ASPIRATIONAL CONSTITUTIONALISM, SOCIAL RIGHTS PROLIXITY AND JUDICIAL ACTIVISM: TRILOGY OR TRINITY?

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ABSTRACT

The epistemic community of constitutionalists and experts in public law is called to critically examine the main assumptions of fundamental social rights theory and its evident impact on the distribution of power among political actors. This article argues that the challenge of social rights' enforceability is clearly exacerbated in austerity contexts and within the framework of strong judicial review models.

One can question not only the legitimacy of downsizing legislation on social rights protection during economic setbacks, but also the constitutional courts' authority to dispute this kind of reformatio in pejus. From this perspective, the author would analyze the interesting evolution of the Portuguese Constitutional Court's jurisprudence of crisis.

Given their extensive commitment to social rights, aspirational constitutions leave more room for institutional tensions between democratic deliberation/popular sovereignty and an over-extended judicial power. Therefore, a too ambitious or unrealistic constitutional text may seduce judges to colonize political and economic issues. Precisely for that reason, this paper focuses on Brazilian right-to-health litigation, hoping to contribute to a puzzling and highly controversial constitutional debate: whether the so-called "judicial activism" is an illegitimate juristocracy or just compliance with the constitutional text?

ASPIRATIONAL CONSTITUTIONALISM

The ideational pattern of "aspirational constitutionalism", as the name suggests, is full of hope and aspirations. The text requires being an active instrument of political and social change. In order to fulfill this ambition, boldness should insinuate itself into the constitutional design. The constitutional reality is often idealized and the text focuses not on what the constitution is but on what it can be.[1] As examples we can point out many constitutional texts that emerged from authoritarian or totalitarian regimes such as the

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[1] Kim Lane Scheppele, *Aspiracional and aversive constitutionalism: The case for studying cross-constitutional influence through negative models*, 1 (2) IJCL 299, 296-324 (2003); PETER HÄBERLE, DAS MENSCHENBILDIM VERFASSUNGSSTAAT 29,30 (Duncker & Humblot, 2008).

Portuguese, the Spanish, the Colombian or the Brazilian Constitution. These examples share a very heavy political history and the ambition of getting over the struggles of the past and building a fairer future.

A. What is the relevant time: the past, the present or the future?

Constitution makers answer the question "what is the relevant time: the past, the present or the future?" differently, that is why there are diverse conceptions of constitutionalism. From an external or sociological perspective on Constitutional Law, the doctrine tends to distinguish two main conceptions of constitutionalism: (*i*) functional or protective constitutionalism; and (*ii*) aspirational constitutionalism.[2] Still, there can be a myriad of possibilities in between, more or less equidistant.

Thus, it is clear that most of the constitutional texts do not fall solely into one category.[3] For this reason, the distinction should not be exacerbated and it is suitable for a propaedeutic perspective of constitutionalism[4]. Both constitutional conceptions share a sense of common purpose and complex balance intent between the normal inconstancy of law and the need for stability and consistency endogenous to the constitutional norms.[5]

The functionalist approach goes back to the constitutional movement at the end of the 18th century. The liberal constitutions which resulted from the French and American Revolutions consecrated the rule of law, separation of powers and a catalog of essentially negative rights.[6] Nowadays we can trace this kind of constitutional perspective in the

[2]Mauricio García Villegas, *Constitucionalismo aspiracional: derecho, democracia y cambio social en la América Latina*, 75 AP 92, 89-110 (2012).

[3]INGO WOLFGANG SARLET, CURSO DE DIREITO CONSTITUCIONAL 88 (Saraiva, 2017).

[4] Catarina Santos Botelho, *Aspirações constitucionais e força normativa da Constituição – Requiem pelo conceito ocidental de Constituição?,* JORNADAS NOS 40 ANOS DA CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA – IMPACTO E EVOLUÇÃO26, 19-52,Universidade Católica Editora, 2017.

[5] Dieter Wyduckel, *Verfassung und Konstitutionalisierung – Zur Reichweite des Verfassungsbegriffs im Konstitutionalisierungsprozess*, FESTSCHRIFT FÜR FRIEDRICH E. SCHNAPP ZUM 70. GEBURTSTAG 895, 893-924 (Duncker & Humblot, Berlin, 2008), Niklas Luhmann, *Positivität des Rechts als Voraussetzung einer modernen Gesellschaft*, AUSDIFFERENZIERUNG DES RECHTS - BEITRÄGE ZUR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 145, 113-153 (Suhrkamp, Frankfurt am Main, 1999), and Peter Häberle, *Zeit und Verfassungsstaat – kulturwissenchaftlich betrachtet*, 1, JURA, 4, 1-10 2000).

[6] As Mattias Kumm, *Taking the dark side seriously: Constitutionalism and the question of constitutional progress. Or: Why is it fitting to have the 2016 ICON-S conference in Berlin*, 13 (4) I.CON 777, 777-785 (2015) puts it "the Trinitarian

United States, Canada, Austria, Germany, Belgium, Denmark or Ireland. The constitutional catalogues are frugal and minimalistic as the constitutional text only prescribes what can be achieved. Therefore, the text concentrates itself on the present moment, on what it wants to preserve in the present time and hopefully sustain in the future. In order to do so, constitutional norms tend to be politically neutral or aseptic.

On the other hand, in an aspirational constitutionalism scenario, the constitutional text is prolix, long and exhaustive, contemplating a wide range of rights and usually a generous catalog of social constitutional rights, even beyond the budgetary possibilities of the State.[7] We can identify a certain dose of constitutional pretentiousness in the way the text is worded, with too ambitious or unrealistic superlatives. This constitutional arsenal is sometimes difficult to interpret and to implement. Therefore, questions arise with regard to the dilution of borders between judicial and legislative power.

After gathering the basic traits of each constitutional conception, what we question is whether intermediate alternatives are more balanced or not? The dangers of an extremely aspirational constitution are plain to see. First, there is a distressing lack of connection between the constitutional text and constitutional reality. This disconnection is potentially disturbing for the constitutional project of a State, as it threatens its probity and suitability.[8] Instead of a normative constitution, in which the constitutional text accompanies the constitutional reality, aspirational constitutionalism is often based on semantic constitutions.[9]

In a semantic constitution, the constituent power tries to portray the historical and political moment of its elaboration.[10] As a metaphor, we can think of the constituent power taking a

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grammar of the constitutionalist project", which involved a commitment to human rights, democracy and rule of law.

[7]CATARINA SANTOS BOTELHO, OS DIREITOS SOCIAIS EM TEMPOS DE CRISE – OU REVISITAR AS NORMAS PROGRAMÁTICAS 167-164 (Almedina, 2015).

[8]Catarina Santos Botelho, *Aspirações constitucionais e força normativa da Constituição – Requiem pelo «conceito ocidental de Constituição»?,* JORNADAS NOS 40 ANOS DA CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA – IMPACTO E EVOLUÇÃO35, 19-52 (Universidade Católica Editora, 2017) (forthcoming).

[9]KARL LÖWENSTEIN,VERFASSUNGSLEHRE151-154 (Mohr Siebeck, 2000).

[10] MANUEL AFONSO VAZ, TEORIA DA CONSTITUIÇÃO – O QUE É A CONSTITUIÇÃO, HOJE?62-64 (Universidade Católica Editora, 2015).

picture of a concrete reality and trying very hard to perpetuate this reality through the times that will come. That, however, is not very likely to succeed. The problem is that, at first, it may seem that people are happy and involved with the constitutional design. However, in both, intra-generational and intergenerational perspective, the political and sociological sensibilities of one time are not necessarily bequeathed to the following decades. As time goes by, it becomes increasingly difficult not to see this one-sided constitutionalism as a helpless political cover-up that downplays the fact that a Constitution is not a governmental programme. When a constitution is not politically neutral and functionalizes its fundamental rights ideologically, it risks of being overcome by the democratic volatility.

B. Semantic constitutions or the need to perpetuate a constitutional moment

The Portuguese example is pertinent to provide an illustration of this kind of phenomena. After almost five decades of the right-wing authoritarian regime of Salazar ("Estado Novo"), there was a military coup called "*Revolução dos Cravos*" led by the Movement of Armed Forces (MFA). However, the overthrow of Salazar's dictatorship did not mean the immediate advent of democracy.[11]

In fact, there was a significant intellectual confrontation between the "revolutionary path", which defended a dominant and authoritarian constitution, and the "electoral path", which opted for a liberal and democratic constitution.[12] The difficulty of forcing a consensus around these contradictory values was quite clear. The first version of the Portuguese Constitution, approved in 1976, had a heavy ideological weight of Marxist-Leninist content through an overly programmatic wording.[13] This impressive ideological twist could have commuted into left-wing authoritarianism.

