

**Transcription of the Debates Presided by Professor Anabela Miranda
Rodrigues (Chair) and Moderated by Professor Mariana Canotilho
(Debater)**

Professor Mariana Canotilho

This panel is about the themes that have preoccupied me most lately and many of the names here have been directly suggested by me. Therefore, the first thing I wanted to start by explaining – Professor Francine Mestrum showed some concern about being a sociologist and linguist and being here, and perhaps Professor Castro Caldas did not say so, but also may have felt the same – is that one of the things that I think is that we have very closed spheres of discourse, we do not hear what others have to say. The lawyers talk to each other, the economists talk to each other, the sociologists talk to each other, and this crisis that we are experiencing, this scenario, poses problems that have to be faced by professionals and academics from a variety of fields, and therefore it is high time we started listening to each other, and us lawyers started trying to learn something from those who have things to teach us, because they come from other areas. For now, to encourage debate, I am just going to raise some concerns.

The first thing I wanted to highlight was that I find it very interesting is that this is a panel discussion on equality and solidarity. When it comes to equal rights in the European Union, if we are to seek references, there appear to be a lot regarding non-discrimination, non-discrimination on grounds of age, as discussed yesterday, but also a lot of literature on discrimination based on sex and gender and some other aspects. However, without having said absolutely anything to anyone, a panel on equality and solidarity having been proposed, people have not talked about this. They have talked about labour rights, about the right to health, about economics, about migration. Therefore, there is much more to say about equality, there are many other important aspects that we have forgotten over the years that go beyond non-discrimination due to all the odious traditional factors. And therefore I am very glad we are revisiting this subject of equality, which has to do with the economy, the redistribution of wealth, social rights. It is essential that we bring this back into legal discourse because I believe it has become a bit diluted in recent times. And so I will just raise some concerns with the various participants.

First, I will start with Professor Dimitry, because he spoke about citizenship, which is something a little separate within the other themes that have been addressed here, but interesting and, it seems to me, important in terms of equality. I wanted you to give me your opinion, I was less interested in what the Court did or can do, than in what we academics think the Court should do. Our role is to propose what the Court and perhaps the European legislator should do, what should comprise citizenship. In this regard, I am interested in knowing what you think, what rights should be included in this package of European citizenship. Because, for me, it was more or less obvious that it is the traditional rights provided in the treaties for European citizens, plus the enjoyment of the catalogue of fundamental rights provided in the Charter, but perhaps this is not consensual at all. We should praise the steps taken by the Court of Justice to end the distinction between static citizens and mobile citizens, but also, perhaps, start talking about another distinction that concerns me, which is the distinction between “good mobile” and “bad mobile” citizens. The “good mobile” citizens, extraordinarily protected by European law, are those moving as factors of production, so they are contractors or employees; the “bad mobile” citizens are those moving for any other reason, even where they are moving to exercise fundamental rights. And I am not even thinking about those who want to seek health care, I am thinking of those who want to do something as simple as demonstrate. In Portugal, when the NATO Summit was held at the end of 2011, there were several European citizens, Finns, Spaniards, barred at the border because the Schengen Agreement had been suspended, barred for reasons of public order and the Aliens and Borders Service reports state that the justification

for their not being allowed to enter is that they were carrying anti-NATO materials... Now, they come to demonstrate, which is a right recognised both by Member States and by EU law, they come to demonstrate at a Summit involving all the authorities of the Member States and the EU itself. And while we have been saying that there is no public sphere in the European Union, that there is no European people, that we have not discussed the issues together, when people try to do this, we bar them at the border because we do not like their opinions, whereas ultimately they could have come if they were coming to demonstrate support. Therefore, should we or should we not also raise this issue of ending the distinction between “good mobile” and “bad mobile” citizens as subjects of the rights conferred by European citizenship?

