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The Portuguese Charter of Human Rights in the Digital Age: a legal appraisal

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La Carta Portuguesa de Derechos Humanos en la Era Digital: una valoración jurídica

RESUMEN: El texto realiza una valoración jurídica de la Carta Portuguesa de Derechos Humanos en la Era Digital recientemente aprobada. Examina su estructura como instrumento de derechos humanos y desde la óptica portuguesa de los derechos fundamentales, centrándose tanto en los nuevos contenidos, como en los redundantes. En este último caso, destacan problemas de interpretación, en particular al considerar la cláusula abierta del artículo 16 de la Constitución que permite el reconocimiento de derechos fundamentales a través de leyes ordinarias. Finalmente, se presta especial atención a un nuevo derecho específico, el derecho a la protección contra la desinformación, con relación a la libertad de expresión. El artículo tiene como objetivo mostrar que el alcance de esta nueva disposición permitiría una restricción inconstitucional a la libertad de expresión y que una norma válida debería estar determinada mediante una ponderación adecuada.

PALABRAS CLAVE: Derechos fundamentales, derechos humanos, desinformación, libertad de expresión, ponderación.

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CONTENIDOS: 1. Introduction. – 2. Legislative history. – 3. Preliminary issues. – *3.1. A human rights legal instrument approved at national level. – 3.2. A national legal instrument approved as an ordinary legislative act and not as a constitutional legislative act. - 3.3. The effects of Article 16(1) of the Portuguese Constitution.* – 4. The provisions of the Charter. *4.1. Provisions without norms and norms without object. - 4.2. Redundant rights. - 4.3. Old rights, new fundamentality. – 4.4. New rights.* – 5. Article 6 and the right to "protection against disinformation". – 6- Conclusions. - References

The Portuguese Charter of Human Rights in the Digital Age: a legal appraisal

ABSTRACT: The paper carries out a legal appraisal of the recently approved Portuguese Charter of Human Rights in the Digital Age. It analyses its structure both as a human rights instrument and as Portuguese fundamental rights instrument focusing on new norms introduced in the system and redundant ones. In this latter case interpretation problems are highlighted, in particular when considering the Portuguese open clause of Article 16 of the Constitution that allows for fundamental rights approved by ordinary laws. Finally, a specific new right is given special attention - the right to protection against disinformation – especially concerning its relation with the freedom of expression. The paper aims to show that the scope of the new provision would allow an unconstitutional restriction on the freedom of expression and that a valid norm must be determined by adequate balancing.

KEYWORDS: fundamental rights, human rights, disinformation, freedom of expression, balancing.

1. Introduction

The Portuguese Charter of Human Rights in the Digital Age (hereinafter "the Charter") was approved by Parliament in April 2021 and entered into force on July 16th of the same year. On July 29th the President of the Republic asked the Constitutional Court to verify the constitutionality of Article 6 of the Charter (the right to protection against disinformation).

This paper focuses on the legal novelty of the Charter analysed through two different perspectives. First, the new norms it introduces in the Portuguese legal system. Second, the new legal problems it poses, such as for example conflicting interpretations of similar normative provisions. It also gives special attention to Article 6, concerning disinformation.

On the second section the paper will first address the Portuguese legislative process that brought about the Charter and on section 3 it will present preliminary topics concerning the Charter in order to adequately frame the analysis. The following issues will be discussed: i) a human rights legal instrument approved at national level; ii) a national legal instrument approved as an ordinary legislative act and not as a constitutional legislative act; and iii) the effects of Article 16 of the Portuguese Constitution (PC). Section 4 will identify new and repeated norms and characterise both groups of norms. It is argued that the Charter is mostly composed of repeated norms from the Constitution and international legal texts binding on the Portuguese State. Section 5 will analyse the specific case of a new right to complain against disinformation as it raises important issues regarding the freedom of expression.

2. Legislative history

The Charter derives from two legislative projects submitted before Parliament[2] in late 2020. The projects were joined in one single project to be discussed and approved before Parliament. Twenty opinions from relevant stakeholders, including representative bodies of media organisations, the publishing industry, consumers, lawyers as well as public bodies with supervisory functions over the Courts, the media, and regarding personal data were presented before the competent parliamentary commission making this legislative process institutionally participated.

[2] Project of law 473/XIV/1 submitted by the Socialist Party and Project of law 498/XIV/1, submitted by PAN Party – People, Animals, Nature. The project from the Socialist Party had the designation "approval of the Charter of Fundamental Rights in the Digital Age" and it had previously been presented on 15.05.2019 as project of law 1217/XIII/4 but it had expired with the end of the previous parliamentary term.

The proposal presented by the Socialist Party states that "In this bill, an attempt was made to set out a diversified and comprehensive list of rights, freedoms and guarantees, which *innovates*, *clarifies* and also serves as the *basis for a binding action program for the authorities*" (our italic).

3. Preliminary issues

3.1. A human rights legal instrument approved at national level

Although the project by the Socialist Party referred to a Charter of "fundamental rights" and the project of the PAN Party referred to a Charter of "digital rights", later in the legislative process, when both projects were merged, the final text referred to a "Charter of human rights". Traditionally the expression "human rights" has been used in the international law arena and "constitutional", "fundamental" or "basic rights" have been reserved for national law (Neuman, 2003: 1865). There seems to be, however, no material difference between national fundamental rights and international human rights (Buchanan, 2015: 249 and ff). As such one could interchangeably speak of national human rights and international fundamental rights (Gardbaum, 2008: 749 and ff). It is a matter of convention. Consider for example the notable cases of France, after the Revolution of 1789, with the Declaration of the Rights of Man and of the Citizen, the UK Human Rights Act of 1998 and the EU with the Charter of Fundamental Rights of the European Union of 2000.