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[11] António de Araújo & J. A. Teles Pereira, *A justiça constitucional nos 30 anos da Constituição Portuguesa: notas para uma aproximação ibérica*, 10, REVISTA BRASILEIRA DE DIREITO CONSTITUCIONAL 21-22, 21-38 (2007), Gonçalo Almeida Ribeiro, *O paradoxo democrático na constituição portuguesa de 1976*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 138, 121-148, (Almedina, 2016),and PAULO CASTRO RANGEL, O ESTADO DO ESTADO – ENSAIOS DE POLÍTICA CONSTITUCIONAL SOBRE JUSTIÇA E DEMOCRACIA 136 (Dom Quixote, 2009).

[12]Andre Thomashausen, *Die revidierteVerfassung der Republik Portugal von 1976*, JÖR 443-444, 443-506 (1983); Maria Inácia Rezola, *O Movimento das Forças Armadas e a Assembleia Constituinte na Revolução Portuguesa*, 13 HISTÓRIA CONSTITUCIONAL635-659 (2012); and Maria Lúcia Amaral & Ravi Afonso Pereira, *Um tribunal como os outros. Justiça constitucional e interpretação da constituição*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 415-416, 381-446 (2016).

[13]CATARINA SANTOS BOTELHO, OS DIREITOS SOCIAIS EM TEMPOS DE CRISE – OU REVISITAR AS NORMAS PROGRAMÁTICAS 256-258 (Almedina, 2015); Joaquim Cardoso da Costa, Tribunal Constitucional e debate público, 40 ANOS DE POLÍTICAS DE JUSTIÇA EM PORTUGAL 120, 113-141 (Almedina, 2016); and JORGE

To begin with, the Portuguese Preamble states that "the Constituent Assembly affirms the Portuguese people's decision to '*open up a path towards a socialist society*'".[14] This kind of poetic and idealized Preamble is typical of what Liav Orgad calls a "ceremonial-symbolic Preamble".[15] According to the author, the Portuguese Preamble, due to its ineluctable politic character, should not be legally enforceable and is just a nonbinding historical and symbolic statement.

Next, the first Article of the Portuguese Constitution (first version of 1976) stated that "Portugal is a sovereign republic committed to transformation into a society without classes". The constitutional text had norms such as: "the Portuguese Republic is a democratic State with the goal of assuring the transition to socialism through the creation of conditions for the exercise of power by the working classes" (Article 2); "the law can regulate that the expropriation of landowners, owners and entrepreneurs or shareholders do not give rise to any compensation" (Article 82); "all nationalizations are irreversible conquests of the working classes" (Article 83).

There is no requirement of presenting more examples. This small sample of articles is enough to understand why some doctrines warned of a dangerous mismatch between text and constitutional reality, which would culminate in the loss of the normative force of the Portuguese Constitution.[16] This a perfect example of what Richard Albert describes as "constitutional dismemberment", which is a "deliberate effort to transform the *identity*, the *fundamental values* or the *architecture* of the constitution without breaking legal continuity".[17]Fortunately, the constitutional amendments of 1982 and 1989 reshaped the Portuguese Constitution and made it consonant with the substantive requirements of a truly democratic Rule of Law.

MIRANDA, DA REVOLUÇÃO À CONSTITUIÇÃO – MEMÓRIAS DA ASSEMBLEIA CONSTITUINTE181-272 (Principia, 2015).

[14] The "socialist society" refers to the Marxist-Leninist front that was very influential in the political Portuguese life at the time of the end of Salazar's dictatorship.

[15]*The preamble in constitutional interpretation*, 8 I.CON 722-723, 714-738 (2010).

[16] Heinrich Ewald Hörster, *O imposto complementar e o Estado de Direito*, III *RDES* 93, 37-136 (1977), and Jörg Polakiewicz, *Soziale Grundrechte and Staatszielbestimmungen in der Verfassungsordnung Italiens, Portugals und Spaniens*,ZAÖRV349,340-391 (1994).

[17]43 YJIL, 2018 (forthcoming).

Aspirational constitutionalism can become a sort of a "cult of constitutionalism"[18], or, as a Portuguese author had once described, a "constitutional psychosis" that asks from the constitution way more than what it can ever give. In this scenery, in each political turn all the attention will "anxiously turn to the magical idea of the constitution, as if the solution to every problem depended exclusively on it".[19] If a constitutional text is an exercise of erudition, intellect and poetry, then its rules and principles will probably not have immediate applicability and will be "sleeping rules."[20]

SOCIAL RIGHTS PROLIXITY

A. Social rights design

A macro-comparative approach shows us that constitutions come in various lengths. For a long time, social rights were disregarded as a less important fundamental rights category. In the last decades, we can identify a growing trend toward their consecration in constitutional texts.

A global survey of social rights' positivation shows a growing number of states with constitutional positivation – for example, Portugal, Brazil, Italy, France, Greece, South Africa, Argentina, and Chile, just to name a few. Other states, such as Germany, Canada, Australia or the United States, prefer to leave social rights to the *infra* constitutional legislation. [21] Nevertheless, while in some countries social rights are not a part of constitutional adjudication, this does not translate to social rights being constitutionally irrelevant.

After years of ongoing debates, the main question is still univocally unanswered: do social rights belong to the constitutional text? Some answer it affirmatively and base their response in several arguments such as social rights are "trumps" against the majority; social rights share the same dignity of liberty rights, given the fact that liberty rights are often

[18] Richard Albert, *The Cult of Constitutionalism*, 39 FSULR, 373-416 (2012).

[19] Rogério Ehrhardt Soares, *O conceito Ocidental de Constituição*, 119 REVISTA DE LEGISLAÇÃO E JURISPRUDÊNCIA, 36, 36-73 (1986).

[20] As Gargella and Courtis interestingly called them, EL NUEVO CONSTITUCIONALISMO LATINOAMERICANO: PROMESAS E INTERROGANTES, 31-34 (Cepal, 2009).

[21] Ingo Wolfgang Sarlet, *Los derechos sociales en el constitucionalismo contemporáneo: algunos problemas y desafios*, LOS DERECHOS SOCIALES COMO INSTRUMENTO DE EMANCIPACIÓN 39, 35-61, (2010).

incomplete without social rights; social rights promote a genuine equality (and not just a formal equality) between citizens.[22]

On the other side of this debate, it is argued that the social rights belong to the democratic discussion; they are neither fundamental rights nor constitutionally binding; they are incredibly costly and an "affordable luxury" only accessible to very rich states. [23] Consequently, social rights could never be designed as rights, but are instead moral duties that arise from a social idea.

B. Unbreakable walls require demolition techniques

The language of indivisibility – liberty rights *versus* social rights – is not uncommon and, according to Jeff Kenner, "[it] cloaks the reality of a 50-year long schism".[24] This systematic option is the reality of most international legislations approved after the Second World War. In 1966, the International Covenant on Civil and Political Rights ("**ICCPR**") and the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**") were approved. Yet, there are remarkable peculiarities regarding the ICESCR when compared with the ICCPR. Firstly, the ICCPR addresses states whereas the ICESCR addresses individuals. Secondly, there is a progressive clause in the ICESCR that does not exist in the ICCPR. Thirdly, contrary to the ICCPR, the ICESCR recognizes that the rights' implementation depends on available resources.

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[22] Absjorn Eide & Allas Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 15-21 (Springer, 1994); Amartya Sen, *Human rights and the limits of law*, 27 CALR 2915, 2913-2927 (2006); Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 AHRLJ 467-474 (1992); HELMUT WILLKE, STAND UND KRITIK DER NEUERENGRUNDRECHTSTHEORIE – SCHRITTE Z. E. NORMATIVENSYSTEMTHEORIE 219 (Duncker&Humblot ,1975); Norbert Bernsdorff, *Soziale Grundrechte in der Charta der Grundrechte der Europäischen Union – Diskussionsstand und Konzept*, 1 VSSR 2, 1-23 (2001); and Pierre de Vos, *Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution*, 13 AHLRJ 71, 67-101, (1997).

[23] Albie Sachs, *Social and Economic Rights: Can they be made Justiciable?*, 53 SMULR1381-1391 (2000), JOEL FEINBERG (1973) at 67-95, JÖRG PAUL MÜLLER; SOZIALERGRUNDRECHTE IN DER VERFASSUNG? 69 (Helbing Lichtenhahn Verlag, 1981); Lawrence G. Sager, *Thin constitutions and the good society*, 69 FLR 1989-1990 1989-1998 (2001); Manfred Nowak, Die Justitiabilität wirtschaftlicher, sozialer und kultureller Grundrechte, DIE DURCHSETZUNGWIRTSCHAFTLICHER UND SOZIALER GRUNDRECHTE387-405 (Norbert P. Engel, 1991); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOYLALREV 1207-1219 (1991); Richard Albert, *The Cult of Constitutionalism*, 39 FSULR, 400 373-416 (2012); and Wofgang Graf Vitzthum, *Auf der Suche nach einer sozio-ökonomischen Identität? – Staatszielbestimmungen und soziale Grundrechte in Verfassungsentwürfen der neuen Bundesländer*, VBLBW 413 404-414 (1991).

