Programme

Private powers and the rule of law

Madrid, 28 and 29 November 2024
Centro de Estudios Políticos y Constitucionales
European Commission for Democracy through Law (Venice Commission), Council of Europe

Any profound social change implies a rebalancing of the distribution of power. The impact of globalisation has for a long time been reshaping the balance between the various types of power, in particular between political power and economic and media power. More recently, technological developments have further exacerbated this trend, with a detrimental impact on human rights, democracy, and the rule of law. However, the control of power is consubstantial to its exercise in any democratic society, which ceases to be democratic when power goes unchecked.

The emergence of "new", typically transnational, for-profit actors with the capacity to influence and make decisions in public affairs increasingly reinforces the relationship between money, information and politics. The decision-making sphere is thus increasingly detached from institutions. These "new" private powers are configured not only as alternative political subjects, but also as alternative decision-making mechanisms within a global community. This process is combined with the decreasing level of interest and involvement in politics on the part of the population in Venice Commission member states. An increasing level of interest group activities coupled with a decreasing level of citizen participation in public affairs has become a significant source of concern.

This trend is taking place in the context of a twofold, deeply interconnected social process: the transition to a global society and the emergence of a digital society. Globalisation and digitalisation converge in the emergence of gigantic and somewhat "savage" powers, be they the great global financial powers or the new digital ones.

Private powers and their impact

In this new power ecosystem, there are phenomena of co-optation, where economic powers become true public decision-makers; of the inability of institutions to enforce current legislation due to problems of jurisdiction or mere technological incapacity; of feedback, where the concentration of power, especially in the economic or media sphere, on the part of the government, becomes an advantage in the conquest and maintenance of power; but also the use of consensus, electoral support, as a way to legitimise these accumulations and deviations of power and to delegitimise any link or criticism coming from non-elected powers or subjects

These powers have shown capable, by virtue of their size and their relevance in the day-to-day functioning of society, of imposing a legal framework favourable to their interests. Moreover, they are powers that often escape the regulatory authority of states and that international organisations have difficulty controlling. It is not only

their economic power, but also their significant domain of public debate and pluralism by exercising a de facto control of the public sphere, achieved through the massive accumulation and processing of data. This gives them an unprecedented capacity for social influence, placing them on a plane of superiority not only with respect to other private subjects, but also with respect to the public authorities themselves. To a certain extent, their operating rules, which seek to protect their business model, become supra-constitutional rules that apply throughout the world, and which offer neither sufficient legal guarantees nor protection mechanisms. Thus, the rule of law has to confront the problem of controlling technical/scientific power on the one hand, and the power of the economic actors in a global market on the other. This is undoubtedly a major challenge.

The activities of extra-institutional actors may, in the end, raise concerns about legitimacy, representativeness, transparency and accountability, which are fundamental principles of democracy and the rule of law. These private powers also put human rights at risk, be it "traditional" rights or new dimensions of human rights, such as the right to health, environmental or digital rights, including so-called "neurorights". The relationship between these private powers and users or consumers of their products is asymmetrical, without the latter being aware of the superiority of the former, which can lead to abuses that jeopardise the enjoyment of their rights or encourage and perpetuate existing biases in society.

Against this background, the traditional legal frameworks are insufficient, as they reflect the classic scheme of state-society separation, between public and private, which is impossible to maintain. Hence the need to reopen the debate on the relationship between private and public powers and the mechanisms of governance and participation based on an in-depth knowledge of the theory of political representation, the rule of law and human rights.

International responses to the impact of private powers

So far, the UN has taken the lead in comprehensively addressing the growing role of private powers and their impact on human rights. Almost two decades ago, the UN Global Compact was set up as a voluntary initiative for companies to align their operations with ten universally principles in the area of human rights, labour, environment and anti-corruption. In 2011, the UN Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights, also known as the Ruggie Principles, a set of guidelines for states and companies to preventing and addressing the risk of adverse impacts on human rights involving business activity, emphasising inter alia access to remedies. The Council of Europe has built on these principles with the adoption of its Recommendation on Human Rights and Business (CM/Rec(2016)3) and has over the years addressed certain specific issues related to the role of private actors in different areas of its mandate[1]. Other organisations have developed similar

[1] For example, in the field of elections regarding the financing of political parties and election campaigns (Recommendation Rec(2003)4) or, more recently, on digital technologies in elections (Guidelines CM(2022)10). Recommendations addressing the power and influence of private actors can also be found in recommendations on lobbying (CM/Rec (2017)2), the roles and responsibilities of internet intermediaries (CM/Rec(2018)2), the impact of digital technologies on freedom of expression (CM/Rec(2022)13) and in respect of Artificial Intelligence, with Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (CETS 225) recently having been adopted. In 2023, at its 4th Summit, Council of Europe member states committed themselves in the Reykjavik Declaration to developing tools to tackle emerging challenges in the area of technology and the environment.

initiatives (e.g. the OECD's Guidelines for Multinational Enterprises, the ILO's Tripartite Declaration of principles concerning multinational enterprises and social policy). Currently, and in view of the growing impact of the digital private powers, the United Nations has proposed a Global Digital Compact to establish an inclusive global framework to overcome digital, data, and innovation divides.