There are however important formal differences, especially concerning the hierarchical position of international law *vis-a-vis* constitutional systems. National fundamental rights are usually enshrined in the Constitution, which occupies the highest hierarchical position in each legal system. Indeed, one could say that the rights enshrined in the Constitution are fundamental because they are in the Constitution, barring some necessary moral pedigree of fundamental rights (which will not be considered here). Thus, if by invoking fundamental rights we allow only for national constitutional rights and by human rights we mean international legal rights, it is important to assess how each Constitution relates to international law.[3] However this is a formal problem that must not concern us here as the Portuguese Charter, although styling itself as a human "rights" charter, was approved neither as a law from an adopted international legal instrument nor as constitutional law, but as a national ordinary law, under the Portuguese Constitution. And, as such, a different question arises.

3.2. A national legal instrument approved as an ordinary legislative act and not as a constitutional legislative act

There are several arguments in favour of constitutionalising human or fundamental rights. In favour, one can speak, with Samantha Besson, of enhanced democratic

[3] We are not considering the cases where human rights as international law are qualified as jus cogens and thus above any Constitution. On this see, Bianchi (2008: 491 and ff); see also Gardbaum (2008: 754).

legitimation; confirmation of their fundamental character; uniform application across a legal order; variation in legislative specifications (Besson, 2015: 289; see also Wellman, 2011: 128 and ff). Against it, Jeremy Waldron argued that there is an anti-democratic entrenchment of fundamental rights in the Constitution that precludes discussion on disagreement regarding those rights (Waldron, 1999: 221 and ff).

The Portuguese legal order has, since its first Constitution in 1822, opted for the constitutionalisation of fundamental rights and it did again in 1976 with the current Constitution. In this respect the choice of Parliament to approve a Charter of Human Rights through an ordinary law instead of through constitutional amendment demands further scrutiny. There are several reasons that could have motivated the legislator prefer for an ordinary law, such as the difficulty in obtaining the two thirds majority required by the Constitution to approve any amendment. We will not consider these arguments here, given their non-normative nature and will instead focus on the consequences of such approval under ordinary law in the context of Article 16 of the Portuguese Constitution.

3.3. The effects of Article 16(1) of the Portuguese Constitution

Article 16(1) of the Portuguese Constitution states that "the fundamental rights enshrined in the Constitution do not exclude any others contained in the applicable laws and rules of international law". A parliamentary law that styles itself as "Charter of Human Rights" begs the question of the subsumption of its norms to Article 16(1) of the Constitution. The literature has dealt extensively with the subject but this is not the place to enter such discussion (see Alexandrino, 2006: 381 and ff; Moreira, 2004: 122 and ff). According to Decision no. 174/87 of 20 May, the Portuguese Constitutional Court ruled that a fundamental right derived from an ordinary law could be eliminated by a subsequent ordinary law. However, it also ruled that while the right is in force it is subjected to the special regime of fundamental rights set out in the Portuguese Constitution, most importantly under Article 18. The problem is thus how to determine when are we in the presence of fundamental or human rights approved by ordinary law. Two approaches seem possible. The dominant approach in Portuguese literature is that there must be a fundamental nature, in a material sense, to the rights comprised in a parliamentary ordinary law. This entails that a judgment be done to determine if a specific right is materially fundamental. This is, of course, a value judgment to be done ultimately by the Constitutional Court. A distinct approach would defend that any rights enacted by parliamentary ordinary law that are characterised as fundamental rights by the legislator should be under the rule of Article 16(1). Thus, any right approved by ordinary law can be qualified as a fundamental right for the purpose of applying the Constitutional regime, as long as such rights comply with Article 18(3) regarding the restriction of fundamental rights.

This is so because any new fundamental right may operate as a restriction to other rights.[4]

This is a formal approach that dispenses with an ulterior value judgment on the part of the interpreters regarding qualification. Dispensing such value judgment would indeed be the point of Article 16(1): such judgment would be restricted to the legislator by appointment of the Constitution. Here it is adopted the formal interpretation of Article 16(1).

It is then the case that if the legislator of the Charter qualifies its content as referring to human rights, as long as such rights do not violate Article 18 (2) and 3, that is, they are coherent with the remaining fundamental rights, they should be treated as such and subjected to its constitutional regime.

One last problem concerning Article 16(1) must be addressed. As we adopt a formal approach to Article 16(1) this entails that the norm operates a hierarchical upgrade to any norms comprised in ordinary laws that approve fundamental rights (and are formally qualified as such). As said above, the purpose of having rights in the Constitution seems to be the hierarchical position they assume regarding other norms in the legal system. Thus, Article 16(1) must be interpreted as an upgrade norm: the Constitution upgrades the hierarchical position of fundamental rights norms contained in ordinary law. This however does not preclude the ordinary law from being revoked by another ordinary parliamentary law as the Constitution recognises the distinction between sources.