[24] *Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility*, ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 1, 1-25 (Hart Publishing, 2003).

In an international regional dimension, there is also a clear division between the European Convention on Human Rights, 1950 ("**ECHR**") and the European Social Charter, 1961 ("**ESC**"). The latter has a very inferior enforceability level when compared to the ECHR. If the ECHR is enforced by the European Court of Human Rights, ESC is monitored by the European Committee of Social Rights, which, until recently, was not considered as a jurisdictional organ.[25] In confirmation of this idea, an analysis of the constitutional jurisprudence – in states members of the Council of Europe – reveals beyond doubt that the ECHR is widely cited and used as a ground for jurisdictional decisions, while references to ESC are infinitesimal.[26] Furthermore, rights protected by the ECHR are susceptible to an individual complaint under article 34, a situation that is not echoed by the mechanisms provided for the protection of the rights provided by the ESC.[27]

After the Second World War, the profound ideological division between liberal and socialist worldviews translated itself to the normative context. However, this division should not be exacerbated. In author's opinion and in a dogmatic perspective, we should not divide fundamental rights according to different values, as if liberty rights were first class rights and social rights were second class rights.[28] These days, we can see a global effort to change the perspective of a constitutional or international "apartheid" between liberty and social rights.[29] There is not a "clear-cut division" between these rights, which is why eventual differences should not be related to alleged diverse levels of

[25] Régis Brillat, *La Charte Sociale et son acceptation progressive par les États*, 13 REDF 230, 227-243(2009).

[26] Catarina Santos Botelho, *A proteção multinível dos direitos sociais : verticalidade gótica ou horizontalidade renascentista – Do nãoimpacto da Carta Social Europeia (Revista) na jurisprudência constitucional portuguesa*, 7 LEX SOCIAL 88-123 (2017) ; Gráinne de Búrca, *The future of social rights protection in Europe*, SOCIAL RIGHTS IN EUROPE 11, 3-15 (Oxford University Press, 2005) ; J.-M. Belorgey, *Quelles garanties des droits sociaux en temps de crise?*, 2 LEX SOCIAL 7, 1-11 (2016) ; and Jean-François Akandji-Kombé, *The Material Impact of the Jurisprudence of the European Committee of Social Rights*, SOCIAL RIGHTS IN EUROPE 89, 89-108 (Oxford University Press, 2005).

[27] Still, it's relevant to mention the collective complaint mechanism, created by the Additional Protocol (1995).

[28] CATARINA SANTOS BOTELHO, OS DIREITOS SOCIAIS EM TEMPOS DE CRISE – OU REVISITAR AS NORMAS PROGRAMÁTICAS 286-287 (Almedina, 2015); Frédéric Sudre, *La protection des droitssociauxpar la Coureuropéenne des droits de l'homme : un exercice de «jurisprudencefiction»?*, 54 RTDH 757, 755-779 (2003); Ngo Wolfgang Sarlet, *Los derechos sociales en el constitucionalismo contemporáneo: algunos problemas y desafíos*, LOS DERECHOS SOCIALES COMO INSTRUMENTO DE EMANCIPACIÓN 40, 35-61, (2010); and Mariella Saettone, *El estado de derecho y los derechos económicos sociales y culturales de la persona humana*, RIIDH 142-143, (2004), at 142-143, 133-154.

[29] Jorge Pereira da Silva, *Os direitos sociais e a Carta dos Direitos Fundamentais da União Europeia*, XV (2) DIREITO E JUSTIÇA 154-155, 147-230 (2001).

dignity/relevance/ontological worthiness, but should be associated with different formal traits of the norms that consecrate fundamental rights instead.[30]

During several decades, a common perspective regarding fundamental rights divided them into two sealed and impenetrable categories: (*i*) *liberty* rights, which are negative rights, rest on state abstention and, therefore, are cost-free; and (*ii*) *social* rights, which are sheer positive rights and demand costly and extensive intervention from the state in order to correct inequalities. In other words, the main logic we are used to, even if just for propaedeutic intentions, is the following: (*a*) liberty rights → *non facere* obligations → non costly; (*b*) social rights → *facere* obligations → costly.

In the last decade, there have been many doctrinal and jurisprudential enlightenments which show us that this dichotomy can be misleading. On the one hand, both liberty and social rights have negative and positive dimensions. Although their positive dimension represents a considerable length in social rights design, it is certainly not an exclusive liberty rights' trait.[31] Social rights do have negative dimensions, even if in some rights' design this negative dimension is just distinguishable in the rights' minimum content. Liberty rights also have positive dimensions, as electoral rights can easily demonstrate.

Regarding rights' costs, there is a tendency to consider social rights as overly pricey when compared to cost-free liberty rights.[32] The truth is that all fundamental rights have significant budgetary implications and the idea of cost-free rights is a myth.[33]

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[30] Simon Deakin and Jude Browne, *Social Rights and Market Order: Adapting the Capability Approach*, ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 38, 27-43 (2003).

[31] FRIEDERIKE VALERIE LANGE, GRUNDRECHTSBINDUNG DES GESETZGEBERS – EINE RECHTSVERGLEICHENDE STUDIE ZU DEUTSCHLAND,FRANKREICH UND DEN USA 444, (Mohr Siebeck, 2010); and Hans-Jürgen Whipfelder, *Die verfassungsrechtliche Kodifizierung sozialer Grundrechte*, ZRP 147, 140-149 (1986).

[32] EVA M. K. HÄUBLING, SOZIALE GRUNDRECHTE IN DER PORTUGIESISCHEN VERFASSUNG VON 1976*,* 67 (Nomos Verlagsgesellschaft, 1997); and Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, TLR 1896, 1895-1919 (2004).

[33] José Casalta Nabais, *Reflexões sobre quem paga a conta do estado social*, 7 RFDUP 51-52, 51-83 (2010); Luigi Ferrajoli, *Derechos sociales y esfera pública mundial*,LOS DERECHOS SOCIALES EN EL ESTADO CONSTITUCIONAL 54, 47-59 (Tirant to Blanch, 2013); Raymond Plant, *Social Rights and the Reconstruction of Welfare*, CITIZENSHIP 56, (Lawrence & Wishart, 1991); STEPHEN HOLMES and CASS R. SUNSTEIN, THE COST OF RIGHTS – WHY LIBERTY DEPENDS ON TAXES (W. W. Norton & Company, 1999), at 43-48; and Volker Neumann, *Sozialstaatsprinzip und Grundrechtsdogmatik*, DVBL 92-100 (1997).

In conclusion, liberty and social rights cannot be successfully compartmentalized because they are deeply interconnected and mutually dependent. They always require the reciprocal enlightenment of engagement.

C. Social rights in the Portuguese Constitution

C.1 *Identifying social rights' regimes*

The wishful thinking of the Portuguese constitutional framers is well documented. Many foreign authors considered this baroque text an inconsistent compromise between liberalism and socialism.[34] The illusion of continuous progress translated in one of the widest social rights' catalogue in the world and probably the widest in Europe.[35]

In the Portuguese Constitution fundamental rights are divided in two categories: (*i*) rights, liberties and freedoms (Title II – articles 24 to 57); (*ii*) social, economic and cultural rights (Title II – articles 58 to 79). To highlight this distinction, the Constitution *warrants* liberty rights (*b)* article 9) and *promotes* social rights (*d)* article 9). As we can see, these verbs are not synonyms and reflect a particular constitutional idiosyncrasy.

This division is relevant since the constitutional framer consecrated a special regime for rights, liberties and freedoms (herein liberty rights). Indeed, the Portuguese Constitution reserves a special regime to liberty rights: they have immediate applicability, bind public and private entities and benefit from rigorous limitations to their restriction (article 18);[36] the right to "resist any order that infringes their rights, freedoms or guarantees and, when it is not possible to resort to the public authorities, to use force to repel any aggression" (article 21); furthermore, unless it also authorizes the Government to do so, the Assembly of the Republic (Parliament) has exclusive competence to legislate on liberty rights (*b*) no. 1 article 165);[37] finally, amongst several material limitations on constitutional amendment,

[34] GEOFFREY PRIDHAM, THE DYNAMICS OF DEMOCRATIZATION – A COMPARATIVE APPROACH 208 (2000).

