

## Social rights trapped in enduring misconceptions of the social state\*

*Catarina Santos Botelho*

CONTENTS: 1. Introduction - 2. Seven misconceptions of the social state - 2.1. 1<sup>st</sup> Misconception: social state is a synonym for welfare state - 2.2. 2<sup>nd</sup> Misconception: Social rights are socialist – 2.3. 3<sup>rd</sup> Misconception: Social rights are less important than liberty rights – 2.4. 4<sup>th</sup> Misconception: Social rights are costly and liberty rights are free - 2.5. 5<sup>th</sup> Misconception: Social retrogression is constitutionally forbidden - 2.6. 6<sup>th</sup> Misconception: There are no social rights in times of crises - 2-7. 7<sup>th</sup> Misconception: Social rights enforcement relies on activist courts - 3. Concluding remarks: social rights' DNA is the triad dignity, liberty and equality.

### *1. Introduction*

The Constitution of the Portuguese Republic contains the largest constitutional catalogue of social rights in the European Union and one of the largest in the world.<sup>1</sup> In addition to articles 58 to 79 of the Constitution, specifically on social rights, in articles 53 to 57 (devoted to liberty rights) we can trace rights that, in other constitutions, are listed as social rights (*v.g.*, job security, workers' committees, and

---

\* *Double-blind peer reviewed in accordance with the Journal guidelines.*

<sup>1</sup> See Avi Ben-Bassat & Momi Dahan, 'Social rights in the constitution and in practice', *Journal of Comparative Economics*, 36 (1), 2008, pp. 103-119, José Martínez Soria, 'Das Recht auf Sicherung des Existenzminimums', *Juristenzeitung*, 13, 2005, pp. 647-655, Mariana Canotilho, '40/30 – 40 years of Constitution, 30 years of European integration: between past and present, openness and belonging', *UNIO - EU Law Journal*, 3 (1), 2017, pp. 38-47, p. 44, and Mónica Brito Vieira & Filipe Carreira da Silva, 'Getting Rights Right: Explaining social rights constitutionalization in revolutionary Portugal', *International Journal of Constitutional Law*, 11 (4), 2013, pp. 898-922, 898-899.

freedom of association).<sup>2</sup> Therefore, the Portuguese catalogue of social rights is prolix and generous.

After several years of studying the social state, with a comparative constitutional perspective, I have identified some misunderstandings and stereotypes worth being unravelled. The majority of these misunderstandings relate to social rights in general (1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> misconceptions). Some of them (the 5<sup>th</sup> misconception and, to some extent, the 3<sup>rd</sup>), though, relate specifically to the Portuguese constitutional context.

## *2. Seven misconceptions of the social state*

### *2.1. 1<sup>st</sup> Misconception: Social state is a synonym for welfare state.*

The constitutionalization of well-being prevailed in the first half of the 20<sup>th</sup> century, in the constitutional texts of Mexico (1917) and Weimar Republic (1919), followed by the Greek (1927), Spanish (1931) and Portuguese (1933) Constitutions. However, the historical genesis of social rights goes back to the liberal movements (18<sup>th</sup> century).<sup>3</sup> If social rights began to emerge in the XVIII century and

---

<sup>2</sup> Catarina Santos Botelho, '40 Anos de Direitos Sociais – Uma reflexão sobre o papel dos direitos fundamentais sociais no século XXI', *Julgar*, 29, 2016, pp.197-216, p. 208.

<sup>3</sup> Anne-Marie Le Pourhiet, 'Le statut, le contenu et l'effectivité des droits culturels et sociaux de plus défavorisés en France', in Marc Verdussen (Ed.), *Les droits culturels et sociaux des plus défavorisés – Actes du colloque international organisé le 18 avril 2008 à Louvain-la-Neuve par la Faculté de droit de l'Université de Louvain, en association avec la Faculté de droit de l'Université d'Ottawa et la Faculté de droit et science politique de l'Université de Rennes*, Brussels, Bruylant, 2009, pp. 119-133, pp. 121-125, Cole Durham, 'General Assessment of the Basic Law – An American View', in Paul Kirchhof and Donald P. Kommers (Ed.), *Germany and its Basic Law – Past, Present and Future: a German-American Symposium*, Baden-Baden, Nomos Verlag, 1993, pp. 37-63 p. 45, Jorge Miranda, 'Os novos paradigmas do Estado social', *Revista da Faculdade de Direito da Universidade do*

were intensified during the XIX century through the demands of the working class, it was in the XX century that they truly became a modern liberal democracies trait.<sup>4</sup> Therefore, and despite the social state not being a legacy of the post-War period, it was after World War II that the liberal state substantially transitioned to the social state.<sup>5</sup>

The concept of ‘social state based on the rule of law’ is a normative one, which offers a foundational basis for the states’ obligations in matters of social and economic policy.<sup>6</sup> Not synonymously, the ‘welfare state’ concerns certain historical, political and societal experiences (such as the New Deal in the United States).<sup>7</sup>

A social state may choose to consecrate social rights either at a constitutional level (Italy, Portugal or Brazil) or in *infra*-constitutional legislation (Austria or Belgium). In the USA and Germany, social rights are not enshrined in the federal constitution, but can be found in the constitutions of some federated States (such as Bavaria, Brandenburg, Mecklenburg-Vorpommern, Rheinland-Pfalz, Sachsen, Sachsen-Anhalt, or Thüringen, in Germany).<sup>8</sup> Therefore, even if social

*Porto*, 9, 2012, pp. 181-197, pp. 187-188, Niklas Luhmann, *Grundrechte als Institution – Ein Beitrag zur politologischen Soziologie*, Berlin, Duncker & Humblot, 1965, p. 209, Nils Teifke, *Das Prinzip Menschenwürde*, Tübingen, Mohr Siebeck, 2011, p. 95, and Paulo Otero, *Instituições Políticas e Constitucionais*, I, Coimbra, Almedina, Coimbra, 2009, pp. 333-336.

<sup>4</sup> Valerio Fabbrizi, ‘Do Social Rights Deserve a Special Constitutional Protection? – On Luigi Ferrajoli’s and Frank Michelman’s Democratic Theory’, *Jura Gentium*, XV, 2018, pp. 46-75, p. 53.

<sup>5</sup> Hans F. Sacher, ‘Der Sozialstaat an der Wende zum 21. Jahrhundert’, *Vierteljahresschrift für Sozialrecht*, 3, 2000, pp. 185-206, p. 187.

<sup>6</sup> Hermann Heller, *Staatslehre*, 6<sup>th</sup> Ed., Tübingen, J. C. B. Mohr, 1983, p. 258.