4. The provisions of the Charter

4.1. Provisions without norms and norms without object

The Charter contains several provisions which lack legal norms or that contain norms without object, such as Articles 2(1)[5] and 4(2)[6]. They are mostly proclamatory and serve a public policy function instead of a normative function. They will not be analysed here.

Another set of provisions includes norms whose object is not discernible. See Article 6(1) that prescribes that "The State ensures compliance in Portugal with the European Action Plan against Disinformation, in order to protect society against natural or legal persons, *de jure* or *de facto*, who produce, reproduce or disseminate a narrative

[4] And it also serves to maintain systemic coherence given that this position would allow the legislator to change the Constitution without submitting to the constitutional revision due process.

[5] "The Portuguese Republic participates in the global process of transforming the Internet into an instrument for achieving freedom, equality and social justice and a space for the promotion, protection and free exercise of human rights, with a view to social inclusion in a digital environment".

[6] The Portuguese Republic participates in international efforts so that cyberspace remains open to the free circulation of ideas and information and ensures the widest possible freedom of expression, as well as freedom of the press.

considered to be disinformation, under the terms of the following paragraph". The European Action Plan against Disinformation of 2018[7] is an EU public policy document that calls for Member States cooperation in undefined terms that demand legislative and administrative measures. This latter kind of norm should not be confused with norms that allow legislative and/or administrative discretion, although their object is determinable. These are also problematic as they do not allow the interpreter to know exactly what the norm is commanding and are therefore, in the interim, inapplicable, but they should be dealt with in the context of the necessary legislative acts of execution. They do indeed foresee rights but ones that require further normative intervention. An example is Article 20(1) regarding children's rights insomuch as it foresees "special protection and necessary care to the well-being and safety in cyberspace" deferring to ulterior norms and administrative acts. Other examples are given referring to the cases of the next subsections.

4.2. Redundant rights

The vast majority of the provisions of the Charter, that are presented as rights, foresee redundant norms (Navarro/Rodríguez, 2014: 205-206) that can raise interpretative problems, inasmuch as some interpreters may find different (and even conflicting) norms in the Constitution, binding international legal documents and the Charter regarding the same rights. The Internet is not an extra-legal domain. Although it may pose jurisdiction challenges those occur only because the law is applicable to the Internet.[8] Therefore, any fundamental or human rights are applicable on the Internet, barring specific objects or scopes that prevent it. Duplicating existing rights and merely adding the reference to cyberspace, although it may have public policy value, causes disturbances in the legal system.[9] International documents regarding human rights in the digital world are not unheard of but they are mainly policy documents[10] with the aim of fostering awareness to this particular domain and not normative instruments that aim to bring about new norms. By adopting a Charter of Human Rights as a legal text Parliament forces the interpreters to determine if new norms arise from the legal provisions or if, on the

[7] See European Union, Action Plan against Disinformation, JOIN(2018) 36 final, 5.12.2018.

[8] The legislator of the Charter explicitly recognises this under Article 2(2): "The norms that in the Portuguese legal order enshrine and protect rights, freedoms and guarantees are fully applicable in cyberspace". This makes the Charter even more perplexing from a normative point of view.

[9] See for instance the good practice of the Council of Europe that instead of a normative text concerning cyberspace opted for a "Guide to Human Rights for Internet Users", Recommendation CM/Rec(2014)6 and explanatory memorandum.

[10] See the notable case of the Charter of Human Rights and Principles for the Internet from the Internet Rights & Principles Coalition, based on the UM Internet Governance Forum. The document is non-normative and its aim is to "to translate existing human rights to the internet environment to build awareness, understanding and a shared platform for mobilisation around rights and principles for the internet."

contrary, such provisions contain norms already present in the system. As we will see infra, the latter scenario is mostly the case.

Article 3(1) copies the suspicious categories of Article 13(2) of the Constitution[11] to the Charter thus duplicating a norm in the system; article 4(1) duplicates Article 37 of the Portuguese Constitution[12]; Article 4(3) derives from the principle of universality enshrined in Article 12 of the Constitution, also it refers necessarily to other norms that foresee specific "public measures to promote the responsible use of cyberspace and protection against all forms of discrimination and crime", again being legally redundant; Article 4(4) refers to the Portuguese "Code of Rights of the Author and Other Connected Rights", which would be applicable without this reference and would already be a concretisation of a fundamental right set out in Article 42 of the Constitution; Article 7(1) repeats Articles 45.º e 46.º of the Constitution[13]; Article 8(2) blends Article 35 of the Constitution as well as Article 8 of the CFREU, again being redundant, as the reference to existing law (GDPR and other legislation) denotes; Article 9(1) regarding the use of artificial intelligence is again redundant as it calls for the application of fundamental principles of the Portuguese legal order; Article 11(1) repeats Article 73 of Portuguese Constitution[14]; Article 12(1), regarding the right to identity and other personal rights repeats Article 26(1) of the Constitution; Article 15(1), regarding a right to cybersecurity, is covered by Article 27(1) of the Constitution[15]; Article 16(1) duplicates Article 42 of the Constitution[16]; Article 21(1) duplicates Article 52 of the Constitution regarding *actio popularis* and Article 21(2), concerning rights of defence, duplicates Article 268(4) of the Constitution, with the exception to the novel reference to alternative dispute resolution mechanisms.