In relation to Professor Francine Mestrum, I wanted to ask you, as a linguist, because it is something we have discussed with colleagues, how do we build a new concept of solidarity? There is much talk of solidarity, but we do not know what it is, what the meaning of solidarity is, and how we can bring it into the legal and political sphere. I found it interesting what you said about Van Rompuy, who said what we have is a problem of values and morals; I also agree that poverty is not a problem of morals or values, but the fight against poverty includes problems of morals and values because, deep down, it seems we have to justify today why it is that the most capable must pay. And the most capable are sometimes us and we are not aware of that: in Portugal only about 20% of people are earning more than 1,200 euros; therefore, whoever in this room earns more than 1,200 euros is among the richest 20% of income earners, and even though 1,200 euros is not that much we should be aware of this. On the other hand, behind capital income and other income – we talk a lot about companies and markets, but companies and markets, as I learned in my first commercial law class, do not exist – behind the companies and the markets there are people. And according to the numbers we have seen lately, Professor Vicenç Navarro in Spain recently published a book that says that around 80% of Spanish GDP is controlled by 1,400 people. Therefore, behind all these terms of markets and companies there are people, and they are apparently few and identifiable. All these people, all us privileged people, have to adopt an attitude of solidarity and ultimately pay for the rights of others and it is important to find a justification of why it is we have to do this. Among the privileged there is a large section not willing to do it, thus leading to the problem of justification of the obligation to contribute to others – to abstract others, to others who are not good, law abiding citizens. One of the political attacks on social benefits may indeed be this idea that people do not want to work, that they are lazy, that we have to encourage them to enter the labour market; most are not, but perhaps some may be. But we have to face the problem that, even if they are lazy and do not want to work, are we going to let them starve to death? Are we no longer going to pay basic health benefits? How do we deal with these problems and build a new concept of solidarity?

In relation to Donatella, I wanted to thank her because I do not study migration but I'm very ashamed of how Europe treats immigrants from outside the community. It treats them in a terrible way, and does so, on our behalf, claiming to protect us, to erect a fortress that protects us, and I do not want this done in my name. At the same time, it treats immigrants in a manner lacking solidarity between European countries themselves. Because it is easy to be Belgian, to be the Belgian government and say to the Spaniards, the Italians and the Greeks “you have to protect the external borders of the European Union”; it is easy to be German and order that the EU's external borders be protected, but it is not at all easy to be the Italian government, or the Greek government and protect the EU's external borders and deal with the problem. Greece has been subject of a series of convictions for torture by the European Court of Human Rights due to the way it treats immigrants from outside the EU. It is unbelievable that we have European Union countries, in the 21st century, repeatedly convicted for torture in the treatment of immigrants from outside the EU due to a scenario created by all, by the legal system that we built around immigration and specifically immigration from outside the EU. What I wanted to ask is if you have any suggestions for dealing with it, if, as scholars, we may suggest something, a catalogue of rights of immigrants that includes basic procedural rights to be respected, basic rights to assistance to be respected? I don't know, but perhaps it would be worth starting to

come up with ideas, we have identified the situation and criticised it, but we should come up with ideas to propose.

As for Professor Catherine Barnard, and now in relation to the points more to do with equality itself, legally speaking, I found it very, very interesting to bring up labour rights here, to try to make this comparison between jurisdictions that seem completely different, such as the British and the Portuguese. I do not know if this preliminary ruling will have any future, legally, due to purely procedural factors, but either way, the issue is very interesting from the academic point of view. It is interesting to challenge the attitude of the national government and the change in labour laws by the national legislative authorities. Portugal has a very extensive catalogue of workers' rights in its Constitution, so we may in fact call upon Article 53 by way of constitutional rights. The right to safety at work is in the Portuguese catalogue of fundamental rights, in the Constitution. We have a labour regulation in the Constitution that is perhaps unusual in comparative terms; it is not very common, especially in northern European countries, so this may be an interesting angle. But what interested me most was something said in passing that is to challenge the European authorities – the European institutions participating in the troika, who impose certain conditions on Portugal, on their side an agreement to provide financial aid. Those who want to help impose the conditions they see fit, so they could impose these or they could impose others, or they could impose none at all. They impose conditions in relation to the amendment of labour laws, which have been justified so far with this idea that, if I make it easy to dismiss workers, this makes creating jobs cheaper. Well, at least in Portugal and Spain we are not seeing the this creating employment; we have been in a process of deregulating labour laws for quite some time, it is not just a recent thing, and we have not seen any jobs created. Therefore, I do not think it has any scientific basis. And at the same time, how can they (the European Institutions) impose this, when they themselves are linked both to the rights laid down in the Charter and the Lisbon Treaty, which says that the EU shall pursue policies aimed at full employment! Would it be possible to question them on this, from this angle?