<sup>7</sup> Hans Michael Heinig, *Der Sozialstaat im Dienst der Freiheit – Zur Formel vom „sozialen“ Staat in Art. 20 Abs. 1 GG*, Tübingen, Mohr Siebeck, 2008, pp. 50-75, Hans-Peter Bull, ‘Sozialstaat – Krise oder Dissens? Schwierigkeiten bei der Verständigung über einen verfassungsrechtlichen Kernbegriff’, in Michael Brenner, Peter M. Huber and Markus Möstl (Ed.), *Der Staat des Grundgesetzes – Kontinuität und Wandel – Festschrift für Peter Badura zum siebzigsten Geburtstag*, Tübingen, Mohr Siebeck, 2004, pp. 57-76, pp. 65-66 and pp. 73-75.

<sup>8</sup> Catarina Santos Botelho, *Os direitos sociais em tempos de crise – Ou revisitar as normas programáticas*, Coimbra, Almedina, 2015, p. 214.

rights are not recognised in the federal constitution, this does not mean that they are unfamiliar to the normative arena.<sup>9</sup>

Furthermore, social rights constitutionalization is not a synonym of social rights enforcement. It would surely be an upright sign of commitment to have social rights consecrated in the constitution, but that does not translate *per se* in an increased commitment to social justice.<sup>10</sup> In fact, there are many examples of developed social policies which coexist with limited recognition of constitutional social rights (Germany, Scandinavian countries, amongst others).<sup>11</sup>

Nevertheless, I believe social rights constitutionalization was of paramount importance in states which transitioned to democracy after long periods of dictatorship (such as Portugal, Brazil or Italy). Without condescendence, I acknowledge that the “social rights discourse has a *rhetoric significance*” which should not be taken for granted.<sup>12</sup>

---

<sup>9</sup> Eberhard Eichenhofer, *Sozialrecht*, 7<sup>th</sup> Ed., Tübingen, Mohr Siebeck, 2010, p. 61. Some authors refer a “vertical concurrence” between the Federal Constitution and the Constitutions of the Federated States. See Johannes Dietlein, *Die Grundrechte in den Verfassungen der neuen Bundesländer: zugleich ein Beitrag zur Auslegung des Art. 31 und 142 GG*, Munich, Vahlen, 1993, p. 7.

<sup>10</sup> See Ran Hirschl and Evan Rosevear, ‘Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities’, in Tom Campell, K. D. Ewing and Adam Tomkins (Ed.), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford University Press, 2011, pp. 207-228.

<sup>11</sup> Catarina Santos Botelho, ‘Aspirational constitutionalism, social rights prolixity and judicial activism: trilogly or trinity?’, *Comparative Constitutional Law and Administrative Law Quarterly*, 3 (4), 2017, pp. 62-87, p. 85.

<sup>12</sup> *Idem, ibidem*. See Ran Hirschl, *Towards Juristocracy – The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cambridge, 2004, stating that even if fundamental rights constitutionalization has a limited impact on promoting distributive justice, it surely has a transformative effect on political discourse.

## *2.2. 2<sup>nd</sup> Misconception: Social rights are socialist.*

The Portuguese constitution is a highly rigid and *defensive* constitutional text, with unique features that set it apart from the rest of the European constitutions, such as: the long unamendable clause (article 288);<sup>13</sup> the prolix catalogue of social rights, one of the widest social rights catalogue in the world and probably the widest in Europe (articles 58 to 79); the detailed economical constitution (articles 80 to 107). As I have written elsewhere, this dysfunctionality is a form of “*constitutional narcissism*, which is a kind of delusional imagery of constituent holiness”, that “certainly may be successful in preventing misuses of amendment power but, at the same time, discourage legitimate renaissances of the constituent power”.<sup>14</sup>

In Portugal, “the original version of the constitution was revolutionary, exhaled self-confidence and was politically compromised as the best and only viable popular choice: the transition to a socialist and classless society”.<sup>15</sup> Borrowing Richard

---

<sup>13</sup> The substantial limits to amendments are the following: “*a*) National independence and unity of the state; *b*) The republican form of government; *c*) Separation between church and state; *d*) Citizens’ rights, freedoms and guarantees; *e*) The rights of workers, works councils, and trade unions; *f*) The coexistence between the public, private, and cooperative, and social sectors of ownership of the means of production; *g*) The existence of economic plans, within the framework of a mixed economy; *h*) The appointment of the elected officeholders of the entities that exercise sovereignty, of the organs of the autonomous regions and of local government organs by universal, direct, secret and periodic suffrage, and the proportional representation system; *i*) Plural expression and political organisation, including political parties, and the right of democratic opposition; *j*) The separation and interdependence of the entities that exercise sovereignty; *l*) The subjection of legal norms to review of their positive constitutionality and of their unconstitutionality by omission; *m*) The independence of the courts; *n*) The autonomy of local authorities; *o*) The political and administrative autonomy of the Azores’ and Madeira’s archipelagos”.

<sup>14</sup> Catarina Santos Botelho, ‘Constitutional narcissism on the couch of psychoanalysis: Constitutional unamendability in Portugal and Spain’, *European Journal of Law Reform*, 21 (3), 2019, pp. 346-376, p. 372. First draft available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3242023](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3242023).

<sup>15</sup> *Idem, ibidem.*

Albert's thesis, the Portuguese foundational moment was a "transformational entrenchment".<sup>16</sup>

In the drafting of the Portuguese constitution, the Communist Party argued for an umbilical link between social rights and socialism.<sup>17</sup> However, a comparative constitutional law study reveals that the resort to the social State (and, more specifically, social rights) was brought as a political flag of a myriad of ideologies, whether socialist, utilitarian, nationalist, progressive, conservative or of christian social inspiration, progressive liberals and even neocapitalists.<sup>18</sup>

Fundamental rights, in general, and social rights, in particular, do not belong to parties or to broader political perspectives. Parties and political fields should not claim social rights as part of their ideological affiliation. One can think that Party A or Party B is more committed to the Social State and therefore stands for a more genuine social rights' enforcement. Nevertheless, these perspectives can often be quite subjective and rely on our own worldview.

This assertion does not mean fundamental rights should be kept away from the reign of politics. Politics plays an important role in fundamental rights enforcement. What I am stating is that fundamental rights belong to people and to their inherent human dignity. Fundamental rights' DNA is *dignity*, not a certain political view.