[35] *See* Avi Ben-Bassat & Momi Dahan, *Social rights in the constitution and in practice*, 36 (1) JOURNAL OF COMPARATIVE ECONOMICS 103-119 (2008); José Martinez Soria, *Das Recht auf Sicherung des Existenzminimums*, 13 JURISTENZEITUNG 647-655 (2005); and Mónica Brito Vieira & Filipe Carreira da Silva, *Getting Rights Right: Explaining social rights constitutionalization in revolutionary Portugal*, 11 (4) IJCL, 898-899, 898-922 (2013).

[36] The immediate applicability clause was clearly inspired by article 1/3 from the German *Grundgesetz*.

[37] Although some social rights also benefit from this partially exclusive legislative competence from the Assembly of the Republic, given *f)*, *g)* and *h)* no 1 article 165 (bases of social security, national health service, nature/ecologic balance/cultural heritage and the e general regime governing rural and urban rentals).

"constitutional revision laws must respect citizens' rights, freedoms and guarantees" (*d*) article 288).

C.2 ***Social rights' specificities in the Portuguese Constitution***

Given social rights' specificities in the Portuguese legal system, it is necessary to establish whether the relationship between liberty rights and social rights should be *dichotomous, unitary* or of *interaction*. We stand for a renewed understanding of social rights, based on logic of material indivisibility and structural interaction between liberty rights and social rights.[38]

Given the impressive array of social rights, the question that follows can be stated thus: which is the social rights' regime? Is it same as liberty rights? The Portuguese doctrine is highly divided on this matter. We will present the three main narratives that were built around this inquiry:

(i) Some authors defend a rigid bifurcation between liberty and social rights and even argue for *an ontological superiority* of liberty rights when compared with social rights.[39] Far from conferring independent constitutional rights, social rights would be principles orientating state's action.

(ii) At the other extreme of this discussion, others defend regime *parity* between both the rights and refuse any distinction.[40] Even if social rights' content are not constitutionally determined, the reality is that the Portuguese legislator has already legislated on all social rights. Then, this *infra* constitutional legislation on social

[38] CATARINA SANTOS BOTELHO, OS DIREITOS SOCIAIS EM TEMPOS DE CRISE – OU REVISITAR AS NORMAS PROGRAMÁTICAS313-321 (Almedina, 2015).

[39] CARLOS BLANCO DE MORAIS, CURSO DE DIREITO CONSTITUCIONAL – TEORIA DA CONSTITUIÇÃO EM TEMPO DE CRISE DO ESTADO SOCIAL II 531-545 (Coimbra Editora, 2014); JÓNATAS MACHADO, LIBERDADE DE EXPRESSÃO – DIMENSÕES CONSTITUCIONAIS DA ESFERA PÚBLICA NO SISTEMA SOCIAL 87 (Coimbra Editora, 2002); and PAULO OTERO, I LIÇÕES DE INTRODUÇÃO AO ESTUDO DO DIREITO 224 (Pedro Ferreira, 1998).

[40] JORGE REIS NOVAIS, AS RESTRIÇÕES AOS DIREITOS FUNDAMENTAIS NÃO EXPRESSAMENTE AUTORIZADAS PELA CONSTITUIÇÃO 76-80 (Coimbra Editora, 2003). This unitary approach is followed by ISABEL MOREIRA, A SOLUÇÃO DOS DIREITOS, LIBERDADES E GARANTIAS E DOS DIREITOS ECONÓMICOS, SOCIAIS E CULTURAIS NA CONSTITUIÇÃO PORTUGUESA 89 (Almedina, 2007); JORGE SILVA SAMPAIO, O CONTROLO JURISDICIONAL DAS POLÍTICAS PÚBLICAS DE DIREITOS SOCIAIS 181-183 (Coimbra Editora, 2015); VASCO PEREIRA DA SILVA, A CULTURA A QUE TENHO DIREITO – DIREITOS FUNDAMENTAIS E CULTURA 113-145 (Almedina, 2007), amongst others.

rights has reached the status of fundamental worth as a constitutional *continuum*.[41] Yet the assumption underpinning this thesis – that fundamental rights' regime is unitary – is not what the constitutional text consecrates de *jure condito*, albeit interesting *de jure condendo*.

(iii) Nevertheless, the majority of the doctrines (as included by the author) supports an intermediate thesis – more or less equidistant – which states that there is no substantial hierarchy between rights, just a *formal* distinction, based either on different regimes, on State's duties or even on the determinability of the right's content.[42] According to this perspective and in a dogmatic point of view, fundamental rights (either liberty rights or social rights) are indivisible, unitary and non-hierarchical. However, the constitutional design of fundamental rights has significant differences, whether the norm is a liberty right or a social one.

There is dissimilarity between immediate applicability and binding effect. A norm can have a binding effect without being immediately applicable.[43] In the Portuguese context, immediate applicability means that the courts can apply the Constitution directly, even against an infra-constitutional law. In other words, immediate applicability is the possibility of direct application, regardless of *interpositiolegislatoris*.[44] That being said, we can conclude that immediate applicability is a plus, an upgrade of the principle of constitutionality. All fundamental rights are binding, but not all of them are *normanormata* and benefit from having immediate applicability.

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[41] However, it must be stressed that intermediate theses believe this discussion shouldn't be placed with regard of *infra* constitutional legislation, but instead should be placed at a constitutional level, comparing social rights' norms with liberty rights' norms.

[42] João Carlos Loureiro, *Constitutionalism, welfareand crises*, 1 (3) REDP 46-47, 41-58 (2014); JOÃO CAUPERS, OS DIREITOS FUNDAMENTAIS DOS TRABALHADORES E A CONSTITUIÇÃO 24 (Almedina, 1985); JORGE MIRANDA, CONTRIBUTO PARA UMA TEORIA DA INCONSTITUCIONALIDADE 74-76 (Coimbra Editora, 1996); JOSÉ CARLOS VIEIRA DE ANDRADE, OS DIREITOS FUNDAMENTAIS NA CONSTITUIÇÃO PORTUGUESA DE 1976 96 (Almedina, 2012); J. J. GOMES CANOTILHO, DIREITO CONSTITUCIONAL E TEORIA DA CONSTITUIÇÃO 802-804 (Almedina, 2003); JOSÉ MELO ALEXANDRINO, I A ESTRUTURAÇÃO DO SISTEMA DE DIREITOS, LIBERDADES E GARANTIAS NA CONSTITUIÇÃO PORTUGUESA 153-157 (2006); MANUEL AFONSO VAZ, LEI E RESERVA DA LEI – A CAUSA DA LEI NA CONSTITUIÇÃO PORTUGUESA DE 1976 293 (Coimbra Editora, 2013); and Rui Medeiros, *O Estado de Direitos Fundamentais português: alcance, limites e desafios*, II ANUÁRIO PORTUGUÊS DE DIREITO CONSTITUCIONAL 42 (Coimbra Editora, 2002).

[43] FRANCISCO BALAGUER CALLEJON, II FUENTES DELDERECHO 21 (1991), and Jean-François Akandji-Kombé, *De l'invocabilité des sources européennes et internationales du droit social devant le juge interne*, DROIT SOCIAL 1015-1019, 1014-1026 (2012).

[44] JOÃO CAUPERS, OS DIREITOS FUNDAMENTAIS DOS TRABALHADORES E A CONSTITUIÇÃO127 (Almedina, 1985).

Therefore, the author proposes a distinction of immediate applicability intensity. Up to a certain point, all fundamental rights are immediately applicable – they benefit from what we call a "*latosensu* immediate applicability", which means that they can derogate norms that violate them or serve as an interpretative tool. *Prima facie*, social rights norms are only *latosensu* immediately applicable. If they prove to be clear, precise and unconditional, then they will be upgraded to benefit from the liberty rights regime, which has *strictosensu* applicability[45].

C.3 ***Requiem for the non-retrocession principle?***

The spirit of generosity of the Portuguese constitutional frames regarding social rights' design raises many pertinent questions and exacerbates some problems. One interesting debate is with regard to the question, whether social rights granted in infra-constitutional legislation can be restricted or even limited. Is there a principle of irreversibility of social conquests?

The principle of the prohibition of social retrogression is not stated in the Portuguese Constitution, but some argue that it springs from rule of law derivations, such as the principles of equality, proportionality and trust protection (doctrine of legitimate expectations). [46] Consequently, once a social right receives concretization in infra-constitutional legislation, it becomes a substantive constitutional fundamental right – acquired or vested social right – and cannot be eliminated or restricted.[47]

The author strongly disagrees with this thesis. Firstly, the democratic principle rests upon the principles of majority rule, periodicity, pluralism and the fact that elected legislatures are the principal forum for passing laws in a representative democracy.[48] Insomuch as

[45] Catarina Santos Botelho, *40 Anos de Direitos Sociais – Uma reflexão sobre o papel dos direitos fundamentais sociais no século XXI*, 29 Julgar, 206-207, 197-216 (2016).