As for Professor Tamara and in relation to health, I think there is here a gap between southern Europeans and the way people in the United Kingdom see these rights. I find it very interesting to see what the courts can do on behalf of them. But looking at the history of my country, Portugal has made absolutely spectacular progress in terms of the level of economic indicators of health, a progress that is normally taken as a case study in terms of improvement in all economic indicators of health. And this was not achieved by the courts, this was achieved by the constituent legislative powers and ordinary legislative powers; by the Constitution of 1976 and the establishment of institutional guarantees of the right to health, which were created first on paper and in law and then at a practical level – specifically, a national health service endowed with universality and “tending towards” being free of charge. It was doing this that allowed the dramatic improvement in our economic indicators of health. Therefore, even though I sympathise with everything that can be done by judicial means (everything that can be done is good to implement the right to health), what should academics propose at a political and legislative level to European Union institutions in terms of the right to health? Because this will solve the problem for us all, and not just those who reach court, so what suggestions can we make here?

Finally, Professor Castro Caldas, I really wanted to have an economist here because we in the Lisbon Treaty we find policies aimed at full employment and high levels of protection; this is a rule of law, but we have no idea if there are scientifically proven policies that lead to full employment. I do not know if there are any, I do not know what they are and I would like to know, so that, when I read that provision, I can understand what the Treaty ultimately requires the political powers and institutions of the EU to do. If I do not know what those policies are, then the text of that provision tells me nothing. Therefore, here we have to learn from economists. Most economists who appear on television advocate the policies of deregulation, facilitating dismissal, making the labour market more flexible. I have seen this happen in Portugal and in other countries similar to us, but I have not seen it lead to any jobs; the overwhelming majority of people of my generation and of those who are close to me are now unemployed or are in precarious employment with so called “false official receipts” (employed as freelance workers where they are in fact members of staff of the

company), which is one of the cancers of our labour market, so all this is clearly not working. Is there anything, from a scientific point of view, anything in the economy that has been scientifically proven to work? I would love to know.

Professor Castro Caldas

Starting with the order in which the questions were asked, Mariana's difficult question, if there are policies that lead to full employment. There are, the question is whether they are compatible with the system of freedoms enjoyed by capital and not people. These policies that lead to full employment need not be tested in a laboratory, in fact, in post-war Europe they were tested, but they were tested within a context where control of capital flows were heavily regulated, and for good reason. The conventional answer tends towards saying that, in the world as it is now, these policies are not viable. That is simply not true. Even today, in a world in which capital can travel freely while people have their feet stuck to ground, capital movements can be controlled. Electronics makes the movement of capital easier, but it also makes control of capital flows much easier. Therefore, it is a political decision, and indeed, I think we will soon see the beginning of a process of enhancing those controls because the sustainability of a system as interconnected, as integrated as global finance is today has been put to the test, and it has failed. And so this is the context where, from a positive point of view, the control of capital flows provides opportunities for full employment policies based on a simple rule: wages should grow in proportion to productivity. A simple and tested rule. And this allows me to move on to the second question, the rise in wages in Portugal over the 2000s was lower than the rise in productivity. In other words, put the question to me this way, has the evolution of the average wage been divergent in Portugal? This was exactly what was supposed to have happened in a virtuous integration process, it was so-called real convergence, real income levels would tend to converge, yet in Portugal, the average wage increased below productivity. The problem is that the others still grew less, beginning with Germany and, therefore, what we witnessed during the 2000s was a race to the bottom in wage growth and a divergence between productivity and wage growth that could not but lead, and this moves on to your other question, to a context in which the surpluses cannot be recycled in the sphere of productive investment because there is no solvent demand for such investment. And entrepreneurs are the first to know that it is not worth investing in a context in which salaries within the European Union are set to grow below productivity and there is no solvent demand for productive investment, and they therefore tend, through finance, to direct the surpluses to credit feeding solvent demand through indebtedness. This works for some time, but there comes a point when it stops working, and we are experiencing that point in which sustained demand for credit stops working. This also suggests my answer to the third question, which is the importance that redistribution may have, probably behind this global crisis we are experiencing there is a problem of severe bias in income redistribution, there is such a large concentration in the 1% that these movements are talking about. A major concentration of income at the top results from the mobile dynamics of capital and therefore in these circumstances, income redistribution would be a good friend of investment and, incidentally, I think there are countries that are successfully testing this, for example Brazil, in which a redistribution of income appears very friendly to investment and growth, and this is happening in much of Latin America. In Europe the opposite is happening, and why is this? Because here there is a gap between ideas, policies, and realities, that needs correcting.