Additionally, some of the provisions of the Charter foresee duties of the State as public interest tasks that must be performed or supervised by Public Administration. Following a Hohfeldian conception of legal positions (Hohfeld, 1917: 710 and ff) this entails the recognition of correspondent rights to the secondary addresses of the norms: people under Portuguese jurisdiction.

[11] See also Article 2 of the Universal Declaration of Human Rights (UDHR), Article 14 of the European Convention on Human Rights (ECHR) and Article 21 of the Charter of Fundamental Rights of the European Union (CFREU).

[12] See also Articles 19 and 27 of the UDHR, article 10 of the ECHR and article 11 of the CFREU.

[13] See also Article 20 of the UDHR, article 11 of the ECHR and article 12 of the CFREU.

[14] See also Article 26 of the UDHR, article 2 of Protocol 1 of the ECHR and article 14 of the CFREU.

[15] See also Article 3 of the UDHR, article 5 of the ECHR and article 6 of the CFREU.

[16] See also Article 27 of the UDHR.

Article 3(2) foresees public tasks concerning cyberspace[17] many of them already dispersed through prior legal instruments including the Constitution. For instance, in the case of lit. b) (for the promotion of gender equality), lit. c) (for the protection of people with disabilities) as well as lit. h) (the protection of digital consumers) there are Constitutional provisions covering these same objects and the Charter duplicates those provisions with further interpretative demands imposed on legal interpreters. In the other cases we are in the presence of claim-rights already derived from duties set out in ordinary laws present in the Portuguese legal system. This is the case analysed in the next subsection. Given the variety of measures set out under Article 3(2) such promotion may imply legislative and/or administrative measures but it leaves a wide discretion to the Portuguese state with the derivative problems mentioned in the previous subsection. These must be considered social rights set out under the Charter (on social rights as human rights see Cruft, 2012: 136 and ff).

4.3. Old rights, new fundamentality

Given Article 16 of the Portuguese Constitution, we are faced with the circumstance that some of the rights foreseen in the Charter are old rights that gain fundamental status through that constitutional norm. These are mostly cases where rights are already present in EU and Portuguese ordinary legislation and by aggregating them through the Charter, they gain fundamental status. However, the problem of redundancy persists and in this case with potentially harsh consequences regarding not only EU law when conflicting interpretations lead to the application of Charter norms in detriment of EU law norms but also conflicting norms of the same hierarchical level although originating from sources of different level.[18]

[17] a) The autonomous and responsible use of the Internet and free access to information and communication technologies; b) The definition and implementation of programs to promote gender equality and digital skills in different age groups; c) The elimination of barriers to Internet access for people with special physical, sensory or cognitive needs, namely through the definition and execution of programs for this purpose; d) The reduction and elimination of regional and local asymmetries in terms of connectivity, ensuring their existence in low-density territories and guaranteeing quality connectivity, in broadband and at an affordable price, throughout the national territory; e) The existence of free access points in public spaces, such as libraries, parish councils, community centers, public gardens, hospitals, health centers, schools and other public services; f) The creation of a social tariff for access to Internet services applicable to economically vulnerable end customers; g) The execution of programs that guarantee access to technological and digital instruments and means by the population, to enhance digital skills and access to electronic platforms, in particular for the most vulnerable citizens; h) The adoption of measures and actions that ensure better accessibility and more informed use, which counteract addictive behavior and protect digitally vulnerable consumers; i) The continuity of the Portuguese Internet domain «.PT», as well as the conditions that make it technologically and financially accessible to all natural and legal persons to register domains under conditions of transparency and equality; j) The definition and implementation of measures to combat the illicit availability and dissemination of illegal content on the network and to defend the rights of intellectual property and victims of crimes committed in cyberspace.

[18] It would be interesting to consider, in a future constitutional revision, that any new fundamental rights approved by law under Article 16 of the Constitution should be mandatorily subjected to preventive review of constitutionality to assure coherence with the remainder of the fundamental rights.

Article 5 states that "Intentional interruption of Internet access, whether partial or total, or limiting the dissemination of information or other content, is prohibited, except in the cases provided for by law". This is indeed an addition to the catalogue of fundamental rights concerning cyberspace considering that only the law may now foresee situations in which these interruptions and limitations may occur and that they must comply with the regime set out in Article 18 of the Constitution, however the Portuguese law already allows for situations in which providers may cut service.[19] Concerning the limitation of communications, under EU net neutrality legislation Regulation 2015/2120 allows little margin for providers to restrict internet traffic.[20] This is now given a constitutional boost.