[46] Articles 2, 13 and 18, 2 of the Constitution.

[47] J. J. GOMES CANOTILHO e VITAL MOREIRA, FUNDAMENTOS DA CONSTITUIÇÃO 131 (Coimbra Editora, 1991). Nevertheless, J. J. GOMES CANOTILHO, *Metodologia «fuzzy» e «camaleões normativos» na problemática actual dos direitos económicos, sociais e culturais*, ESTUDOS SOBRE DIREITOS FUNDAMENTAIS97-114 (Coimbra Editora, 2008) seems to be defending this thesis less and less enthusiastically.

[48] RAINER GEESMANN, SOZIALE GRUNDRECHTE IM DEUTSCHEN UND FRANZÖSISCHEN VERFASSUNSGRECHT UND DER CHARTA DERGRUNDRECHTE DER EUROPÄISCHEN UNION (2005) at 244, and VOLKER NEUMANN401 (Europäischer Verlag der Wissenschaften, 1998).

legislative process is not a one-way street, the legislator is free to change the relevance he gives to each fundamental right, considering that he respects other fundamental principles and constitutional limitations to restrictions.

Secondly, this theoretical construction is wrongly premised on fundamental social rights being self-executing norms on the grounds of their constitutional consecration. If we accept the assertion that the legislator cannot go back in any social right's policy, then the lofty goals of our glorious social rights' catalogue would translate in a potential constitutionalization of the entire infra-constitutional legislations on social rights.[49] It seems that the seductiveness of pan-constitutionalism – transformation of infra constitutional law in constitutional law – is still alive.[50]

Thirdly and quite ironically, social rights would be more immune to the legislative activity than liberty rights, on account of liberty rights' restriction being admissible in the Portuguese Constitution.[51]/[52]

According to the author, the non-retrocession principle is not a constitutional principle but motto for political programmes. Nonetheless, we must stress out some constitutional safeguards that the Portuguese constitution allows on social rights: (*i*) retrocession must always be sufficiently grounded for protecting another *in casu* stronger constitutional right;[53] (*ii*) social rights' core must be protected. For example, the Portuguese legislator cannot eliminate the national health system, but he can change it into a more or less socialized system or a more or less decentralized one.[54]

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[49] MATTHIAS CORNILS, DIE AUSGESTALTUNG DER GRUNDRECHTE – UNTERSUCHUNG ZUR NORMATIVEN AUSGESTALTUNG DER FREIHEITSRECHTE 541 (Mohr Siebeck, 2005).

[50] João Carlos Loureiro, *Constitutionalism, welfareand crises*, 1 (3) REDP 48, 41-58 (2014).

[51] Articles 18(2) and 18(3).

[52] JOÃO CAUPERS, OS DIREITOS FUNDAMENTAIS DOS TRABALHADORES E A CONSTITUIÇÃO 133 (Almedina, 1985), JORGE REIS NOVAIS, DIREITOS SOCIAIS – TEORIA JURÍDICA DOS DIREITOS SOCIAIS ENQUANTO DIREITOS FUNDAMENTAIS 244 (2017); and MANUEL AFONSO VAZ, LEI E RESERVA DA LEI – A CAUSA DA LEI NA CONSTITUIÇÃO PORTUGUESA DE 1976 384 (Coimbra Editora, 2013).

[53] José Carlos Vieira De Andrade, *O Papel do Estado na Sociedade e na Socialidade*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 251, 239-255 (Almedina, 2016); And Maria Benedita Urbano, *Ainda algumas notas breves sobre a criação de direito pelos juízes constitucionais*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 372, 363-379 (Almedina, 2016).

[54] JORGE MIRANDA, IV MANUAL DE DIREITO CONSTITUCIONAL 494 (Coimbra Editora, 2012).

What we object is that there is no justification for claiming social rights as immutable. Successive cycles of fiscal loosening and retrenchment are a reality of economic recoveries and setbacks. Despite many social empathic yet circular defenses of the non-retrogression principle, we are not convinced of their validity. Additionally, the non-retrogression principle receives scant attention from the Portuguese jurisprudence.

In 1984, the instantly created Portuguese Constitutional Court applied the principle of non-retrogression, in a famous judgment concerning a legislation that revoked a significant part of the law that created a national health system.[55] From this judgment onwards, the Constitutional Court adopted terse, decaffeinated and rhetorical references to non-retrogression, essentially referring to the judgment of 1984, but deciding on the grounds of violation of other (constitutional) principles. Its lingering presence in the Portuguese jurisprudence through several decades indicates poor dogmatic grounding for non-retrogression as a constitutional principle.[56]

JUDICIAL ACTIVISM

A. Constitutional courts trapped in a legitimacy crisis

Almost 40 years ago, Ernst Forsthoff prognosticated a "transition from a parliamentary legislative state to a judicial-constitutional judicial state".[57] Once surpassed the idea of judicial activity as mere legal syllogistic reasoning or "*buche qui prononce les paroles de la loi*", it was recognized that this activity included moments of creation and influenced the political process of a dynamic society.[58] The danger of the judicial usurpation of politics is very well-

[55] Available, in a Portuguese version at http://www.tribunalconstitucional.pt/tc/acordaos/19840039.html

[56] CATARINA SANTOS BOTELHO, *Os direitos sociais num contexto de austeridade: um elogio fúnebre ao princípio da proibição do retrocesso social?*, I/II REVISTA DA ORDEM DOS ADVOGADOS, 259-294 (2015).

[57] *Die Umbildung des Verfassungsgesetzes*, VERFASSUNG: BEITRÄGE ZUR VERFASSUNGSTHEORIE 148 (Wissenschaftliche Buchgesellschaft, 1978).

[58] RALPH CHRISTENSEN & ANDREAS FISCHER-LESCANO, DAS GANZE DES RECHTS – VOM HIERARCHISCHEN ZUM REFLEXIVEN VERSTÄNDNIS DEUTSCHER UND EUROPÄISCHER GRUNDRECHTE 263 (Duncker & Humblot, 2007).

know.[59] Michel Rosenfeld argues constitutional states tend to constitutionalize the political and to politicize the constitution.[60]

The economic and financial crises that have affected Europe reopened the debate about judicial self-restraint as a tool for interpreting more abstract norms, such as fundamental rights norms. When legislative power acts contrary to the constitution, jurisdictional power (constitutional courts and/or the ordinary courts, depending on the constitutional justice model) can invalidate this unconstitutional action – jurisdictional restraint. Contrastingly, the only control available for jurisdictional activity is self-restraint.

Constitutional courts are not co legislators but controllers. Legislative power does have that positive function of creating legislation.[61] Constitutional courts are asked to intervene as a "negative legislator", in order to invalidate unconstitutional positive inputs given by the legislative power.[62] Should constitutional judges upgrade from mere "negative legislators" or watchdogs to policymakers? [63]

Even so, the constitutional court's activity is quite difficult. We cannot lose insight of what constitutional courts are asked: to decide whether or not public policies respect the Constitution. On one hand, if the constitution is political, then a constitutional judgment cannot be politically aseptic. On the other hand, courts should not dethrone legislators.[64] Therefore, what divides politics from constitutional jurisdictions is not the *quisjudicabit*

[59] Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznormen. Zur gegenwärtig Lage der Grundrechtsdogmatik*, 29, DER STAAT 25, 1-31 (1990).

[60] *Constitutional adjudication in Europe and the United States: paradoxes and contrasts*, EUROPEAN AND US CONSTITUTIONALISM 205, 197-238 (Cambridge University Press, 2005). For the origin of "judicial activism", *see* Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CLR, 1441 -1478 (2004).

[61] Ingo von Münch, *El Tribunal Constitucional Federal como actor político?*, 6 AIJC 581, 567-582 (2002); and Uwe Wagschal, *Verfassungsgerichte als Vetospieler in der Steuerpolitik*, POLITIK UND RECHT, 581, 559-584 (Verlag für Sozialwissenschaften, 2006).

[62] HANS KELSEN, JURISDIÇÃO CONSTITUCIONAL 153 (Martins Fontes, 2003).

[63]MARIA BENEDITA URBANO, *Ainda algumas notas breves sobre a criação de direito pelos juízes constitucionais*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 377, 363-379 (Almedina, 2016).

[64] Manuel Aragón Reyes, *La interpretación de la Constitución y el carácter objetivado del control jurisdiccional*, 6 (17) REDC 128, 85-136 (1986).

