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OS DIREITOS SOCIAIS E O 70.o ANIVERSÁRIO DA 'SEGUNDA DECLARAÇÃO DE DIREITOS'

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In early 1944 the victory of the Allied forces in World War II was already almost certain. The question was to know which peace would follow the bloodiest armed conflict that history had ever known. It was in this context that, on January 11, 1944, in his speech to Congress on the state of the Union, President Frank Delano Roosevelt launched his proposal for a 'Second Bill of Rights'.

Roosevelt began by stressing the "inalienable political rights – among which the freedom of expression, press freedom, freedom of religion, trial by jury, protection against unreasonable searches and seizures without reasonable foundation" – under whose sign the American Republic was born. But he recognized that those rights had proved to be inadequate, solely by themselves, to ensure "equality in the pursuit of happiness".

His words on the occasion probably are, even today and perhaps never since then as today, the best explanation of the importance of social and economic rights:

> "We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men.' People who are hungry and out of a job are the stuff of which dictatorships are made.
>
> In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis

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of security and prosperity can be established for all—regardless of station, race, or creed.

Among these are:

- The right to a useful and remunerative job in the industries or shops or farms or mines of the nation;
- The right to earn enough to provide adequate food and clothing and recreation;
- The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
- The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
- The right of every family to a decent home;
- The right to adequate medical care and the opportunity to achieve and enjoy good health;
- The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;
- The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being."

The security Roosevelt was concerned with was not simply the physical security that gives us protection against attacks from aggressors, but economic and social security. Indeed, the relation between freedom and security also appears in the field of social rights. In Roosevelt's words, "freedom from fear is eternally linked with freedom from want."[2]

It is this legacy that the present issue of *e-Pública* wants to celebrate by reflecting on social rights' challenges in contemporary societies. A context with some similarities to the one that existed when Roosevelt was first elected.

The following essays originated in some of the papers presented to the conference celebrating Franklin Roosevelt's 'Second Bill of Rights', which took place at the University of Lisbon School of Law on the 19th and 20th May, 2014. Notwithstanding this fact, the essays herein included are enlarged versions of

2. See the complete speech of President Roosevelt and its contextual history in Cass Sunstein, *The Second Bill of Rights: FDR'S Unfinished Revolution and Why We Need it More than Ever*, New York: Basic Books, pp. 9 ff., 235 ff.

the presentations and were submitted to a double blind peer review process, in accordance with the rules of this journal[3].

The contributions to this special issue can be separated in two main groups. The first one includes articles dealing with general issues concerning social rights. This is the case of the articles of Mark Tushnet, Jeff King, João Carlos Loureiro, Carlos Blanco de Morais, and Luís Pereira Coutinho. In the second group more specific contributions can be found, ranging from the situation of social rights in a specific country to the handling of various topics related to social rights. These are the essays by Octávio Ferraz, Rainer Palmstorfer, Lena Boucon, Rui Tavares Lanceiro, Sasa Sever, Mariana Melo Egídio, and Borja Barragué and César Martínez Sánchez.

Professor Tushnet gives us an overview of the historical origins of social rights in the constitutional discourse as well as an appraisal of the future prospects of the judicial enforcement of social and economic rights. According to Tushnet, by the late 19th century three streams flowed together and became embedded in a discourse of constitutionalism: the socialist ideas of economic redistribution, Bismarck's programs of social welfare, and the Catholic Church's social teachings. These streams remained important in the early 20th century and eventually led to the embedding of social and economic rights in constitutions throughout the century, furthering the connection between individual rights – including social and economic rights therein – and the judicial enforcement of rights. In our time, attention has turned from the "question of *whether* courts should enforce social and economic rights to the question of *how* they should do it". In this context, the most pressing issue is the development of a coherent overall system of judicial intervention. Finally, Tushnet claims that social and economic rights, on the one hand, and the doctrines of horizontal effect and unconstitutionality by omission or state of unconstitutionality, on the other, are conceptually connected.