Article 7(2) sets a duty to legislate and/or regulate under specific conditions. In this case the legislator creates a claim-right to a specific form of exercise of an already existent right of participation: "through digital platforms or other digital means". Article 9(2) seems to connect with Articles 13(2)(f), 14(2)(g), 22 of the GDPR regarding automated individual decision-making. In this sense, albeit not a new one, the right to have "Decisions with a significant impact on the recipients' sphere that are taken through the use of algorithms […] communicated to the interested parties, being subject to appeal and auditable, in accordance with the law" benefits from the special protection of Article 18 of the Constitution through the Portuguese Charter, through Article 16, as the GDPR, under the Portuguese basic law, occupies a hierarchical position midway between the Constitution and ordinary law and its provisions do not necessarily benefit from the Constitutional regime afforded to fundamental rights (a connection to the CFREU must be shown). Article 10, regarding net neutrality, is another important case of extension of the regime of Article 18 of the Constitution to a subject already regulated under EU and Portuguese law, namely the Regulation 2015/2120. Article 11(2) sets another duty to the state with the correspondent right to "programs that encourage and facilitate access, by the various age groups of the population, to digital and technological means and instruments, in order to ensure, in particular, education through the Internet and the growing use of digital public services". This is complemented by a duty addressed to the public service broadcaster (mandatory according the Portuguese Constitution) that entails a right to digital literacy through audio-visual means. Although the duties foreseen in Article 12(2) derive from the rights foreseen under Article 26(1) of the Constitution and 12(1) of the Charter, they are duties of protection that the legislator has specified in ordinary legislation. Thus, through Article 12(2) such rights gain fundamental status. A similar upgrade happens with Article 12(3) given the fact that it reiterates Article 9 of the GDPR. Article 13(1), concerning the right to be forgotten, references Article 17 of the GDPR. Article 13(2) also duplicates Article 17(2) of the Portuguese law[21] that executes the GDPR. Article 14(1) foresees a set of rights

[19] See Article 52-A of Law 5/2004 of 10.02.

[20] See Article 3 of Regulation 2015/2120.

[21] Law 58/2019 of 08.08.19.

concerning digital platforms[22] that are already foreseen in EU and Portuguese legislation, namely the e-commerce Directive and the e-privacy Directive as well as the transposition laws. Also, these rights are reinforced in the proposal for a Digital Services Act. Article 17(1) and 2 also determine hierarchical upgrades from GDPR norms. The norms comprised in Article 18(1) and 2 derive from the right to make a will, thus the right to make a digital will should be considered as an existing right that earns fundamental status. Article 19, concerning digital rights that can be used when interacting with the Public Administration are also rights already foreseen in ordinary laws, as explicitly exemplified by lit. f). Article 21(3) regarding legal entities with public benefit status also comprises a right, already established under ordinary law, to receive such public benefit status, limiting itself to foresee a specific general interest relevant to the Public Administration.

All the examples presented above raise the same issue: by upgrading already existing rights there should have been a concern with guaranteeing that the Charter norms are in line with the already existing norms of similar object. Not only to facilitate interpretation and application but because in case of conflict, given the interposition of Article 16 of the PC, the Charter norms will prevail over similar norms (even if the objective would have been to duplicate them without any change).

4.4. New rights

A few provisions foresee new fundamental rights. Article 6(5) foresees a right to "submit and see the Media Regulatory Authority assess complaints against entities that carry out the acts provided for in this Article, and the means of action referred to in Article 21 and the provisions of Law no. 53/2005, of 8 November, shall apply, regarding the complaint and deliberation procedures and the sanctioning regime". This right refers to acts of disinformation and will merit specific analysis on the next section.

Article 8(1) foresees a right that cannot be said to derive unequivocally from Article 26 of the Portuguese Constitution (right to privacy): "Everyone has the right to communicate electronically using encryption and other forms of identity protection or that avoid the collection of personal data, namely to exercise civil and political liberties without censorship or discrimination". The right to online anonymity is foreseen in the Charter of Human Rights and Principles for the Internet[23] and it is also

[22] a) Receive clear and simple information on the conditions for providing services when using platforms that enable information and communication flows; b) Exercising on these platforms the rights guaranteed by this Charter and other applicable legislation; c) See guaranteed protection of your profile, including its recovery if necessary, as well as obtain a copy of personal data concerning them under the terms provided for by law; d) Presenting complaints and resorting to alternative means of resolving conflicts under the terms provided for by law.

[23] See Internet Rights and Principles Coalition, Charter of Human Rights and Principles for the Internet, point 8; see also Internet Rights and Principles Coalition, 10 Internet Rights & Principles, point 5. Available at https://internetrightsandprinciples.org/charter/ (last seen on 29.07.21)

explicitly mentioned in the Explanatory Memorandum of the Proposal for the Digital Services Act.[24]

In Article 9(3) the legislator adopts into law the four ethical principles in robotics engineering presented in the Code of Ethical Conduct for Robotics Engineers[25] as well as the principles enshrined in Article 2 of the TUE. They are enacted as duties to the entities responsible for robots and the norms set rights of secondary addressees (anyone under Portuguese jurisdiction) to claim the respect for these principles of robotics.

In Article 14(2) the legislator determines that "The State promotes the use by digital platforms of graphic signs that transmit in a clear and simple way the privacy policy that they ensure to their users", thus enabling a new claim-right.

Article 15(2) sets a competence to the Portuguese National Centre for Cybersecurity (NCC) and, at the same time, foresees a duty to promote the training of citizens and companies on online services to prevent and neutralise threats to safety in cyberspace. This entitles both citizens and companies to request the NCC for the promotion of such training sessions.

5. Article 6 and the right to "protection against disinformation"

Of the few new rights deriving from the provision of the Charter one in particular deserves special attention, the "right to the protection against disinformation", as stated by the title of Article 6. This is so because not only there were parliamentary projects to change and eliminate this article even before the Charter came into force, but also because on 28th of July of 2021 the Portuguese President of the Republic asked the Constitutional Court to review the constitutionality of Article 6.