(object) of their decisions – constitutional text – but the grounding for their decisions.[65] If legislators are responsible for the lawmaking, constitutional courts are adjudicators.

Nevertheless, there is a qualitative difference about legislation and jurisprudence.[66] As the legislator is the first constitutional interpreter, its function is to determine *prima facie* that whether the legislation is in accordance with the constitution. Besides, the legislator benefits from a *constitutional preference*, on the grounds of being the state power responsible for creating legislation. On the other hand, *constitutional primacy* is given to constitutional courts for interpreting and applying the constitutional text.[67]

Nowadays, judicial activism is a label often used to inadvertently shadow constitutional enlightenment. Very sharply, Nuno Garoupa discusses whether the pejorative term "activism" really is "a bad thing".[68] In a context like the Portuguese one, where the Constitutional Court has significant powers of constitutional review, judicial activism cannot simply mean strong constitutional adjudication.[69] Therefore, given the fact that the label "judicial activist" is used quite superficially, we agree with the author's conclusion of "judicial activism" being somehow "an empty concept", hence a vicious circular concept.[70]

According to the author, a properly understood notion of "judicial activism" would then be one that describes controversial judicial behavior, "judicial misuse of authority", such as

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[65] DOROTHEE AX, PROZEßSTANDSCHAFT IM VERFASSUNGSBESCHWERDE-VERFAHREN – ZUGLEICH EIN EXKURS BETREFFS METHODENRICHTERLICHER RECHTSFORTBILDUNG IM VERFASSUNGSBESCHWERDE-VERFAHREN 25 (Nomos Verlagsgesellschaft, 1994).

[66] HORST DREIER, DIMENSIONEN DER GRUNDRECHTE – VON DER WERTORDNUNGSJUDIKATUR ZU DEN OBJEKTIV-RECHTLICHENGRUNDRECHTSGEHALTEN 52 (Schriftenreihe der Juristischen Studiengesellschaft, 1993); Paul Kirchhof, *Verfassungsgerichtsbarkeit und Gesetzgebung*, VERFASSUNGSGERICHTSBARKEIT UNDGESETZGEBUNG 16, 5-22 (C.H.Beck, 1998).

[67] *See* Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznormen. Zur gegenwärtig Lage der Grundrechtsdogmatik*, 29, DER STAAT 18, 1-31 (1990).

[68] *Comparing Judicial Activism – Can we say that the US Supreme Court is more Activist than the German Constitutional Court?*, RPF 1090, 1089–1106 (2016).

[69] If we compare it to the countries with strong-forms of constitutional review, we will conclude that the Portuguese constitutional justice is quite strong, albeit not having a constitutional complaint mechanism that could allow (as the German "*Verfassungsbeschwerde*" or the Spanish "*recurso de amparoconstitucional*") citizens to address the Constitutional Court directly.

[70] *Comparing Judicial Activism – Can we say that the US Supreme Court is more Activist than the German Constitutional Court?*, RPF 1090-1091, 1089–1106 (2016).

"sticking down constitutional legislation" or acting from a partisan point of view.[71] As Mattias Kumm points out "once judicial power becomes so strong that overall legislative effective control is lost, the step from contestatory democracy to *juristocracy* has been taken". [72]

B. Do aspirational constitutions promote judicial activism?

B.1 ***Portuguese Constitutional Court and austerity***

A prolix positivation of social rights could lead to an uncontrolled judicial activism, especially in a crisis context and when all eyes are on the state's budget.[73] When critiques regarding the activity of the constitutional court are polarized, then also their legitimacy is being questioned. In the European context, constitutional courts were widely criticized for acting with substantial judicial self-restraint when faced with decisions that carried out severe economic implications.[74] This attitude was seen as an unacceptable deference to the legislator and an inversion of the constitutionality principle.[75]

Likewise, the Portuguese Constitutional Court (PCC) was often criticized by its *favor legislatoris* (deference towards the legislator) jurisprudence in the beginning of the application of the Memorandum of Understanding.[76] This problem was very pertinent during "Troika" intervention in Portugal, which started in 2011.[77] The Memorandum of Understanding signed between the International Monetary Fund, the European Commission and the European Central Bank compelled the Portuguese legislators to a very

[71] IDEM, at 1092-1093.

[72] *Constitutional Courts and Legislatures – Institutional Terms of Engagement*, 1 CLR, 56, 55-66 (2017).

[73] JOSÉ MELO ALEXANDRINO, I A ESTRUTURAÇÃO DO SISTEMA DE DIREITOS, LIBERDADES E GARANTIAS NA CONSTITUIÇÃOPORTUGUESA 44 (Almedina, 2006).

[74] Volker Neumann, *Sozialstaatsprinzip und Grundrechtsdogmatik*, DVBL 04, 92-100 (1997); and WouterVandenhole, *Conflicting Economic and Social Rights: the Proportionality Plus Test*, CONFLICTS BETWEEN FUNDAMENTAL RIGHTS, 559-590 (2008).

[75] Rainer Wahl, *Der Vorrang der Verfassung*, 20 DER STAAT 487, 485-516 (1981).

[76] JORGE REIS NOVAIS, DIREITOS SOCIAIS – TEORIA JURÍDICA DOS DIREITOS SOCIAIS ENQUANTO DIREITOS FUNDAMENTAIS 374 (2017).

[77] More generally, *see* Mattias Kumm, *Taking the dark side seriously: Constitutionalism and the question of constitutional progress. Or: Why is it fitting to have the 2016 ICON-S conference in Berlin*, 13 (4) I.CON 779, 777-785 (2015).

strict austerity programme, which predictably lead to significant budgetary cuts and other measures: public sector wage cuts, tax increases, flexibilization of dismissal rules, pensions cuts and other welfare benefits, privatization of public utilities, increased working hours (for civil servants and equivalent), convergence of pension systems (public and private sectors), amongst other measures.

During 2010-2011, PCC judgments seemed to adhere to the crisis's rhetoric and to refrain from interfering with budgetary impositions and international commitments.[78]/[79] These endogenous and exogenous constraints justified the permissiveness of the PCC, which allowed many austerity laws to remain in force or to get into force.

However, soon after, the PCC showed a decreasing deference towards the legislator, arguing that the "exceptional argument" could not be sustained for a long period of time and stating that its tolerance to the crisis argument would be inversely proportional to the duration of the crisis.[80]

More recently, the PCC undertook a formulation of the constitutionality judgment according to the reasoning of normality, giving as surpassed the argument of exceptional economic-financial conjuncture. [81] These reasoning coincided with the Portuguese withdrawal from the assistance program by June 2014.

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[78] Rui Medeiros, *Jurisprudência Constitucional Portuguesa sobre a Crise: Entre a Ilusão de um Problema Conjuntural e a Tentação de um Novo Dirigismo Constitucional*, O TRIBUNAL CONSTITUCIONAL E A CRISE – ENSAIOS CRÍTICOS 263-288 (Almedina, 2014).

[79] PCC ruling number 399/2010 from October 27th, available in an English version at http://www.tribunalconstitucional.pt/tc/en/acordaos/20100399s.html (retroactive personal income tax pensions); and number 396/2011 from September 21th, available only in Portuguese at http://www.tribunalconstitucional.pt/tc/acordaos/20110396.html (public sector wage cuts).

[80] PCC ruling number 353/2012 from July 5th, available in an English version at http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html (suspension of the Christmas-month (13th month) and holiday-month (14th month) payments of annual salaries, both for persons who receive salaries from public entities and for persons who receive retirement pensions from the public social security system). This judgment was highly controversial as the PCC limited the retroactive effects of the declaration of unconstitutionally on the grounds of "exceptionally important public interest" (article 282/4). In fact, the PCC suspended its decision's effects in order to permit the full execution of the state budget (which had already been executed for half a year); PCC ruling number 187/2013 from April 5th, available in an English version at http://www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html (review of the constitutionality of norms contained in the State Budget Law for 2013).

[81] PCC ruling number 862/2013 from December 19th, available in an English version at http://www.tribunalconstitucional.pt/tc/en/acordaos/20130862s.html (Civil Service Law – Statute governing the Retirement of Public Sector Staff); PCC ruling number 413/2014 from May 30th, available in an English version at http://www.tribunalconstitucional.pt/tc/en/acordaos/20140413s.html (review of the

These cases thus emphasize the power given to constitutional jurisdictions. Even if the PCC did not invalidate unconstitutional governmental measures on the grounds of fundamental social rights violations – but the violation of the principles of equality, proportionality, and protection of trust instead – its activity was considered highly activist.[82] The PCC received unprecedented attention and international coverage, which combined endorsement and disapproval insights.[83] How did the PCC's reputation change from almost 30 years of a relatively unknown existence (not to say a diminished existence) to a kind of super-hero constitutional guardian (to some) or to a *constitutional juristocracy* (to others)?