It is thus important to emphasise that the concept of social state should not be held hostage by any political-ideological conception.<sup>19</sup> In particular, one should not fall into the temptation of associating social rights with socialist rights, as Carl Schmitt did in the last century, in his work *Verfassungslehre*.<sup>20</sup>

---

<sup>16</sup> Richard Albert, 'Constitutional Handcuffs', *Arizona State Law Journal*, 42, 2010, pp. 663-715, pp. 666-667.

<sup>17</sup> Constitutional Assembly Diary, no. 44, p. 1257, and no. 46, p. 1321.

<sup>18</sup> Catarina Santos Botelho, *Os direitos sociais em tempos de crise... cit.*, p. 496.

<sup>19</sup> *Idem, ibidem.*

<sup>20</sup> *Verfassungslehre*, Duncker & Humblot, Berlin, 1974, p. 169.

In Portugal, to the semantic confusion between ‘social’ rights and ‘socialism’ contributed the strong Marxist-Leninist influence on the original version of the constitution (1976). In the first version of the constitution we could find odd provisions, such as: “Portugal is a sovereign Republic (...) committed to transformation into a society without classes” (Article 1); “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).

The ideological neutralization of 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.<sup>21</sup> In my point of view, these amendments metamorphosed the constitution and are a perfect example of a “constitutional dismemberment”, which is a “deliberate effort to transform the *identity*, the *fundamental values* or the *architecture* of the constitution without breaking legal continuity”.<sup>22</sup>

Nevertheless, the fact that the constitutional preamble has remained unscathed – stating that “the Constituent Assembly affirms the Portuguese people’s decision to “*open up a path towards a socialist society*” – raises pertinent questions of genuine democratic pluralism.<sup>23</sup> To me, as the Portuguese preamble lacks political neutrality, it should not be legally enforceable, as it just a nonbinding

---

<sup>21</sup> Catarina Santos Botelho, ‘Constitutional narcissism on the couch of psychoanalysis... *cit.*, pp. 361-362.

<sup>22</sup> Richard Albert, ‘Constitutional Amendment and Dismemberment’, *Yale Journal of International Law*, 43 (1), 2018, pp. 1-84.

<sup>23</sup> Carlos Blanco de Moraes, *Curso de Direito Constitucional – Teoria da Constituição em Tempo de Crise do Estado Social*, II (2), Coimbra Editora, Coimbra, 2014, p. 449, e Catarina Santos Botelho, *Os direitos sociais em tempos de crise... cit.*, p. 169, and Rui Medeiros, *Constitucionalismo de Matriz Lusófona*, Lisbon, Verbo, 2011, p. 41.

historical and symbolic statement – a “ceremonial-symbolic preamble”.<sup>24</sup>

Thus, if one understands, as some doctrine does, that a preamble should have the same value as the rest of the constitutional provisions, then it will be necessary to revise the Portuguese preamble.<sup>25</sup> Reviewing our preamble does not mean, in my point of view, the need to abolish it, since it marks the end of nearly five decades of dictatorship. Still, to eliminate ambiguities, the expression “to open the way to a *socialist* society” could be substituted by this one: “to open the way to a *solidary* society”.

We can therefore conclude that social rights are open to all ideologies and political thoughts. They are not exclusive of a specific political spectrum. This assertion should not come as a surprise. *A fortiori*, we can bring the debate in Europe about the *universal basic income* into discussion.<sup>26</sup> This thought-provoking idea of replacing or increasing existing social protection systems has advocates in both

---

<sup>24</sup> To borrow Liav Orgad’s interesting expression at ‘The preamble in constitutional interpretation’, *International Journal of Constitutional Law*, 8 (4), 2010, pp. 714-738, pp. 722-723.

<sup>25</sup> Addressing this subject, see J. J. Gomes Canotilho, ‘Preámbulo de la Constitución de Portugal de 1976’, in A. Torres del Moral and Javier Tajadura Tejada (Ed.), *Los Preámbulos constitucionales en Iberoamérica*, Madrid, C.E.P.C., 2001, p. 369, and Manuel Afonso Vaz, *Teoria da Constituição – O que é a Constituição, hoje?*, Porto, Universidade Católica Editora, 2015, pp. 118-119.

<sup>26</sup> In Philip Alston’s words, the idea of a basic income “is explicitly designed to challenge most of the key assumptions underpinning existing social security systems. Rather than a system where there are partial payments, basic income guarantees a floor; instead of being episodic, payments are regular; rather than being needs-based, they are paid as a flat rate to all; they come in cash, rather than as messy in-kind support; they accrue to every individual, rather than only to needy households; rather than requiring that various conditions be met, they are unconditional; rather than excluding the well off, they are universal; and instead of being based on lifetime contributions, they are funded primarily from taxation. And simplicity of design promises minimal bureaucracy and low administrative costs.” See Philip Alston, ‘Report of the Special Rapporteur on extreme poverty and human rights’, *Human Rights Council*, 2017, A/HRC/35/26, p. 6.



left- and right-wing parties, ranging from libertarians to socialists.<sup>27</sup> In fact, the seeds of universal basic income can be found in the intellectual contributions of many mathematicians, economists, legal philosophers and political scientists, such as Thomas More, Nicolas de Condorcet, Charles Fourier, Victor Prosper Considerant, John Stuart Mill, Bertrand Russell, Herbert Simon, Milton Friedman, and Martin Luther King Jr., among others.<sup>28</sup>

For all the reasons mentioned above, social rights must be a key ingredient of contemporary constitutional democracies, regardless of the political majority of each state in a given time.

### *2.3. 3<sup>rd</sup> Misconception: Social rights are less important than liberty rights.*

The option of separating liberty rights from social rights was accepted in most post-war constitutional texts and in international law.<sup>29</sup> At an international global level, there are two distinct treaties addressing human rights: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). At an international regional level, if the European Convention on Human Rights is enforced by the

---

<sup>27</sup> Andy Stern, *Raising the Floor: How a Universal Basic Income Can Renew Our Economy and Rebuild the American Dream*, Public Affairs, 2016, Bertrand Russell, *Roads to Freedom: Socialism, Anarchism and Syndicalism*, Unwin, 1918, p. 127, Philippe van Parijs and Yannick Vanderborght, *Basic Income: A Radical Proposal for a Free Society and a Sane Economy*, Harvard University Press, 2017, Matt Zwolinski, 'Property rights, coercion, and the welfare state', *The Independent Review*, 2015, p. 519, Michael Howard, 'Basic income, liberal neutrality, socialism, and work', *Review of Social Economy*, 2005, p. 613, Rutger Bregman, *Utopia for Realists – How We Can Build the Ideal World*, Bloomsbury Publishing, 2017, or Thomas Straubhaar, *Radikal Gerech*t, Körber Stiftung, 2017.