Leaving aside Article 6(1), that, as noted above, has an indeterminate object, Article 6 comprises a legal definition of disinformation resulting from §2, 3 and 4 and a right to have the Media Regulator decide claims and apply sanctions against entities that generate disinformation, deriving from §5. It also includes, under Article 6(6) a duty of the State to support the creation of fact-checking "structures" by legally registered

[24] See Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15.12.2020, p. 1.

[25] See Annex 1 to the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics.

media and to foster the "the attribution of quality seals by reputable entities endowed with the status of public utility".[26]

Legal definitions, although second-order norms in Hartian sense (Hart, 2012: 79-81), can normatively conflict with other norms inasmuch as they can "ground legal decisions" (Bulygin, 2015: 43). Thus, the definition of disinformation will only present a problem to the exact extent of first-order norms that may foresee it in the antecedent. This is the case with the norm resulting from the provision of article 6(5). As we have seen the Charter grants a right to any person to complain to the Portuguese Media Regulator against any entity (not only media) that conducts disinformation in the sense resulting from of Article 6(2), (3) and (4). It is clear from Article 6(5) that the Media Regulator will have to analyse the claims and therefore to determine if a certain state of affairs is subsumed to the legal definition of disinformation. In this sense the legal definition of disinformation determines (Guastini, 2011: 168) the meaning of the concept of disinformation as a forbidden form of expression thus establishing a relation of conditioned precedence. If the legal definition of disinformation is valid it will cause the reformulation of the freedom of expression (henceforth FE) to allow for the exception of disinformation, thus enabling a restriction to its scope (by restricting its application conditions) (Zorrilla, 2007: 229).

However, this operation alone does not conflict with the freedom of expression. For that conflict to exist there must be a norm that determines a deontic application of the legal definition (Zorrilla, 2007: 133). This is what happens, under Article 6(5) when the legislator grants powers to the Media Regulator to limit the exercise of the freedom of expression deemed disinformation.

When we interpret the remaining of Article 6(5), we find a reference to the processual means of Article 21 of the Charter, which are ancillary to the protection of a given legal position (vg. the duty to strike down disinformation) and a reference to the "complaint and deliberation procedures of the Media Regulator statute as well as its penalties regime". When we study these regimes in the statute, we find that, following Article 37(3) of the Portuguese Constitution[27] the Media Regulator is given competence to analyse complaints "regarding behaviour likely to constitute a violation of [fundamental] rights, freedoms and guarantees or any legal or regulatory rules applicable to media activities, provided that it does so within a maximum period of 30 days from the knowledge of the facts and provided that such knowledge does

26 These duties and their correspondent claim-rights will not be analysed. The duties to "support" and to "foster" do not seem to raise any problems of constitutionality, other than the reference to "trustworthy entities endowed with the status of public utility" as this discrimination must pass the control of the principle of equality. Besides the problem of equality, it seems that any problems of constitutionality arising from this matter will be deferred to the legislation that will enable such mechanisms.

27 "Violations committed in the exercise of [the freedom of expression] are subject to the general principles of criminal law or the tort of mere social order, and their assessment is respectively within the competence of the judicial courts or of an independent administrative entity, under the terms of the law".

not occur more than 120 days after the alleged violation occurred".[28] It is not clear, however, what can the Media Regulator do if it considers that a certain state of affairs is legally disinformation. The Media Regulator statute foresees a competence to "adopt decisions", stating that they are binding to their addressees.[29] Let us admit that the Media Regulator could order the information, deemed disinformation according to the legal definition in Article 6, to be rectified or deleted (if rectification is not possible or done in a short period). In this case the legal definition combined with the exercise of competence by the Media Regulator would restrict FE (Article 37(1) of the Constitution) through a duty to strike down disinformation/right to the protection against disinformation (Article 6(2) to (5)).

Portugal would therefore join other countries that have laws that allow for the restriction of the freedom of expression based on disinformation definitions (see Hoboken et al., 2019: 39 and ff; Hoboken and Fathaigh,2021: 18 and ff).

The Portuguese Constitution allows for legal restrictions to the FE in Article 37(3) as mentioned, above under the requisites of Article 18(2) and (3): the restriction must be limited to what is necessary to safeguard other constitutional norms; ii) it cannot be retroactive; and iii) it cannot diminish the scope of the essential content of the constitutional provisions. We will not analyse all these requisites here and will instead focus on one final issue: if and how the concept of disinformation can be a legitimate ground to restrict the freedom of expression.

The part of the legal definition foreseen in Article 6(2), matches the one that can be found in the European Commission Action Plan against Disinformation[30] but the Portuguese legislator, under Article 6(3), offers examples of categories of situations that should be considered "false or misleading information", such as "the use of manipulated or fabricated texts or videos, as well as practices to flood email inboxes and the use of fictitious followers' networks". This provision poses a problem: manipulated or fabricated texts or videos may not convey false information (consider, for example, interviews with blurred images of witnesses); practices to flood email inboxes may not be false (but only a means of aggressive marketing) and the use of networks of fictional followers, although implying false information about the users, may have no connection with disinformation (and may serve only as a means to increase revenue from advertisement). In this sense, extending the meaning of the concept of disinformation beyond what is constitutionally admissible, Article 6(3) restricts the FE against Article 18(2) of the Constitution. Below we will discuss how to better justify this violation. Also, following the Action Plan against Disinformation, Article 6(4) excludes from the notion of disinformation "inadvertent

[28] See Article 55 of the Law 53/2000 of 08.11.