If some praised the Court's unwillingness to convey with social state downsizing,[84] others consign it to a corner of shame for supporting an unaffordable welfare state and obstructing a free-market economy.[85] In an empirical point of view, a Portuguese study

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constitutionality of norms contained in the State Budget Law for 2014 – the PCC declared the unconstitutionally of the majority of the measures syndicated); PCC ruling number 575/2014 from August 14th, available in an English version at http://www.tribunalconstitucional.pt/tc/en/acordaos/20140575s.html (proposed creation of an additional tax- "Sustainability Contribution" - updating pensions in the public social protection system); PCC ruling number 3/2016 from January 13th, available in an English version at http://w3b.tribunalconstitucional.pt/tc/en/acordaos/20160003s.html (elimination of lifetime annuity for former political officials, declared unconstitutional on the grounds of the violation of the principle of the protection of trust).

[82] We have to stress out, as Claire Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry*, EUROPEAN UNIVERSITY INSTITUTE 11 (2015), rightly did, that in other judgments in which the Court reasoned changes driven by the bailout programme, specific labour and social rights provisions were applied. *See* PCC ruling number 602/2013 from September 20th , http://www.tribunalconstitucional.pt/tc/en/acordaos/20130602s.html.

[83] Claire Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe: a challenging new area ofconstitutional inquiry*, EUROPEAN UNIVERSITY INSTITUTE 13-14 (2015); and Joaquim Cardoso da Costa, *Tribunal Constitucional e debate público*, 40 ANOS DE POLÍTICAS DE JUSTIÇA EM PORTUGAL113, 113-141 (Almedina, 2016).

[84]Andreas Dimopoulos, *PIGS and Pearls: State of Economic Emergency, Right to Resistance and Constitutional Review in the Context of the Eurozone Crisis* 7 (4) VJICL501 -520 (2013), Luis Gordillo Pérez, *Derechos Sociales y Austeridad*, LEX SOCIAL, 55, 34-56 (2014), and Nelliana Rodean, *Social rights in our backyard: 'Social Europe' between standardization and economic crisis across the continent*, EUROPEAN SOCIAL CHARTER AND THE CHALLENGES OF THE XXI CENTURY – LA CHARTE SOCIALE EUROPÉENNE ET LES DÉFIS DU XXIE SIÈCLE, 41-42, 23-49 (Edizioni Scientifiche Italiane, 2014).

[85]Susan Corado, Nuno Garoupa & Pedro Magalhães, *Judicial Behaviour Under Austerity – An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002-2016*, JLC 26 (2017), at 10, even gather significant elements that showed how far PCC critics went: "sanctions against judicial party misalignment" were suggested along with proposals for the "dissolution of the Constitutional Court as an independent court and for the consequent transfer of its powers to the Supreme Court".

revealed that the judicial behavior of the PCC "exhibits much less exceptional patterns than often argued".[86]

Regardless of where one stands in the above controversy, it is important to stress out that a constitutional court is not just "another court". Although constitutional courts share the main aspects of other jurisdictions – so, regarding this subject, the logic should not be one of "constitutional courts" *versus* "the others"[87] – at the same time they display very distinctive traits: the designation of their judges, the object of their decisions and, more importantly, their parameter – the Constitution. A constitutional text is not just the *norma normarum* of a state (only through an internal perspective, by all means) but a very complex and compromised political tissue.[88] There is a world of difference between interpreting the constitution text or an infra constitutional norm.[89]

B.2 ***Right-to-health litigation in Brazil: helicopter judging?***

On the other side of the Atlantic, the Brazilian Constitution competes with the Portuguese in terms of the magnitude of the catalogue of fundamental rights, in particular the one referring to social rights. The 1988 Brazilian Constitution establishes economic, social and cultural rights, spread over several articles – 6, 8, 11, 205 and 214. Unlike the Portuguese Constitution, in this constitutional text liberty and social rights are not divided into different categories and the immediate applicability clause (article 5 § 1) can be interpreted in a way that applies to all fundamental rights.[90]

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[86] Susana Corado, Nuno Garoupa & Pedro Magalhães, *Judicial Behaviour Under Austerity – An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002-2016*, JLC 26 (2017), at 26, interestingly found out that the "pattern of political (…) polarization [of the PCC] seems to have been less prevalent during the financial crisis than before".

[87] Maria Lúcia Amaral & Ravi Afonso Pereira, *Um tribunal como os outros. Justiça constitucional e interpretação da constituição*, I ESTUDOS EM HOMENAGEM AO CONSELHEIRO PRESIDENTE RUI MOURA RAMOS 435-437, 381-446 (Almedina, 2016).

[88] Joaquim Cardoso Da Costa, *Tribunal Constitucional e debate público*, 40 ANOS DE POLÍTICAS DE JUSTIÇA EM PORTUGAL, 126, 113-141 (Almedina, 2016) states that "constitutional justice, as justice that interprets and applies the constitution, is as politicized and «impure» as are the constitutional norms which it must interpret and apply" (our translation).

[89] CHRISTIAN PESTALOZZA (2008), at 31; MANUELARAGÓN REYES (1986), at 109; PAVEL HOLLÄNDER (2011); RAINER WAHL (2010), at 30; and RAVI AFONSO PEREIRA (2012), at 65-66.

[90] MANOEL GONÇALVES FERREIRA FILHO, DIREITOS HUMANOS FUNDAMENTAIS 38 (Editora Saraiva, 2000). It should be mentioned that in an intermediate position, INGO WOFGANG SARLET, A EFICÁCIA DOS DIREITOS FUNDAMENTAIS – UMA TEORIA GERAL DOS DIREITOS FUNDAMENTAIS NA PERSPECTIVA CONSTITUCIONAL 261-273 (Livraria do Advogado Editora, 2009), has defended a mitigate approach to

In this scenario, it is not surprising that an uncontrolled judicial activism has emerged, especially with regard to fundamental social rights to health, education, housing, environment and social assistance.[91] Many scholars even refer to an "epidemic of litigation."[92]

Perhaps, the main critic to judicial activism is the one acknowledging its casuistic approach.[93] Situations of social exclusion and social rights implantation should be primarily addressed through legislation. Detractors of judicial activism argue that it impacts the separation of powers principle, namely by involving courts in traditional legislative and executive functions. We have to keep in mind that the separation of powers is the bulwark of democratic and balanced societies.

Unlike normative acts (e.g., constitution, laws), which are general and abstract, non-normative acts (e.g., administrative acts, court decisions) are individual and concrete. Judicial acts apply general and abstract norms to the circumstances of the concrete legal dispute between adverse parties. Hypothetically, given a situation where right X is on stake, litigant A can obtain a positive result, whereas litigant B might have his request rejected. It is up to the judiciary to clarify the meaning of legislation and to apply it to concrete disputes. In other words, legislators are responsible for macro-justice, whereas judges have a micro-justice role, as they decide in a one-case-at-a-time perspective.[94]

Judicial empowerment is not compatible with judicial definition/concretization of what a fundamental right is, but how this right applies itself in a concrete case. For example, health litigation in Brazil attracted wide media coverage. New alleged fundamental rights to "therapeutic innovation" and to "healthcare tourism" are emerging. These rights gather

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dogmatic unitary thesis, arguing that Article 5 § 1, of the Brazilian Constitution does not have the character of norm-rule, but of norm-principle and therefore of a mandate of optimization.

[91] ALBERT NOGUERA FERNÁNDEZ, LOS DERECHOS SOCIALES EN LAS NUEVAS CONSTITUCIONES LATINOAMERICANAS, 70-95 (2010).

[92] Octavio Luiz Motta Ferraz, *The right to health in the Courts of Brazil: worsening health inequities?*, 11 (2) HEALTH AND HUMAN RIGHTS 35, 33-45 (2009).

[93] Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznormen. Zur gegenwärtig Lage der Grundrechtsdogmatik*, 29, DER STAAT 25, 1-31 (1990).

[94] Ana Paula de Barcellos, *Constitucionalização das políticas públicas em matéria de direitos fundamentais: o controle político-social e o controle jurídico no espaço democrático*, 3, RDE111-147 (2006).

many corollaries, such as: access to unorthodox treatments, experimental therapies and other non-validated medical practices, innovative surgery, and access to not yet approved drugs or not even included on governmental drug formularies/protocols.