<sup>28</sup> Philip Alston, 'Report of the Special Rapporteur on extreme poverty and human rights', *Human Rights Council*, 2017, A/HRC/35/26, p. 7.

<sup>29</sup> Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity and judicial activism: trilogy or trinity?', *Comparative Constitutional Law and Administrative Law Quarterly*, 3 (4), 2017, pp. 62-87, pp. 68-69.

European Court of Human Rights (ECtHR), the Council of Europe’s “ugly duckling” – the European Social Charter – is carried out by the European Committee on Social Rights, which has neither the same persuasive impact nor the same powers as the ECtHR.<sup>30</sup>

Adhering to this kind of systematization, in the Portuguese Constitution, fundamental rights are divided into liberty rights and social rights.<sup>31</sup> Social rights are thus designed as fundamental rights, meaning that they are no less important than the ‘other’ fundamental rights, nor hierarchically inferior.<sup>32</sup> However, given their undetermined content and low normative density, the constitutional fathers opted not to automatically bring its regime into line with the liberty rights regime (Articles 17 and 18).<sup>33</sup>

Some scholarship argues that, although social rights are ‘rights’, they are not ‘fundamental’, which is why they do not have the same value as liberty rights.<sup>34</sup> Others believe that there is no genetic or

---

<sup>30</sup> *Idem*, ‘A proteção multinível dos direitos sociais: verticalidade gótica ou horizontalidade renascentista? – Do não impacto da Carta Social Europeia (Revista) na jurisprudência constitucional portuguesa’, *Lex Social: revista de los derechos sociales*, 7, 2017, pp. 88-123.

<sup>31</sup> More precisely, fundamental rights are divided into two categories: (i) rights, liberties and freedoms (Title II – articles 24 to 57); and (ii) social, economic and cultural rights (Title II – articles 58 to 79).

<sup>32</sup> Catarina Santos Botelho, *Os direitos sociais em tempos de crise... cit.*, pp. 217-323.

<sup>33</sup> The Portuguese Constitution consecrates 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); 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) n.º 1 article 165); finally, amongst several material limits on constitutional amendment, “constitutional revision laws must respect citizens’ rights, freedoms and guarantees” (d) article 288).

<sup>34</sup> Friedrich A. Hayek, *Law, Legislation and Liberty, II – The Mirage of Social Justice*, London, Routledge & Kegan Paul, 1976, pp. 168 ff., or, in Germany, Ernst Fortshoff, *El*

endogenous difference between them.<sup>35</sup> Social rights are not second-class rights.<sup>36</sup> In fact, fundamental rights are mutually dependent.<sup>37</sup>

*Estado de la sociedad industrial: El modelo de la República Federal Alemana*, Madrid, Instituto de Estudios Políticos, 1975, pp. 151-159.

<sup>35</sup> Catarina Santos Botelho, *Os direitos sociais em tempos de crise... cit.*, pp. 283-290, Humberto Nogueira Alcalá, 'Los derechos económicos, sociales y culturales como derechos fundamentales efectivos en el constitucionalismo democrático latinoamericano', *Estudios Constitucionales*, 7 (2), 2009, pp. 143-205, pp. 148-151, Isabel Moreira, *A Solução dos Direitos, Liberdades e Garantias e dos Direitos Económicos, Sociais e Culturais na Constituição Portuguesa*, Coimbra, Almedina, 2007, p. 89, João Caupers, *Os Direitos Fundamentais dos Trabalhadores e a Constituição*, Coimbra, Almedina, 1985, p. 49, Jo Hunt, 'Fair and Just Working Conditions', in Tamara K. Hervey and Jef Kenner (Ed.) *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003 pp. 45-65, p. 48, Jean-Marie Pontier, 'L'irrémissible imperfection de L'État de Droit', *Revue de la Recherche Juridique – Droit Prospectif*, 2, 2008, pp. 733-769, p. 751, Jorge Reis Novais, *Direitos Sociais – Teoria Jurídica dos Direitos Sociais enquanto Direitos Fundamentais*, Coimbra, Wolters Kluwer Portugal/Coimbra Editora, 2010, pp. 9-10, Jorge Silva Sampaio, *O Controlo Jurisdicional das Políticas Públicas de Direitos Sociais*, Coimbra, Coimbra Editora, 2015, pp. 181-183, J. J. Gomes Canotilho, 'Dignidade e constitucionalização da pessoa humana', in Paulo Otero, Fausto de Quadros and Marcelo Rebelo de Sousa (Ed.), *Estudos em Homenagem ao Prof. Doutor Jorge Miranda*, vol. II, Coimbra, Coimbra Editora, 2012, pp. 285-296, p. 296, Juan Carlos Gavara de Cara, *La dimensión objetiva de los derechos sociales*, Barcelona, Librería Bosch, 2010, p. 21, Mariella Saettone 'El estado de derecho y los derechos económicos sociales y culturales de la persona humana', *Revista Instituto Interamericano de Derechos Humanos*, 40, 2004, pp. 133-154, p. 148, Miguel Carbonell, 'Eficacia de la Constitución y Derechos Sociales: Esbozo de Algunos Problemas', *Estudios Constitucionales*, 6 (2), 2008, pp. 43-71, p. 43, and Vasco Pereira da Silva, *A cultura a que tenho direito – Direitos Fundamentais e cultura*, Coimbra, Almedina, 2007, pp. 113-145.

<sup>36</sup> Bruno Simma, 'Wirtschaftliche, soziale und kulturelle Rechte im Völkerrecht', in Jürgen F. Baur, Klaus J. Hopt and K. Peter Mailänder (Ed.), *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990*, Berlin, Walter de Gruyter, 1990, pp. 1477-1502, p. 1482, Friederike Valerie Lange, *Grundrechtsbindung des Gesetzgebers – Eine rechtsvergleichende Studie zu Deutschland, Frankreich und den USA*, Tübingen, Mohr Siebeck, 2010, p. 474, and María del Carmen Barranco Avilés, *La Teoría Jurídica de los Derechos Fundamentales*, Madrid, Dykinson, 2000, p. 107.

