

Volume 6, Issue 2, December 2022

## **The Dangerous Illusion of a “National Path” to Human Rights**

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### **Editorial**

#### **DOI:**

10.14658/pupj-phrg-2022-2-1

#### **How to cite:**

De Stefani, P. (2022) ‘The Dangerous Illusion of a “National Path” to Human Rights’, *Peace Human Rights Governance*, 6(2), 105-109

#### **Article first published online**

December 2022

## The Dangerous Illusion of a “National Path” to Human Rights

*Paolo De Stefani\**

This issue of *Peace Human Rights Governance* is published in a particularly delicate historical moment for the international community as a whole. 2021 saw the COVID-19 pandemic continue to spread; then, the gradual implementation of a now near-complete exit strategy from the health crisis for most (but not all) countries that were overwhelmed by the pandemic only one year earlier. This has been thanks to the discovery, development and mass production of vaccines. At the time of writing this introduction, although new variants of the virus with high infection rates are emerging, mass vaccination has dramatically reduced the number of serious cases, causing the mortality rate of COVID-19 to decrease, albeit slowly. All States, and in particular EU Member States, are finally seeing light at the end of the tunnel.

What “lessons” have States and civil society learnt in almost two years of global pandemic? 2021 witnessed the efforts of some State and International actors in building the foundations of a shared response to the health emergency and the socio-economic crisis that ensued soon after. Europe in particular made unprecedented attempts to finance post-pandemic recovery, intertwining these actions with those that States and other social and economic actors should be implementing to tackle climate change. The commendable idea is to protect humanity from the so-called “natural” threats that humankind itself has unleashed upon the world. Despite the numerous examples of effective and forward-thinking solidarity seen at all levels, there were also destructive cases of denialism (both of the pandemic and global warming), which have had (and will continue to cause) huge consequences on the lives of current and future generations. At the same

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time, we have seen that the various nature and dynamics of political systems and governments do truly matter. States have developed extremely varied strategies to combat and control the virus. Differences have regarded the magnitude of restrictions imposed on individuals and populations, the transparency of measures, the repression of rule infringements, the fight against discrimination, and, ultimately, the respect for human rights and fundamental freedoms. Some governments imposed strict lockdowns; others tolerated more relaxed behaviour from individuals; others still took advantage of the pandemic to unnecessarily extend the state of exception and pursue some spurious objectives, not simply to protect the health of their citizens.

However, the first few months of 2022 may have given us a response to our question as to whether the pandemic has taught us anything on the need to strengthen mechanisms for solidarity and global governance: overall, the international community responded with a tragic yet resounding: Nothing.

With dismay, we must recognise that the realisation of how individuals, societies, States and our own planet Earth are fragile and vulnerable has above all promoted isolationist, nationalist and imperialistic feelings and practices. Not only has this not ended ongoing wars, but it has caused the overbreak of others once again. The Russian aggression on Ukraine, in contempt of any consideration of international law or respect for human rights and the rights of peoples, is the most extreme example. The same “white noise of information” that was reported in the Introduction to the *Italian Yearbook of Human Rights 2021* (p XVI)<sup>1</sup> as characteristic of the international response to the pandemic in 2020 instead tinged the response to Russian aggression in 2022.

The war between Russia and Ukraine once again highlighted the inadequacy of global institutions, this time in terms of collective security and defending peace. While the pandemic emphasized the discrepancy between various States and groups of States in quickly and efficiently tackling a “natural” challenge such as the spread of an aggressive and often deadly virus, as well as the shortcomings of international institutions regarding risk mitigation and protecting the lives and health of millions, the war gave witness to the powerlessness of the international community to carry out its “core business”, that is guaranteeing collective security –one of the fundamental goals of the United Nations.

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<sup>1</sup> University of Padova Human Rights Centre 'A. Papisca' (2022) *Italian Yearbook of Human Rights 2021*, Padova: Padova University Press (<http://www.padovauniversitypress.it/publications/9788869383076>).

The taboo of war has once again been broken, dramatically and explicitly, by one of the most powerful “guarantors” of peace and global security, and “peace-loving” States (article 4, UN Charter) are still searching for legal, political and diplomatic instruments that will help end the conflict in Ukraine. Moreover, they have been powerless to use any other measures to maintain or restore international peace, as envisaged in Chapter VII of the Charter. This aggression has been recognised by the General Assembly, but not by the Security Council. The International Court of Justice ordered both sides to cease all use of force, but the request went ignored. The International Criminal Court has begun in-depth investigations, but there is no possibility of opening proceedings for the crime of aggression, and trials for war crimes and crimes against humanity do not seem to be an imminent prospect.

