoted to formal and informal amendment, to their interaction, "and also to the costs and consequences of privileging one over the other".

As the brilliant Portuguese poet Fernando Pessoa once wrote: "every gesture is a revolutionary act". Clearly, at the end of the book one is left with the certainty that its open-minded and enriching ideas will have a significant, positive impact in comparative legal scholarship. For the present reviewer, it has been an enjoyable learning experience which reveals with admirable clarity and accuracy the challenges of constitutional amendment as a distinct field of study in public law.



DIREITO  
PÚBLICO

Guilherme da Fonseca Teófilo  
Hakim Yasir Abbas  
Patrícia Fragaço Martins  
Ricardo Rodrigues de Oliveira  
Catarina Santos Botelho



# Revista Quadrimestral

Sim, desejo ser assinante a partir do próximo número.

Ficha para assinatura em [www.fd.lisboa.ucp.pt](http://www.fd.lisboa.ucp.pt)

- Portugal**  Assinatura anual 45 €  
**Europa**  Assinatura anual 55 €  
**Resto do Mundo**  Assinatura anual 65 €

Nome .....

Morada .....

Localidade ..... Código Postal .....

NIF\* ..... Tel. .... Tm.....

e-mail ..... Profissão .....

Instituição | Empresa .....

\* Campo de preenchimento obrigatório para emissão de recibo.

## FORMAS DE PAGAMENTO

Cheque n.º .....

Banco .....

Cheque passado a:

Universidade Católica Portuguesa

Transferência bancária

PT50 0033 0000 2108 0018 4224 3

(Anexar comprovativo de transferência)

ASSINATURA

OS DADOS FORNECIDOS SERÃO PROCESSADOS AUTOMATICAMENTE NO FICHEIRO COMERCIAL DO DESTINATÁRIO, GOZANDO OS RESPECTIVOS TITULARES DE DIREITO DE INFORMAÇÃO E ACESSO. ESTAS INFORMAÇÕES SERÃO EXCLUSIVAMENTE UTILIZADAS PARA DIVULGAÇÃO DE PRODUTOS E PROMOÇÕES DA CATÓLICA LAW REVIEW. SE, DE FUTURO, NÃO PRETENDE RECEBER ESSAS INFORMAÇÕES, ASSINALE UM X.

POR FAVOR, ENVIE ESTE CUPÃO PARA:

Católica Research Centre for the Future of Law  
Faculdade de Direito  
Universidade Católica Portuguesa  
Palma de Cima 1649-023 Lisboa

INFORMAÇÕES: Tel.: (351) 21 721 41 78 | Fax (351) 21 721 41 77  
[catocalawreview.fd@ucp.fd.pt](mailto:catocalawreview.fd@ucp.fd.pt)







VOLUME II

n.º 1

jan. 2018

# DIREITO PÚBLICO

## DOCTRINA

Identidade e autodeterminação informacional no novo Regulamento Geral de Proteção de Dados: a inevitável privatização dos deveres estaduais de proteção \ **Guilherme da Fonseca Teixeira**

The muddled science of comparative law: mending terminology and mapping its' benefits within indian constitutional discourse \ **Hakim Yasir Abbas**

Things we lost in the fire: EU constitutionalism after Brexit  
\ **Patrícia Fragoso Martins**

Yet another prying eye  
Surveillance as a consented cultural phenomenon?  
\ **Ricardo Rodrigues de Oliveira**

## RECENSÃO

The Foundations and Traditions of Constitutional Amendment  
\ **Catarina Santos Botelho**



www.uceditora.ucp.pt



ISSN: 2183-9336

**FCT** Fundação para a Ciência e a Tecnologia  
MINISTÉRIO DA EDUCAÇÃO E CIÊNCIA