<sup>37</sup> Eva M. K. Häußling, *Soziale Grundrechte in der portugiesischen Verfassung von 1976 – Verfassung und soziale Wirklichkeit*, Baden-Baden, Nomos

We cannot fully enforce our liberty rights if we lack basic social rights. For instance, how can we consciously vote or exercise other political rights if we are hungry or live in extreme poverty?<sup>38</sup> Social rights enhance freedom and equality.<sup>39</sup>

For sure, “unbreakable walls require demolition techniques”.<sup>40</sup> In the last decades, though, given the international commitment to fundamental rights’ *indivisibility*, legislation, jurisprudence and doctrine are growingly accepting that liberty rights and social rights share the same worth. This renaissance shows that social rights’ *capitis deminutio* is being overcome and the clear-cut division between liberty and social rights is getting blurrier.<sup>41</sup>

---

Verlagsgesellschaft, 1997, pp. 95-96, Jeff Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’, in Tamara K. Hervey e Jeff Kenner (Ed.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003, pp. 1-25, p. 3, Jörg Lücke, ‘Soziale Grundrechte als Staatszielbestimmungen und Gesetzgebungsaufträge’, *Archiv des öffentlichen Rechts*, 107, 1982, pp. 15-60, p. 39, Jörg Paul Müller, *Sozialer Grundrechte in der Verfassung?*, Basel, Helbing Lichtenhahn Verlag, 1981, p. 166, Karl-Jürgen Biekack, ‘Sozialstaatsprinzip und Grundrechte’, *Europäische Grundrechte Zeitschrift*, 1985, pp. 657-669, p. 663, and Peter Häberle, ‘Grundrechte im Leistungsstaat’, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 30, 1972, pp. 43-141, p. 91.

<sup>38</sup> Amartya Sen, ‘Human rights and the limits of law’, *Cardozo Law Review*, 27, 2006, pp. 2913-2927. Raymond Plant, Harry Lesser and Peter Taylor-Gooby, *Political Philosophy and Social Welfare – Essays on the normative basis of welfare provision*, London, Routledge & Kegan Paul, 1980, p. 79.

<sup>39</sup> For Daniel Wunder Hachem, ‘A noção constitucional de desenvolvimento para além do viés econômico – Reflexos sobre algumas tendências do Direito Público brasileiro’, *Revista de Direito Administrativo & Constitucional*, 13 (53), 2013, pp. 133-168, it is crucial to have public policies that correct severe social inequalities.

<sup>40</sup> Catarina Santos Botelho, ‘Aspirational constitutionalism, social rights prolixity... *cit.*, p. 68.

<sup>41</sup> Danièle Lochak, *Les droits de l’homme*, 3<sup>rd</sup> Ed., Paris, La Découverte, 2009, p. 41, Jorge Pereira da Silva, ‘Os direitos sociais e a Carta dos Direitos Fundamentais da União Europeia’, *Direito e Justiça*, XV (2), 2001, pp. 147-230, pp. 154-155, and Simon Deakin & Jude Browne, ‘Social Rights and Market Order: Adapting the Capability Approach’, in Tamara K. Hervey and Jeff Kenner (Ed.),

The Charter of Fundamental Rights of the European Union, a hard law instrument subsequent to the Treaty of Lisbon (Article 6), states the indivisibility of fundamental rights.<sup>42</sup> Most social rights are consecrated in Chapter IV (Solidarity) and a few others are scattered along the Charter (Articles 12, 14, 16 and 23, to name a few). Nevertheless, some caution is advised before adopting a too optimistic approach on the European Union commitment to social rights enforcement. The Charter does not literally exclude nor affirm social rights' immediate applicability (Articles 51 and 52, par. 5).

With this idea in mind, Jeff Kenner sustains that a careful analysis might reveal that “the Charter’s bold affirmation of indivisible rights is a mirage”, not only because the social rights catalogue is incomplete, but also given the positivation of social rights as indeterminate principles or conditional rights.<sup>43</sup>

---

*Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003, pp. 27-43, p. 38.

<sup>42</sup> Linda A. J. Senden, *Soft Law in European Community Law*, Hart, Oxford, 2004, p. 112 e ss., Marianne Gijzen, ‘The Charter: A Milestone for Social Protection in Europe?’, *Maastricht Journal of European and Comparative Law*, 8, 2001, pp. 33-48, p. 42, and Martin Kober, *Der Grundrechtsschutz in der Europäischen Union – Bestandsaufnahme, Konkretisierung und Ansätze zur Weiterentwicklung der europäischen Grundrechtsdogmatik anhand der Charta der Grundrechte der Europäischen Union*, Herbert Utz Verlag, 2009, p. 11.

<sup>43</sup> Jeff Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’, in Tamara K. Hervey and Jeff Kenner (Ed.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003, pp. 1-25, p. 24. Accordingly, Armin von Bogdandy, ‘The European Union as a human rights organization? Human Rights and the core of the European Union’, *Common Market Law Review*, 37, 1997, pp. 1307-1338, p. 1315, Bruno de Witte, ‘The Trajectory of Fundamental Social Rights in the European Union’, in Gráinne de Búrca e Bruno de Witte (Ed.), *Social Rights in Europe*, OUP, Oxford, 2005, pp. 153-168 and Mariana Canotilho, *O Princípio do Nível Mais Elevado de Protecção em Matéria de Direitos Fundamentais*, pp. 153-154, available at: <https://infoeuropa.euroid.pt/files/database/000047001-000048000/000047387.pdf>

With a different perspective, though, Simon Deakin and Jude Browne, ‘Social Rights and Market Order: Adapting the Capability Approach’, in Tamara K. Hervey and Jeff Kenner (Ed.), *Economic and Social Rights... cit.*, pp. 27-43, p. 27.

2.4. 4<sup>th</sup> Misconception: Social rights are costly and liberty rights are free.

As I have written, “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 that show us 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.<sup>44</sup> 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”.<sup>45</sup>

It is undeniable that social rights enforcement (as well as liberty rights enforcement) relies heavily on a state’s economy and finances.<sup>46</sup> A constitutional democracy is costly *per se*. One thing is certain: the protection of social rights (especially health, education and social security) is expensive and has serious implications in the state’s

---

<sup>44</sup> Friederike Valerie Lange, *op. cit.*, p. 44, and Hans-Jürgen Whipfelder, ‘Die verfassungsrechtliche Kodifizierung sozialer Grundrechte’, *Zeitschrift für Rechtspolitik*, 147, 1986, pp- 140-149.

<sup>45</sup> Catarina Santos Botelho, ‘Aspirational constitutionalism, social rights prolixity... *cit.*, pp. 69-70.