[29] See Article 64 of the Law 53/2000 of 08.11.

[30] See European Union, Action Plan against Disinformation, p. 1.

errors, satire and parody" although it did not exclude "partisan news and commentary", which is also mentioned in the Action Plan.

The new right, foreseen in Article 6(5) of the Charter, inasmuch as it derives from a special norm that restricts the FE is the result of a balancing operation performed by the legislator in order to "safeguard other rights or interests constitutionally protected" (see Article 18(2) *in fine*). This means that the operation that the interpreter should now perform, *maxime* the Constitutional Court, is to determine if the balancing operation conducted by the legislator is admissible within the system. This means that we should ascertain which rights or interests are being safeguarded by the restriction and apply the principle of proportionality.

Given the legal definition of Article 6(2) of the Charter, and considering that i) truthfulness and ii) deceitfulness are easy cases of interpretation, we are left with a wide and open notion of iii) "public harm", exemplified by the legislator by stating "threats to democratic political processes, to the processes of elaboration of public policies and to public goods" (Article 6(2) of the Charter). The EU Action Plan against disinformation further states that such public goods may include "Union citizens' health, environment or security"[31]. As we can gather, the notion of "public harm" refers to damage that affects society as interconnected groups but can relate to individual harm done to people. The degree of vagueness is very high (see Hoboken et al., 2019: 17 and ff) and the concept seems to operate merely as a negative requisite: "public harm" as a means to differentiate between harm targeted at specific individuals and harm targeted at whomever accesses the data. Even in this sense the concept is very broad and connects with several constitutional rights and interests through different objects according to the protected goods in question.

Different kinds of public harm can be analysed, regarding for instance i) object, ii) degree of severity and iii) probability of occurrence. These kinds will affect differently the outcomes of the proportionality test demanded by Article 18(2) of the PC. The Constitutional Court will have to take in consideration not only i) all the rights and interests that may justify the restriction of the FE under Article 6(2) to (5) of the Charter, but also ii) the variations of kind within each balanced set (for instance FE vs public health, FE vs public safety, FE vs national security and so forth). It goes beyond the scope of the present paper to assess and analyse exhaustively each one of the possible sets and their variations and so, as an example, we choose a specific set comprising FE and the right to physical integrity (henceforth RPI) under Article 25 of the Portuguese Constitution. But even accounting only for this set it is now clear that given the concept of "public harm" the concept of disinformation allows for several

[31] Compare this ground for restriction with the ones admitted by the European Convention on Human Rights, Article 10(2): "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

variations of restriction regarding FE when RPI is at stake. This happens because a restriction where information is eliminated to prevent a probable physical harm to a group of people is different from a restriction where information is eliminated to stop an existent harm to a group of people. This means that there will be as many restrictions to FE deriving from Article 6 of the Charter as the number of variants the Constitutional Court determines when dealing with the concept of "public harm".

Following the German Constitutional Court, the Portuguese Constitutional Court reads the principle of proportionality into Article 18(2) of the PC. The principle comprises three sub principles applied once the restrictive norm is considered to pursue a legitimate aim: the principle of suitability, the principle of necessity and the principle of proportionality in the narrow sense. The first two deal with factual possibilities and the last with normative possibilities, according to Alexy (2014: 513). Thus, one can say that balancing only occurs with the third sub-principle and that the prior operations are tests to determine the correct elements of balancing.

As mentioned above, there seems to be no doubt that the right of protection against disinformation pursues legitimates interests grounded in several constitutional norms inasmuch disinformation, as defined, may lead to public harm against goods foreseen in constitutional norms thus restricting their use by the norms' addressees. The legitimate interest in case should be considered the prevention of public harm to any of these goods. Under another perspective it is clear that the preclusion of public harm derived from false information intended to deceive is not clearly prohibited by the Constitution.

Considering the situation we admitted above, that the right foreseen in Article 6(5) of the Charter allows the Media Regulator to order the rectification or deletion of disinformation and that such measure is justified by the prevention of public harm derived from deceitful and false information it also seems that the suitability test is passed. If it is false and deceitful information that leads to harm, rectifying or deleting such information seems a suitable measure to prevent or stop such harm and thus, for instance, to protect the physical integrity of people.

Regarding the necessity test, however, there seem to be alternatives that cause less interference with the freedom of expression, except when we qualify "public harm" as "*imminent or existent* public harm". One could consider not rectifying or deleting the information but alternatively annexing a disclaimer stating that such information is false or publishing an accompanying text or video with true information regarding the subject. These options, however not only may not be technically feasible but may not be able to be done in time. That is why *imminent or existent* public harm passes the necessity test but any harm that would occur in the not immediate future would not. This is so because alternative ways of contradicting and confronting such information would be available to prevent such harm without deleting the

information.[32] Thus, a more restrictive interpretation of "public harm", as "imminent or existent public harm" satisfies the necessity test.