In the meantime, Russia has been excluded from the Council of Europe and has become the target of severe economic sanctions by numerous and influential countries, to which the Russian Federation has responded with equally harmful counter-sanctions and acts of sabotage. A significant group of States and sections of the population, alongside centres of interest within the same block that support Ukraine, express “understanding” for the Russian claims and support the military action carried out by the Kremlin against Ukraine, or maintain a predatory and opportunistic distance from the crisis.

The need to take sides without being able to exercise any effective leadership even on an issue that directly involves them will damage the governments of the European Union and its peoples. The humanitarian response – the implementation of Directive 2001/55/EC which opened the doors of EU Member States to millions of Ukrainian refugees – had a strong impact, though it left Ukraine asking for more, in the form of military support. This has exposed the uncertainties and contradictions of a political institution, namely the EU, an institution that was clearly not founded to deal with wars at its external borders. Member States were already tempted by “health nationalism” during the pandemic, and once again they found themselves unprepared and exposed to a re-emergence of outright nationalism. Europe is paying for the years and decades of lack of preparation of a credible and coherent political path that defines its place in this multi-polar world. Peace is a founding value of the EU, yet it is still not adequately incorporated into institutions, values and working strategies (including credible nonviolent defence plans that can be “exported”). The Kremlin’s war rhetoric has instead stolen the show.

States run the risk of fooling themselves with the illusion that their traditional nationalist arsenal has once again turned to be the only viable response to the challenges of modern world: from national security to energy

access; from fighting climate change to protecting the population from financial risk and inflation. State policies on human rights – not forgetting the rights of peoples, the right to sustainable development (as articulated in the Agenda 2030) and the right to peace – now show a sometimes explicit tendency to “go it alone”, to forge a national path to rights and their implementation that does not necessarily align with recommendations made by international institutions.

All human rights and their related implementation and guarantee strategies are based on multilateralism. In this domain, multilateralism essentially refers to the habitus of thinking (as individuals, as a society and as institutions) within a plural context, made up of diverse stakeholders, sometimes hard-lined, but not aggressive, willing to create dialogues and agreements with one another, at least by majority vote, and share their actions to face imminent challenges. Only within a multilateral framework can human rights – universal and interdependent – be imagined and pursued. However, even multilateralism, which nobody has called explicitly into question, goes through centripetal and centrifugal phases.

One symptom of the fact that we live through a centrifugal phase in conceiving and practicing multilateralism can be seen when, even in the pursuit of universal human rights, each community emphasises its own peculiar way (*Sonderweg*) to achieve that goal; a distinct national path rooted in a nation’s incomparable history or anchored in its own unique political projects. In centrifugal multilateralism, differences from common trends and practices (the despicable “mainstream”) are highlighted, rather than identities and points of agreement. Multilateralism itself (when it exists at all) is taken for granted, a basis from which it is legitimate to step away when advantageous, proudly evoking one’s national difference (expressed in terms of national identity or economic concern). Instead of being seen as an aspirational goal in which to invest politically and strategically, multilateralism appears to be treated as a safety net, testing its resistance by conveniently granting licence where desired.

The “legal regimes” created by the numerous human rights instruments are multilateral spaces that are exposed to this double dynamic. Individual actors may display an attitude that constructively emphasises unifying elements between the national and international normative plan, thus promoting the strengthening of a common framework and any local and national articulations of such a framework. On the contrary, any exception that favours the domestic approach (a national margin of appreciation) over a shared approach, even when theoretically justifiable, threatens to loosen the multi-level safety net that protects the individual rights. This is even more evident if the national margin of discretion is used to restrict individuals’

spaces of freedom and access to rights. The situation is just as problematic when the national system claims – as a legal doctrine, as a political posture or simply as a done deed – that domestic law must prevail over international human rights law, especially when the latter is deeply and inextricably woven into the State’s legal system. In these cases, any severance of international guarantees inevitably causes domestic guarantees to shrink or at least induces an unwarranted rise in the complexity of protection mechanisms, resulting in them becoming less efficient and less accessible for the most disadvantaged individuals of society.

The tendency to overemphasise national peculiarities shows a weakening of confidence in the mechanisms of multilateralism, even when this is cloaked in good intentions and uses flawless arguments such as the call for subsidiarity and the need for a “vernacularisation” of rights. It is no coincidence that this trend has been undertaken, and in some cases taken to extreme consequences, by States that are now embracing various forms of authoritarianism, namely by reducing the guarantees provided by the rule of law and the independence of the judiciary. International human rights law, as interpreted by the supervisory international bodies, is, in many cases, a legal resource that legitimises innovation and the evolution of domestic legislation, particularly on pioneer issues where the political debate stagnates or aligns with anachronistic positions. Giving up these fundamental sources of life by opposing the primacy of national legislation (perhaps by calling on the excellence of national traditions and laws) makes the movement for human rights significantly impoverished at all levels.