The Venice Commission itself underlined in its Rule of Law Report (CDL-AD(2011)003rev), the importance "to recognise that during recent years due to globalisation and deregulation there are international and transnational public actors as well as hybrid and private actors with great power over state authorities as well as private citizens" (par 16). It however did not address the issue in depth but mentioned it as a new challenge (par 66) for the future. In the Rule of Law Checklist (CDL-AD(2016)007), private actors are only specifically addressed when entrusted with public tasks (par. 56) or in issues related to the media (par. 104) or the protection of personal data (par. 117), while recognising the imposition of general obligations on private actors stemming from respect for the principles of the rule of law (par. 17) or human rights enshrined in the ECHR (par. 35-36). On the other hand, the link between extra-institutional actors and democracy were addressed both in Resolution 1744 (2010) on 'Extra-institutional actors in the democratic system' and in the Venice Commission Report on the role of extra-institutional actors in the democratic system, adopted in March 2013 (CDL-AD (2013)011).

In the current landscape, it is important to raise new issues and propose new approaches such as the separation between economic and media power, between media and political power, and between political and economic power. To provide all of them with greater transparency and legal certainty and better governance mechanisms. Establish limits to the accumulation of power in private hands and limits to the accumulation of personal data, which today is a unique form of power. Transnational regulatory approaches are needed. Revise regulatory and decision-making mechanisms by rethinking the rules regulating lobbying or the establishment of formulas such as co-legislation.

In short, it seems imperative that in the new modern context, the constitutional values of the Venice Commission's member states should permeate the actions of the new private powers. The composition of the Commission, which encompasses states beyond the Council of Europe, makes it a privileged forum for reflection on these issues, as it makes it possible to overcome the territorial/spatial restrictions of any regulation.

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MINISTERIO DE LA PRESIDENCIA, JUSTICIA Y RELACIONES CON LAS CORTES

CENTRO DE ESTUDIOS POLÍTICOS Y CONSTITUCIONALES

COUNCIL OF EUROPE 75 1949 - 2024 CONSEIL DE L'EUROPE

VENICE COMMISSION COMMISSION DE VENISE

Thursday 28 November

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10:00 Opening Remarks

Rosario García Mahamut, Director of the CEPC and Professor of Constitutional Law

Simona Granata-Menghini, Director/Secretary, Venice Commission

Juan Ignacio Morro Villacián, Ambassador, Permanent Representative of Spain to the Council of Europe

10:30 First panel

"New" Private Powers: globalisation and digitalisation

Olena Uvarova, Postdoctoral Researcher and Research Coordinator, MSCA4UKRAINE, Wageningen University

Josep Ibáñez Muñoz, Associate Professor of International Relations, Universitat Pompeu Fabra

Íñigo Macías Aymar, Research Coordinator, Oxfam Intermon

Panel Chair: **Paloma Llaneza,** Lawyer and CEO at Razona Legaltech

12:00 Coffee break

12:30 Second Panel

Private Power and the Rule of Law in the Common Constitutional Traditions of the Member States of the Venice Commission

Cesare Pinelli, Professor of Constitutional Law, Sapienza University of Rome, Substitute Member of the Venice Commission for Italy

Xabier Arzoz Santisteban, Professor of Administrative Law, University of Distance Education (UNED)

Panel Chair: **Paloma Biglino Campos,** Professor of Constitutional Law, Valladolid University, Substitute Member of the Venice Commission for Spain

14:00 Lunch

16:00 Third Panel

The Human Rights Dimension

Eliška Pírková, Senior Policy Analyst and Global freedom of expression Lead, Access Now

Milena Costas Trascasas, Member of the Advisory Committee of the UN Human Rights Council and Independent Consultant

Renata Ávila Pinto, CEO, Open Knowledge

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Friday 29 November

Panel Chair: **Rafael Rubio Núñez**, Associate Professor, Complutense University of Madrid

09:30 Fourth Panel

The Democracy Dimension

George Papandréou, General Rapporteur for Democracy, Parliamentary Assembly of the Council of Europe (PACE), former Prime Minister of Greece

Juan Fernando López Aguilar, Member of the European Parliament, former Minister of Justice of Spain

Enrico Bellini, Head of Government Relations, Southern Europe, TikTok

Panel Chair: **Elena García Guitian,** Professor of Political Science and Administration, Autonomous University of Madrid (UAM)

11:00 Coffee break

11:30 Fifth Panel

The Rule of Law Dimension

Kaarlo Tuori, Professor of Jurisprudence (Emeritus), University of Helsinki, Honorary President of the Venice Commission

Óscar Sánchez Muñoz, Professor of Constitutional Law, Valladolid University, Substitute Member of the Venice Commission for Spain

Jessica Ní Mhainín, Policy and Campaigns Manager, Index on Censorship

Panel Chair: **Iain Cameron,** Professor of International Law, Uppsala University, Member of the Venice Commission for Sweden

13:00

Conclusions

Rafael Bustos Gisbert, Professor of Constitutional Law, Complutense University of Madrid, Member of the Venice Commission for Spain

13:30

Closing remarks

Simona Granata-Menghini, Director/Secretary, Venice Commission

Rosario García Mahamut, Director of the CEPC, Professor of Constitutional Law

Juan Ignacio Morro Villacián, Ambassador, Permanent Representative

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of Spain to the Council of Europe

Working languages: Spanish and English

Simultaneous interpreting will be provided.

The seminar can be followed on-line, but speakers will be present in person.

Plaza de la Marina Española, 9, Madrid
www.cepc.gob.es