Finally, one must adopt a balancing method. We will consider the well-known laws of balancing introduced by Alexy (2014: 513) under the principle of proportionality in the narrow sense. The first one (substantive law of balancing) states that "[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other" (Alexy, 2014: 513) and the second one (epistemic law of balancing) states that "[t]he more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises" (Alexy, 2014: 514). Regarding the situation under analysis, given that information will either be changed (rectified) or deleted, the degree of non-satisfaction of the freedom of expression is very high, thus the importance of satisfying the right to physical integrity must be valued very highly for the restriction to be valid, such as cases of severe injuries to the body. On the other hand, the value of certainty over the underlying premises must be very high, that is, we must be very sure we are precluding imminent or existent physical harm[33] given the deletion of information.

A reviewer such as the Court must determine if the importance of satisfying the right to physical integrity guaranteed by the right to protection against disinformation justifies the non-satisfaction of the freedom of expression given the certainty of the premises. The problem with the definition foreseen in Article 6(2) of the Charter is that, even assuming that the other properties do not raise problems when assigning weight (information is either false or not and the intention to deceive is either present or not), causing "*imminent or existent* public harm", as a general clause (Guastini, 2011: 57-58), allows for very different degrees of evaluation and thus of weights according to the conditions of each concrete property of "public harm" (for instance between "imminent" and "existent" public harm), whereas the Constitutional Court is called to do an abstract balancing (in the case considered here).

A weight formula of the kind developed by Alexy (2014: 514) to apply the laws of balancing (but see also Klatt and Meister, 2012: 10 and ff; Duarte, 2021: 40 and ff), given the wide scope of "public harm", would have to deal with several different weighing operations for each instance of i) probability/imminence of public harm; ii) degree of severity; and iii) kinds of public harm (vg. harm done to large crowds, harm done to children, harm done to disadvantaged groups) (on this, see Zorrilla, 2007:205) which would generate different weights regarding both FE and RPI. Thus only external justification by the Court can resolve the matter as there is no formal hierarchy of constitutional norms (see Klatt and Meister, 2014: 54; Duarte, 2021: 38).

[32] There are, however worrisome inputs resulting from behavioural and social psychology claiming that the contradiction of information may sometimes lead people to cling to their false beliefs and the information that supports them in what is known as belief perseverance, see Britt, M. (2019: 94 and ff), Maegherman et al. (2021: 1 and ff); see also Wardle and Derakshan (2017: 66-67).

[33] Echoing John Stuart Mill and his harm principle (2015: 55-56).

We will not deal with external justification here. The Constitutional Court case law has mainly dealt with collisions between FE and the rights to privacy, honour and image. It has yet to deal with cases where physical harm may be considered, thus paradigmatic cases from which to infer rules of decision are missing regarding important sets of conflicting rights affected by the restriction under Article 6 of the Charter.[34]

Following our analysis, Article 6(2) to (5) seems to be partially unconstitutional. Not only because i) it would allow for a restriction of the FE with no imminent or existent harm to any constitutionally protected good, but also because ii) an internal and external justification of the prevalence of gains in the preclusion of physical harm over the losses derived from the correction or deletion of information seems possible.

6. Conclusions

The Portuguese Charter of Human Rights in the Digital Age raises quite a few problems from a normative perspective. We are first faced with the difficulty of determining the hierarchical position of its norms, given the open clause of Article 16 of the Portuguese Constitution. If one adopts a formal approach to the open clause, it seems that the human rights that the legislator wants to enshrine in the Portuguese system should be inserted at constitutional level while they are in force. This problem is mitigated, however by the fact that the majority of rights foreseen in the Charter are repetitions of rights already foreseen in the Constitution and international legal texts binding to the Portuguese system. Even so, to conclude for such repetition the interpreter is called to a comparative exercise that should not have been necessary. In this regard the Council of Europe leads the best practice with its "Guide to Human Rights for Internet Users" that focus on interpreting existing provisions in a digital context. This comparative exercise must be done with a constitutional mandate (art. 18) to assure coherence between constitutional norms on an abstract level. Thus, with this Charter, if a constitutional qualification is accepted under Article 16 of the Portuguese Constitution, it is very well possible that in the future conflicts will arise on whether certain norms of the Charter restrict constitutional norms. This was indeed the case with the right foreseen in Article 6(5) of the Charter, the "right to the protection against disinformation". An extreme example of the main problem raised by the Charter, the new right must be hierarchically qualified (at a constitutional or ordinary level) and beyond this issue it must be analised for its compliance with a fundamental right foreseen in the Constitution and international legal instruments: the freedom of expression. It seems to be the case that by introducing a wide concept of "public harm" the legislator forces a restriction that is unconstitutional: the Portuguese Media Regulator would be able to restrict the freedom of expression in any case of false and deceitful information that could generate a public harm given

[34] On the inference of rules from the properties of paradigmatic cases see Zorrilla, 2007: 205 and ff; Moreso, 2012:39.

the legislative definition. This definition, unless understood as "imminent or existent public harm" will thus have difficulty passing the necessity test. Considereing proportionality in the narrow sense given the several weighing operations that the concept of "public harm" entails it will be up to the Court to set the relevant variants of restriction and determine which, if any, pass the proportionality test. With the set FE vs RPI we aimed to show that it would not be impossible to have a valid restriction given adequate internal and external justification. This shows both the caution that the legislator must show when introducing new provisions regarding human rights and the special attention that must be given to disinformation as a concept that can be used both to qualify special kinds of harm and restrict the freedom of expression. Also, the role of the reviewer and the margin of self-restraint will be under scrutiny.

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