<sup>46</sup> *Idem*, *Os direitos sociais em tempos de crise... cit.*, p. 498.

budget. Having said that, does that mean that the ‘other’ rights are free or necessarily cheaper? Not exactly. All fundamental rights (liberty or social rights) entail substantial public spending.<sup>47</sup> There are no rights for free.<sup>48</sup>

If all rights are costly, one can wonder why social rights are labelled as the pricey ones. Within the realm of possibility, liberty

<sup>47</sup> Catarina Santos Botelho, *Os direitos sociais em tempos de crise... cit.*, pp. 121-125, Isabel M. Gímenez Sánchez, ‘Límites económicos de los derechos sociales’, in J. L. Cascajo Castro, M. Terol Becerra, A. Domínguez Vila and V. Navarro Marchante (Ed.), *Derechos Sociales y Principios Rectores – Actas del IX Congreso de la Asociación de Constitucionalistas de España*, Valencia, Tirant to Blanch, 2012, pp. 301-303, Nicholas Bernard, ‘A «New Governance» Approach to Economic, Social and Cultural Rights in the EU’, in Tamara K. Hervey and Jeff Kenner (Ed.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003, pp. 247-268, p. 264, Raymond Plant, ‘Social Rights and the Reconstruction of Welfare’, in Geof Andrews (Ed.), *Citizenship*, London, Lawrence & Wishart, 1991, pp. 54 ff., p. 56, Roberto Gargarella, ‘Justicia dialógica y derechos sociales’, in Javier Espinoza de los Monteros & Jorge Ordóñez (Ed.), *Los Derechos Sociales en el Estado Constitucional*, Valencia, Tirant to blanch, 2013 pp. 109-141, p. 111, note 3, Stephen Holmes & Cass R. Sunstein, *The Cost of Rights – Why Liberty Depends on Taxes*, New York, W. W. Norton & Company, 1999, pp. 43-48, and Volker Neumann, ‘Sozialstaatsprinzip und Grundrechtsdogmatik’, *Deutsches Verwaltungsblatt*, 1997, pp. 92-100, p. 97

<sup>48</sup> Andrés Rossetti, ‘¿Los Derechos Sociales como derechos «de segunda»? Sobre las generaciones de derechos y las diferencias con los derechos «de primera»’, in Ernesto Abril *et al.* (Ed.), *Lecturas sobre los derechos sociales, la igualdad y la justicia*, Córdoba, Advocatus, 2010, pp. 83-102, Benedita Mac Crorie, ‘Os direitos sociais em crise?’, in Pedro Gonçalves, Carla Amado Gomes, Helena Melo and Filipa Calvão (Ed.), *Encontro de Professores portugueses de Direito Público*, Lisboa, ICJP/FDUL, 2013, pp. 33-45, p. 33, Jorge Reis Novais, *Direitos Sociais – Teoría Jurídica dos Direitos Sociais enquanto Direitos Fundamentais*, Coimbra, Wolters Kluwer Portugal/Coimbra Editora, 2010, pp. 93-103, José Casalta Nabais, ‘Reflexões sobre quem paga a conta do estado social’, *Revista da Faculdade de Direito da Universidade do Porto*, 7, 2010, pp. 51-83, pp. 51-52, and Luigi Ferrajoli, ‘Derechos sociales y esfera pública mundial’, in Javier Espinoza de los Monteros and Jorge Ordóñez (ed.), *Los Derechos Sociales en el Estado Constitucional*, Valencia, Tirant to blanch, 2013, pp. 47-59, p. 54.

rights costs are so embedded nowadays that we see them as ‘normal’ costs of constitutional democracies: elections and party financing, justice system, security, amongst others.<sup>49</sup>

The difference regarding the costs of liberty and social rights might be not that significant. What changes, though, is the *perception* of the cost. To some, social rights are an exclusive of developed societies or a “luxury” of rich states.<sup>50</sup>

### *2.5. 5<sup>th</sup> Misconception: Social retrogression is constitutionally forbidden.*

Successive cycles of fiscal loosening and retrenchment are a reality of economic recoveries and setbacks. In a social state, is it possible for the legislator to go back on social conquests? In other words, is there a principle of irreversibility of social conquests that prevents the current legislator from altering or even removing social rights granted in *infra* constitutional legislation?

If the answer is positive, then once a social right receives concretization in *infra* constitutional legislation, it becomes a substantive constitutional right (acquired or vested social right) and cannot be eliminated or restricted.<sup>51</sup>

My answer to that question, though, is negative and grounded in three main arguments. “First, 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. Insomuch as legislative process is not a

---

<sup>49</sup> Catarina Santos Botelho, *Os direitos sociais em tempos de crise... cit.*, p. 124.

<sup>50</sup> Tamara K. Hervey, ‘The «Right to Health» in European Union Law’, in Tamara K. Hervey and Jef Kenner (Ed.) *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003, pp. 193-222.

<sup>51</sup> J. J. Gomes Canotilho and Vital Moreira, *Fundamentos da Constituição*, Coimbra, Coimbra Editora, 1991, p. 131. Nevertheless, J. J. Gomes Canotilho, *Estudos sobre direitos fundamentais*, Coimbra, Coimbra Editora, 2008, pp. 97-114, seems to be defending this thesis with less enthusiasm.



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.

Second, 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 legislation on social rights.<sup>52</sup> It seems that the seductiveness of pan-constitutionalism – transformation of *infra* constitutional law in constitutional law – is still alive.<sup>53</sup>

Third 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 (article 18, paragraphs 2 and 3).<sup>54</sup>

In my view, the prohibition of social retrogression can operate as a political motto, but it is not an autonomous constitutional principle. Accepting the total prohibition of social retrogression would mean limiting legislative freedom and democratic alternation, burdening the current legislator/generation with the choices of previous legislators/generations.

Given the limited financial resources and the tight budgets, the legislator should be free to reform the social state if needed, in a more or less centralised way or with more or less economic intervention of the state. However, legislative comebacks are not arbitrary and social right's minimum context should be immune to change. For example,

---

<sup>52</sup> Matthias Cornils, *Die Ausgestaltung der Grundrechte – Untersuchung zur normativen Ausgestaltung der Freiheitsrechte*, Tübingen, Mohr Siebeck, 2005, p. 541.

<sup>53</sup> João Carlos Loureiro, 'Constitutionalism, welfare and crises', *Revista Eletrónica de Direito Público*, 1 (3), 2014, pp. 41-58, p. 48.

<sup>54</sup> Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity... *cit.*, pp. 74-75.

the Portuguese legislator cannot abolish the national health service or universal basic education.

If the prohibition of retrocession is not regarded as an autonomous constitutional principle, one may question how citizens will be protected against social rights restrictions. To me, the compromise between acquired social conquests and legislative freedom lies in the delicate balance of the following constitutional principles and interests: protection of trust, proportionality, equality, deference to a presumption of possibility/viability reservation, minimum requirements for living (*Existenzmínimum*), and intergenerational justice.