Professor Dimitry Kochenov

I would respectfully disagree with the commentator about the questionable importance of following what the Court is actually doing, that is the key thing without knowing which it would be totally useless to propose any suggestions. Why? Because the Court created these limits, they are not in the Treaty as I have demonstrated. So it is only up to the Court (or up to the Member States revising the Treaties) to get free of those reins. There is no revision of the Treaty, however, that would absolutely guaranty us from the possible negative impact coming from the Court, so the Court is *the* power to watch. And then what kind of rights? The answer is *any* rights. Because now we are speaking not about the list of rights to be found in the law. We are

speaking about something else. I demonstrated that the Charter is totally irrelevant and inconsequential in this kind of sphere. There is a lot of interesting research about the reasoning behind the actual drafting of this Charter, suggesting quite convincingly that the reasons were to *limit* the Court's ability to protect human rights. Indeed, this is what Article 51 of the Charter points to as well. There was a wonderful article by Allard Knook in the Common Market Law Review in 2005 – many years back, explaining this mechanics in quite a brilliant way, so let's not mistakenly assume that the only source of rights we have would be the Charter. Yet, what we are speaking about is the distinction of the fields of competences of the EU and the Member States, so we need to be very careful in not grabbing all the competences upstairs to the EU level, because it would destroy European federalism. We need very carefully to come up with some kind of rights-based test which would not be based on a particular list of rights – unlike the idea you hold of the Charter – and which will enable effective guarantee of protection for those EU citizens (no matter what kind of situation, whether wholly internal or not) which are mistreated by their own Member States. We see the confirmations of this vision in some extrajudicial writings of the Members of the Court, especially by Koen Lenaerts. Moving in the direction I am suggesting can also be interpreted as reinforcement of democracy, because usually those who suffer in those situations – i. e., those who never moved and are married with third country nationals; those who are taxed double etc. – are *always* a minority, so their interest cannot possibly be reflected through the normal democratic channels within the Member States. However, as we have seen, the European Union can help. And that we already see in the case law: the Court seems to have a clear idea of what is going on. I come to this conclusion based on the comparison of the factual situations in *McCarthy*, *Ruiz Zambrano* and *Dereci*. The Court seems to be willing to step in, thereby moving the border of *ratione materiae* of EU law, in those cases where the Member States disrespect *their own* law. So once you abuse the citizens by not sticking to *your own* law – what happened in *Ruiz Zambrano*, where the national law potentially allowed Belgium to regularize the situation of the family but the Belgium authorities decided not to do it and the European law had to step in. So we are not speaking about overruling what is going on at the level of the Member States in terms of human rights protection, we are speaking about stepping in in those situations where the Member States openly abuse European citizens of whatever nationality by disregarding their own national law. I think this can work because this provides a viable alternative to the obscure and hypothetical cross-border test of *ratione materiae* which has been proven dysfunctional in the context of European Union citizenship. I hope I have answered your question.