There will always be a certain amount of dissatisfaction in the fulfilling of the right to health, as it combines a myriad of more or less convincing drugs/treatments with limited state resources. That being said, we have to analyze if the judiciary ought to protect social rights as a reaction to the inaction or insufficient commitment of the legislator. If health is one of the budgetary items responsible for draining the majority of public funds, should judges decide to attribute huge amounts of the state's budget to very expensive treatments/drugs, even if they lack convincing data on their efficacy?

When courts act as social rights' enablers, allowing every single demand, they will inevitably compromise state's budget. Then, their legal reasoning will be (knowingly or unknowingly) metamorphosed in political reasoning, jeopardizing the constitutional division of powers.

Just as psychologists identifies "helicopter parenting" phenomenon in our parenting generation, we recognize in this judicial behavior a pathology that we call *helicopter judging*. This metaphor allows us to understand how judges, facing cases involving health, housing (and other life) struggles, can easily be tempted to hover over citizens like a helicopter. This could be perceived as a somehow imprudent or at least impulsive behavior. Some scholars even warned about the dangers of judiciary "messianic" approaches or jurisdictional "emotionality", relying on populist and demagogic analysis.[95]

This syndrome of over judging could also lead to other pathologies described above. If judges constantly shadow citizens in a way that is overprotecting, they discourage them to search democratic ways to change the laws. Even if they start off with good intentions, judges will inadvertently contribute to an "infantilized" society.[96]

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[95] Ana Paula de Barcellos, *O Direito a prestações de saúde: complexidades, mínimo existencial e o valor das abordagens coletiva e abstrata*, DIREITOS SOCIAIS: FUNDAMENTOS, JUDICIALIZAÇÃO E DIREITOS SOCIAIS EM ESPÉCIE 824-825, 803-826 (Lumen Juris, 2010); ANGÉLICA CARLINI, JUDICIALIZAÇÃO DA SAÚDE PÚBLICA E PRIVADA (Livraria do Advogado, 2014); Luís Roberto Barroso, *Da falta de efetividade à judicialização excessiva: direito à saúde, fornecimento gratuito de medicamentos e parâmetros para a atuação judicial*, IX (46) REVISTA INTERESSE PÚBLICO 31-62 (2007); and Zélia Luiza Pierdoná, *A proteção social na constituição de 1988*, 7 (28) RDS 11-29 (2007).

[96]Daniel Sarmento, *O neoconstitucionalismo no Brasil: riscos e possibilidades*, 3 (9) REVISTA BRASILEIRA DE ESTUDOS CONSTITUCIONAIS 95-133 (2009).

In medio stat virtus?[97] Not always, but generally this seems to be true. To us, the key would be a balance between a too libertarian or a too paternalistic approach. On the one hand, judges have a role to play, which is why they simply cannot be passive and accept a continuous legislative silence on rights that demand legislator intervention. On the other hand, instead of being so enmeshed, judges need to take a step back and allow legislative and executive powers to honor their constitutional tasks.

FINAL REMARKS – TRILOGY OR TRINITY?

From our perspective, there is sometimes a bias inherent to social rights, as if the word "social" was a hint for social rights being part of a socialist discourse. There is a rooted fallacy from the last decades that scholars ought to unmask. For this reason, it is important to emphasize that the concept of social state should not be held hostage by any political or ideological conception.[98] Constitutional history demonstrates that the label "social state" is imbued in the narratives of several political views, whether social Christian, socialist, capitalist, nationalist, utilitarian, conservative or progressive liberal.

Despite of social rights' language streaming more or less naturally in a given ideology, it is not directly linked to any political view. Instead, it flows from its umbilical source: human dignity. Irrespective of whether all parties share the same views on reduction/increasing of state size or state intervention on macro-economic matters, social protection is a common denominator. In the realm of politics, comparisons are often misleading. Thus, social rights should not be a sort of ideological-cultural inheritance of a predetermined political party, elite (or, more broadly, political ideology), since all democratic political parties promote social justice.

As the author tried to demonstrate, aspirational constitutions may be trapped in their own generosity due to their likely utopian characteristics. Just the belief that a state can convey to the fullest extent all constitutional rights is faced with the harsh reality of scarce goods, resource limitations and fluctuating macro-economic circumstances.[99] If on the one side of

[97] Meaning that virtue stays in the middle and not in an extreme position.

[98] Ernst Benda, *Der soziale Rechtsstaat*, HANDBUCH DES VERFASSUNGSRECHTS 477-544 (1984); and JORGE BACELAR GOUVEIA, II *Manual de Direito Constitucional* 847 (Almedina, 2013).

[99] Luís Heleno Terrinha, *The under-complexity of social rights*, 201 (5) LLR 50-51, 27-53 (2015).

the coin we have entitlements, on the flip side we do not have (due to *de facto* limitations) unlimited resources and full right's application.

This previous consideration should not be followed by the unilluminating conclusion that constitutionalizing social rights was a poor idea. Although social rights consecration in a constitution is not a sufficient predictor of social rights effective implementation,[100] we have good reasons to believe that upgrading these rights in a constitutional text was a very important step in post-authoritarian/totalitarian states. If anything, social rights discourse has a rhetoric significance that should not be taken for granted – we believe this to be true, without any kind of surreptitious condescendence.

The focal point remains unanswered: (*i*) are aspirational constitutionalism, social rights prolixity and judicial activism three related subjects – a trilogy? Or (*ii*) are aspirational constitutionalism, social rights prolixity and judicial activism mutually interdependent - a trinity?

This new seam of constitutional challenges are quite enriching and yet difficult to answer univocally. In our point of view, the flimsiest connection is the latter (i.e., social rights prolixity → judicial activism). We can say that aspirational constitutions will have social rights' catalogues and, most likely, their catalogues will be generous. However, does aspirational constitutionalism and social rights prolixity necessarily mean judicial activism? The answer to this question will depend on the adopted definition of "judicial activism". As I stated before, if we label "judicial activism" as engaging in strong forms of judicial review, then we can portrait both Brazilian courts and PCC decision-making as activists.[101] However, if by "judicial activism" we interpret an illegitimate usurpation of legislative or executive powers, there is not an umbilical link between them. Usurpation of powers could never be a constitutional trait of a democratic state, but only a pathology requiring treatment.

[100] There are many examples of developed social policies, which coexist with limited recognition of social constitutional rights (Germany, Scandinavian countries, amongst others).

[101] As Nuno Garoupa, *Comparing Judicial Activism – Can we say that the US Supreme Court is more Activist than the German Constitutional Court?*, RPF 1098-1099, 1089–1106 (2016), stated judicial activism "is shaped by the frequency and extension of constitutional adjudication".

Consequently, we don't have a trinity – that rests upon a premise of the three factors being ineluctably interrelated – but a trilogy. In a trilogy there is a series of three related subjects that usually come together, but they are not necessarily codependent of each other.
As stated before, public policies involve significant compromise and arduous choices that benefit some rights (or rights dimensions) to the detriment of full implementation of other rights. It is true that undue conquest of political decisions encourages judicial activism. After all, jurisdictional function does not entail rewriting the constitution, but applying it in accordance with the constitutional reality.[102]

However, this does not justify the disregard of social rights as a normative constitutional concept nor that constitutional courts should acquiesce to the political majorities. What it requires is stronger vigilance and the break of the misconception that public policies cannot be criticized. Here, the main problem is how to satisfy the double objective of limiting both legislator's and judge's activities. If the judge's activity is limited, then the legislator will have a wider margin of legislative design. If the legislator has a narrower margin of legislative discretion, then the judge will be able to contribute to the (living) constitutional design of his state.

In sum, two lessons can be drawn. First, conventional self-restraint is not compatible with the paramount expression, social rights have in aspirational constitutions. That is why, in our point of view, a disregard of constitutional social rights conflicts with the wide consecration, which they have in the Portuguese and Brazilian constitutions. We need to realize that the judicial role can be played with accuracy, endeavor, creativity and even activism (not pejorative one), without overstepping separation of powers. Second, the confine of judicial activism is precisely the constitutional separation of powers. For this reason, there should be no judicial activism at the sake of democracy.

To us, it is quite an illusion or a fallacy to separate, with a perfect dividing line, law from politics. We can perform conceptual divisions and undertake complex line-drawing maneuvers, but in the end, there will always be some kind of intersection. [103] Notwithstanding areas of imbrications and significant blurriness, the reign of politics

[102] David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, CLREV 1172, 1163-1254 (2011).

[103] Jutta Limbach, *The Law-Making Power of the Legislature and Judicial Review*, LAW MAKING, LAW FINDING AND LAW SHAPING: THE DIVERSE INFLUENCES 174 (Oxford University Press, 1997).

should refrain from overpowering the reign of law. Macro-economic decision-making pertains to democratic deliberation and popular sovereignty, albeit fertile exchanges of ideas amongst state powers are always welcome.