*2.6. 6<sup>th</sup> Misconception: There are no social rights in times of crises.*

It is undeniable that financial and economic crises pose serious obstacles to fundamental rights enforcement, namely those rights which require state's intervention through public policies (welfare, health or education). Nonetheless, the normative force of a constitutional text cannot succumb to *de facto* economic and financial distresses.<sup>55</sup> Times of crisis are critical for social rights enforcement and exacerbate the marginalization of vulnerable groups, such as the unemployed, the underemployed, and the precariously employed.

Between 2011 and 2014, Portugal's EUR 78-billion international bailout consisted in a *Memorandum of Understanding* agreed between the International Monetary Fund, the European Commission

---

<sup>55</sup> Catarina Santos Botelho, *Os direitos sociais em tempos de crise... cit.*, p. 490, David Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine', *International Journal of Constitutional Law*, 12 (3), 2014, pp. 710-739, Jean-Michel Belorgey, 'Politiques d'austerité et droits sociaux', *Lex Social*, 9 (1), 2019, pp. 162-170, and Tiago Antunes, 'Reflexões constitucionais em tempos de crise económico-financeira', in Paulo Otero, Fausto de Quadros and Marcelo Rebelo de Sousa (Ed.), *Estudos em Homenagem ao Prof. Doutor Jorge Miranda*, vol. II, Coimbra, Coimbra Editora, 2012, pp. 727-759, p. 759.

and the European Central Bank (known as “Troika”). The agreement with “Troika” was signed by both the government parties (centre-right and conservatives) and the socialist opposition (centre-left). The Portuguese legislator adhered to a very strict austerity programme, which predictably lead to unpopular public policies and stressed Portugal’s social fabric.<sup>56</sup> These significant budgetary cuts and other measures were the following: public sector wage cuts, tax increases, flexibilization of dismissal rules, pension 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.<sup>57</sup>

In the Portuguese context, when it came to monitoring the compatibility of the austerity measures with the social state, many predicted a deferent constitutional court.<sup>58</sup> If at first, the Portuguese constitutional court (PCC) judgements seemed to adhere to the crisis’ rhetoric and to refrain from interfering with budgetary impositions and international commitments,<sup>59</sup> soon after, the PCC showed a decreasing deference towards the legislator.<sup>60</sup> The reason for the

---

<sup>56</sup> Catarina Santos Botelho, ‘Portugal – The State of Liberal Democracy’, *in* Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (Ed.), *2017 Global Review of Constitutional Law*, I.CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2018, pp. 230-234.

<sup>57</sup> *Idem*, ‘Aspirational constitutionalism, social rights prolixity... *cit.*’, p. 79.

<sup>58</sup> Jorge Reis Novais, *op. cit.*, p. 374, p. 382, and Mónica Brito Vieira & Filipe Carreira da Silva, *op. cit.*, p. 921.

<sup>59</sup> PCC ruling number 399/2010, from October 27<sup>th</sup>, available at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20100399s.html> (retroactive personal income tax pensions); and number 396/2011, from September 21<sup>th</sup>, available only in Portuguese, at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20110396.html> (public sector wage cuts).

<sup>60</sup> PCC ruling number 353/2012, from July 5<sup>th</sup>, available at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html> (suspension of the Christmas-month (13<sup>th</sup> month) and holiday-month (14<sup>th</sup> 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

jurisprudential change was that the “argument of exceptionality” could not be sustained for a long period of time without losing its validity. The PCC then decided that its tolerance to the crisis argument would be *inversely proportional* to the duration of the crisis.<sup>61</sup>

“The PCC received unprecedented attention and international coverage, which combined endorsement and disapproval insights. How did the PCC 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)?”<sup>62</sup>

---

the declaration of unconstitutionally, on the grounds of “exceptionally important public interest” (article 282/4).

<sup>61</sup> PCC ruling number 862/2013, from December 19<sup>th</sup>, available at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20130862s.html> (Civil Service Law – Statute governing the Retirement of Public Sector Staff); number 413/2014, from May 30<sup>th</sup> available at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20140413s.html> (review of the constitutionality of norms contained in the State Budget Law for 2014 – the PCC declared the unconstitutionality of the majority of the measures syndicated); number 575/2014, from August 14<sup>th</sup> available 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); number 3/2016, from January 13<sup>th</sup> available 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).

<sup>62</sup> Catarina Santos Botelho, ‘Aspirational constitutionalism, social rights prolixity... *cit.*, pp. 80-81. For a sharp review of the PCC jurisprudence of crisis, see Antonia Baraggia, ‘Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?’, *Cambridge International Law Journal*, 4 (2), 2015, pp. 268-288, pp. 283-286, Gonçalo Almeida Ribeiro, ‘Judicial Activism against austerity in Portugal’, *Int’l J. Const. L. Blog*, Dec. 3, 2013, available at <http://www.iconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/> and Mariana Canotilho, Teresa Violante and Rui Lameiro, ‘Austerity Measures under Judicial Scrutiny: the Portuguese Constitutional Case Law’, *European Constitutional Law Review*, 11, 2015, 155-183. Exploring the tension between democracy and judicial review, see Mark Graber, ‘Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power’, *Maryland Law Review*, 65 (1), 2006, pp. 1-14.

The Portuguese constitutional court was considered, by national and international scholars, as “one of the most active courts” in Europe.<sup>63</sup> The so-called “jurisprudence of crisis” also demystified the idea of the politicization of constitutional judges.<sup>64</sup>

*2.7. 7<sup>th</sup> Misconception: Social rights enforcement relies on activist courts.*

Should courts protect social rights as a reaction to the procrastination or insufficient commitment of the legislator? A few examples can be found in which a prolix positivization of social rights lead to an uncontrolled judicial activism, especially in a crisis context and when all eyes were on the state’s budget. As well-known, Brazil has one of the most remarkable social rights catalogue in the world. One should therefore not be surprised that an uncontrolled judicial activism has emerged, especially regarding fundamental social rights to health and housing.<sup>65</sup> Health litigation is now claiming the rights to therapeutic innovation (access to unorthodox treatments, experimental therapies and other non-validated medical practices or drugs) and the right to healthcare tourism (right to travel to the state where the best treatment option is available).

As I have written, “when courts act as social rights’ enablers, allowing every single demand, they will inevitably compromise the

---

<sup>63</sup> Andreas Dimopoulos, ‘PIGS and Pearls: State of Economic Emergency, Right to Resistance and Constitutional Review in the Context of the Eurozone Crisis’, *Vienna Journal on International Constitutional Law*, 7 (4), 2013, pp. 501 -520, and Luis Gordillo Pérez, ‘Derechos Sociales y Austeridad’, *Lex Social*, 2014, pp. 34-56 (2014).