And I have one remark to Donatella: you always speak about how to respect third country nationals – coming from Italy it is very interesting, because Italy has one of the most restrictive naturalization regimes. It requires a sham marriage in order to become Italian. This means that all the discourse about protecting third country nationals is basically a façade behind the idea of not allowing them to become Italians, so Italian law is terrible in the way how it alienates and creates third country nationals in Italy out of those people who would be naturalized in any other Member State of the Union. So instead of thinking about improving registration simply give them the passports and all will be OK.

Professor Francine Mestrum

I think that indeed we need a very good definition of solidarity and in order to find it I would look to South Africa because amongst others they speak a variety of Dutch, my mother tongue, and in that language solidarity means *saamstaan* or “standing together”. And that means that in order to organize solidarity you do not have to look at a common interest, it is a balance between interests you need, the result of a negotiation between unequal partners who have to become equal partners. I think that is a very important thing because solidarity is fundamentally different from charity or from philanthropy. Giving, as charity and philanthropy, gives power, it is giving from a powerful one to a weak one and that relationship remains by giving and that is what we have to break, so that is one point. The other point is that I would like to refer to Georg Simmel, the father of poverty sociology. What he has convincingly shown is that poverty reduction policies, and general poverty eradication policies never, never are

put into place in order to help the poor in the first place. They always originate in political needs of legitimacy, a need of those who are in power and the need of those who have to legitimize their power and prove their social usefulness. What I am very much convinced of is that you cannot fight poverty by looking at poverty in an isolated and separate way, poverty is a political problem, and it is also an economic problem and a social problem. So if you want to solve poverty you cannot make it an end of the pipe solution, leaving in place the impoverishment processes, you have to tackle it, I don't like the word but, in a holistic way, which means at a political level you have to organize your society in a different way so that people have indeed that equal status, a status of citizenship. At a social level you have to tackle inequality and at an economic level I think we have to look today mainly at money systems and the money creation systems in order to change the way that wealth is now created. We now have mainly virtual wealth and virtual money though they create real power. And I think we have to work at all these different levels if we want to come to poverty eradication, I think it has to be eradicated because it is immoral and contrary to all human rights, it is unacceptable. But we have to work at different levels.

Professor Tamara Hervey

Thank you for a very thought provoking response. Your question to me is essentially what we should propose to the European Union in terms of health law and policy. My answer is differentiated depending on what aspect of health law or policy you mean. I have four suggestions, each of which relates to different areas of health law and policy. One option is to propose the continued circulation of best practice. We believe that sharing of best practice can improve the effectiveness of health care systems. For instance, the practices of evidence-based decision making in terms of health interventions, or prescribing generic drugs instead of proprietary drugs, have been adopted by many EU Member States, not only because they save money, but also because they could be best for patients. It is difficult to claim with certainty that circulation of ideas of best practice through European channels *causes* policy change, but there must be at least a chance that the involvement of the EU assists in disseminating good practice. Secondly, there are still opportunities to use European Union redistributive mechanisms to improve health. I know that European Union redistributive mechanisms are very small, and that they are under threat. But they still exist. For instance, the EU has invested in capacity building among health care professionals, particularly primary care professionals, such as nurses. Particularly in Eastern European states, a very small amount of resources deployed to educate and build professional capacity can have hugely important effects on the ground for patients there. Thirdly, in terms of key indicators of public health, there is a scope for EU legislation based on internal market competences and EU can do more in terms of its external relations here as well. I would say that the European Union has done pretty well on tobacco regulation given where it started. Since the time of subsidizing tobacco producers under the Common Agricultural Policy, we have come a long way – though we could go further. Working with the World Health Organization, the EU has developed legislation, challenging tobacco regulation, the content of tobacco products and so on. There is scope for the EU to do that, for instance, for alcohol. The European Union could do a great deal more in terms of food regulation, in the fight against obesity. The latest EU food labelling legislation is not far from a disgrace in terms of public health. It seems to me that that may be in part because the European Parliament may have been very effectively infiltrated and managed by the powerful food industry. Fourth, and finally, concerning health care systems, I think what needs to happen here is that we need to clearly rearticulate and keep rearticulating the constitutional position. European Union law does not detract from the power of Member States to organize their health care systems. So, for instance, the Patients' Rights Directive must be interpreted consistently with that principle. European health care systems do not have to be reimbursement systems. They can be national health systems, such as in the UK and Portugal. National health systems are in the minority across the EU, but those Member States that have these types of health care systems are constitutionally permitted to continue to have national health systems. This is guaranteed by the Treaty of Lisbon.