<sup>64</sup> Susana Corado, Nuno Garoupa & Pedro Magalhães, ‘Judicial Behaviour Under Austerity – An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002-2016’, *Journal of Law and Courts*, forthcoming, p. 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”.

<sup>65</sup> Catarina Santos Botelho, ‘Aspirational constitutionalism, social rights prolixity... *cit.*, p. 82.

state's budget. Then, their legal reasoning will be (knowingly or unknowingly) metamorphosed into political reasoning, jeopardizing the constitutional division of powers. Just as psychologists identify a '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.<sup>66</sup> (...) If judges constantly shadow citizens in a way that is overprotecting, they discourage them to search democratic ways to change the laws.

(...) *In medio stat virtus?* Not always, but generally this seems to be true. (...) 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."<sup>67</sup>

The protection of social rights does not exclusively depend on courts activism, much less on courts only. On the contrary, it is a shared responsibility. In a participatory democracy, there are several social rights promoters, namely: the legislator, the courts, the public administration, the ombudsperson, and even civil society itself.<sup>68</sup>

---

<sup>66</sup> Some scholars alert to the dangers of jurisdictional "emotionality", relying on populist and demagogic analysis. See 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*, Lumen Juris, 2010, pp. 803-826, pp. 824-825, Luís Roberto Barroso, 'Da falta de efetividade à judicialização excessiva: direito à saúde, fornecimento gratuito de medicamentos e parâmetros para a atuação judicial', *Revista Interesse Público*, IX, 2007, pp. 31-62, and Zélia Luiza Pierdoná, 'A proteção social na constituição de 1988', 7 (28) *Revista de Direito Social*, 2007, pp. 11-29.

<sup>67</sup> Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity... *cit.*, pp. 83-84.

<sup>68</sup> *Idem*, *Os direitos sociais em tempos de crise...*, *cit.*, pp. 357-358.

*3. Concluding remarks: social rights' DNA is the triad of dignity, liberty and equality*

In Ingo Wolfgang Sarlet's brilliant synthetisation, the main social rights dilemma of our time relates to the definition (in internal and international law) of social rights, both qualitatively and quantitatively.<sup>69</sup> Constitutions and other normative acts differ greatly on the quality and quantity of social protection.

The *qualitative* aspect pertains to how social rights should be consecrated: in the constitution or in infra constitutional legislation? As rights or as directive principles? As inferred rights or as subjective rights? As programmatic norms or as preceptive norms? As justiciable (along with judicial review mechanisms) or as merely aspirational? The *quantitative* aspect refers to social rights *quantum*: should constitutions include a long list of social rights that can be judicially adjudicated? Should the list be more parsimonious, and some social rights be left to legislative power and majority rule enforcement?

Social rights belong to a social state normative context, but the social state is not a synonym for welfare state. Both social rights and the concept of social state should not be held hostage by any political-ideological conception. As fundamental rights, social rights belong to people and to their inherent human dignity. Therefore, social rights' DNA is not a certain political view, but the triad of *dignity, liberty and equality*.

---

<sup>69</sup> Ingo Wolfgang Sarlet, 'Los derechos sociales en el constitucionalismo contemporáneo: algunos problemas y desafíos', in Miguel Ángel Presno Linera and Ingo Wolfgang Sarlet (Ed.), *Los derechos sociales como instrumento de emancipación*, Thomson-Aranzadi, 2010, pp. 35-61, p. 46. For an interesting development of this idea and concluding that "despite the prevalence of economic and social rights in national constitutions", there is still "considerable variance with respect to the formal status, scope and nature of such rights", see Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions', *The American Journal of Comparative Law*, 62 (4), 2014, pp. 1043-1094.

There can be no dignity in a society that does not guarantee each human being a social minimum (food, water, housing, health and education). There can be no true liberty (*v.g.*, right to vote) if one lives in extreme poverty. As Jorge Miranda said, “liberty – for everyone and not a few, and to express the communitarian dimension of the person – demands economic, social and cultural rights”.<sup>70</sup> There can be no equality without social rights enforcement and the prerequisite not to marginalize some segments of each society. These segments (persons with disabilities, children, the elderly, and the unemployed) can suffer enormous vulnerability and helplessness.

In the last decades, the international commitment to fundamental rights’ *indivisibility* has been blurring the clear-cut division between liberty and social rights. Constitutional rights, in general, and social rights, in particular, must convey with the harsh reality of resource limitation, scarce goods, changes in social structures and fluctuating macro-economic circumstances. Nonetheless, the normative force of a constitutional text cannot succumb to *de facto* economic and financial distresses. In times of crisis, social rights enforcement is imperative, as economic inequalities become more acute. Thus, in such contingencies, it is of paramount importance to promote distributive justice.

As I have written, social rights should not be claimed *sotto voce*. They are crucial in contemporary constitutionalism, “not because a welfare state is mandatory, not for paternalistic reasons, but for the reason that they are inherent to the community (...) they are endogenous to citizenship. (...) People do not live alone, but in community and in constant interaction. If, on the one hand, the community should functionalize its members or curtail their individuality, on the other hand, being a citizen implies the sharing of social responsibilities (ethical contract of citizenship)”.<sup>71</sup>

---

<sup>70</sup> *Apud* Catarina Santos Botelho, *Os direitos sociais em tempos de crise...* *cit.*, p. 27.

<sup>71</sup> Catarina Santos Botelho, *Os direitos sociais em tempos de crise...*, *cit.*, p. 516.



**Abstract:** This paper focuses on the highly controversial constitutional debate on social rights design and the social state. With a comparative constitutional law approach, I identify seven misunderstandings and stereotypes of the social state worth being unravelled: social state is a synonym for welfare state; social rights are socialist; social rights are less important than liberty rights; social rights are costly and liberty rights are free; social retrogression is constitutionally forbidden; there are no social rights in times of crisis; social rights enforcement relies on activist courts. I will then conclude that social rights are not exclusive of a specific political spectrum. As social rights' DNA lies in the triad of dignity, liberty and equality, their effective enforcement can (and should) be addressed by all democratic ideologies and political thoughts, regardless of their axiological and epistemological differences.

**Keywords:** social rights, dignity, liberty, equality, social state, social retrogression, positive/negative rights, costly rights and rights for free, indivisibility, judicial activism

**Catarina Santos Botelho** – Assistant Professor and Department Chair of Constitutional Law at the Porto Faculty of Law, Universidade Católica Portuguesa; email: [cbotelho@porto.ucp.pt](mailto:cbotelho@porto.ucp.pt).