Professor Donatella Loprieno

Thanks Mariana for the interesting question. I think that there is a lot of hypocrisy in immigration matters, not only in Italy, but also in all Europe. To say the truth, Europe got the neighbours, and in particular the North-African countries to do the dirty job, thanks to the bilateral agreements of readmission. Everybody knew about the Italian-Libyan agreements, everyone in Europe knew about it, everybody or almost everybody, or at least the relevant authorities, knew or know the condition of the sub-Saharan immigrants in the refugee camps in most of the North Africa. And we are also aware that just before the beginning of the Arab spring and Gheddafi non-glorious murder, he was looking for money in Europe claiming: or you help me financially or I will not help you to control the sub-Saharan migration flow. Therefore, most of Europe and some countries in particular were very interested in stirring up this type of policies.

The question you asked me (“what can we do?”) does not take much into consideration the abstract ownership of the immigrants human rights: in terms of national constitutions; in terms of international documents; in terms of supranational documents. The main issue remains always the effectiveness of the human rights and that most migrants and their life are controlled by the administrative authorities: nowadays, there are always less judges and more policemen, but clearly this cannot have any repercussion on the infringement on human dignity. In Italy, for example, there is an association of legal practitioners and scholars, which is called ASGI (Association for the Judicial Studies on Immigration) that operates in the Italian territory with meetings, workshops and refresher courses. The interesting thing is that the members of Asgi are judges, lawyers who defend, often for free, the immigrants in difficult conditions or illegal ones. We constitutionalists have a critical right/duty: we must always exercise our right to criticize government’s management. The main issue remains the administration on the migration. What Dimitri was saying is absolutely right, one of the main problems in Italy is the bad nationality law, the no. 91 of 92: it is unthinkable that a kid born from foreign parents in Italy has to wait to turn eighteen years old to aim at obtaining the Italian citizenship. The citizenship based only on the *ius sanguinis* horrifies me. The only nationality I see in the future is the citizenship by affiliation: if somebody chooses Italy or Europe as the place to live, he must have the right to be considered citizen of that country. There are no better citizens than the ones who choose our country to live in, not the one who born from Italian mothers or fathers or of other nationalities. Thank you.

Professor Catherine Barnard

An answer to your question is potentially rather long but it is in essence I think the only real hope of constructing some sort of non-
-regression clause
reading of the Charter is by reading perhaps Article 53 in the light of your constitutional provision, but in the light of more realistically Article 3(3) TEU, the provision on a social market economy, plus Article 151 which is about raising of the standard of living. And there is a rather helpful observation by the Advocate General in the working time case, the case brought by the UK against the Council over the choice of legal basis of the working time directive. The Advocate General said there, albeit talking in a slightly different context, that the whole purpose of EU social policy is to raise standards of living and the standard should be set at a higher level. But I am trying to construct bricks with very little straw and I realize the frailties of my argument. In answer to your question I think the most potentially interesting grounds of challenge for what the troika is doing to you is to challenge it not so much on the basis of the Charter but on the basis that the Troika or the Commission and the Council are exceeding their competences under Article 122(2) TFEU. It says that there is competence for the EU over matters considered to be general economic policy conditions. It is not at all clear to me that Article 122(2) even gives the EU the

competence to mandate the cuts of labor standards, because traditionally economic policy and social policy have been separate. I know that in some Member States they are intimately linked, but if you look at the integrated guidelines from 2005 onwards the two have always been kept distinct. It seems to me that the European Union can't have its cake and eat it; it can't say that they are entirely separate and do the opposite when it suits them.