In his article, Jeff King focuses on the constitutional role of the German social state principle and the questions it generates for foreign scholars. Although the German Basic Law contains no set of social rights, the social state principle has invigorated readings of the basic rights constitutional provisions in a manner that invites comparison with, and raises the same competence questions, as the adjudication of social rights. On the other hand, the principle focuses on a general state duty to take responsibility for the 'social question' and take an active role in the society. Although the German Constitutional Court has found that the Basic Law is neutral in what regards economic policy, the commitment to the social state principle does not appear neutral or apolitical in the Anglo-American sense. Jeff King explores two ways in which the social state principle seems to have had an important impact. Firstly, the German Constitutional Court has developed the principle as a basis for interpreting the Constitution, using it occasionally "in conjunction with" other basic rights provisions to provide

3. The only exception was the paper of our distinguished keynote speaker, Professor Mark Tushnet, who needs no presentation to anyone interested in constitutional theory and law.

affirmative entitlements. Secondly, there is a clear link between the social state principle and the major achievement of the legal protection of social rights in Germany: the Social Code. Finally, Jeff King underlines the important role of the social state principle in a nation that takes seriously both the welfare state and the rule of law (*Rechtstaat*), and raises some questions concerning its relevance from the point of view of constitutional comparative law.

João Carlos Loureiro proposes to take seriously the constitution in an "age of austerity" by means of a reading of social rights in a globalized world based on sustainability and intergenerational justice. His proposal includes six steps: *(i)* he starts with lessons from Roosevelt; *(ii)* he then suggests some of the possible links between constitutionalism and welfare; *(iii)* he takes a quick glance at the so-called – especially in Latin countries, including Latin America – neoconstitutionalism(s), combining the temptation of panconstitutionalism with an intensive judicial control that threatens the relative autonomy of the legislative branch in what concerns public policies; *(iv)* a brief remark on social rights in an "age of austerity"; *(v)* he traces a route from austerity to sustainability as a road for social rights in a globalized world; and lastly, *(vi)* he links social rights with intergenerational justice.

According to Carlos Blanco de Morais, a recent Portuguese scholarly trend intends to equalize the classic liberty rights and social rights, and to demonstrate that the latter cannot actually qualify as "weak rights". This is the thesis that sustains the dogmatic unity of liberty rights and social rights. He critically assesses the contribution of the mentioned scholarly trend that defends this dogmatic unity of fundamental rights. Moreover, Blanco de Morais further appraises whether the judicial protection of social rights violated by legislative measures in the context of the financial crisis was due to the thesis of the indivisibility of liberty rights and social rights.

Luís Pereira Coutinho addresses the adequacy of the conception of social rights as constitutive commitments – advanced by Cass Sunstein with reference to the 'Second Bill of Rights' – to constitutional systems, such as the Portuguese, in which those rights are entrenched by the constitutional text. He argues that such a conception captures more accurately the weak legal status of social rights, as opposed to freedoms, reinforcing their political force, which ultimately is their only possible real strength. He also claims that the same conception bolsters the association between democracy and social rights.

Octávio Ferraz questions whether the Brazilian Constitution of 1988, the first democratic one in Brazil for decades, is to be considered as including an effective "second bill of rights". The Constitution of 1988 established an extensive catalogue of fundamental rights and set the fundamental principles and objectives of the new Brazilian republic: citizenship, the dignity of the human being, and the construction of a free society, based in justice and solidarity, in which poverty should be eradicated and inequalities reduced, and everyone's well-being should be promoted without any discrimination. Bearing these proclamations in mind, the question arises as to how wide is the gap between

the social and economic citizenship promises of the Citizen's Constitution and the real life of the Brazilian population. Despite significant problems of quality, efficiency and underfunding, the imperfect quantitative data indicates that the public services and benefits system in Brazil – a great part of which was created by the Constitution –, have improved, often significantly, the well-being of the Brazilian population in the past couple of decades.

According to Rainer Palmstorfer, the legal analysis has predominantly focused so far on the question whether the measures that were adopted in the context of the so-called 'eurocrisis' (i.e. European Stability Mechanism, Treaty on Stability, Coordination and Governance, etc.) are compatible with the EU Treaties. This discussion has concentrated on competences and the institutional framework of the Economic and Monetary Union. Recently, however, the crisis has also developed a fundamental-rights dimension, as it was/is questionable whether austerity measures adopted in the wake of the crisis are compatible with the European Convention on Human Rights, in particular with Article 1 of Protocol 1 (Protection of Property). Austerity measures such as cuts in social security benefits, pensions, or excessive tax rates have given rise to a series of cases before the European Court of Human Rights ("ECtHR") that were decided in 2013. In these cases, the ECtHR conferred a wide margin of appreciation to the national legislators in what regards the definition of 'public interest'. However, this margin is not unlimited. In his paper, Rainer Palmstorfer analyses this recent case-law, in particular the issue of possible limits for the legislator in what cuts in public sector salaries and pensions are concerned.

With her contribution, Lena Boucon intends to shed light on the nature of the cross-border welfare rights that are recognized by the European Court of Justice in its free movement cases. To this end, she first sets forth the specific context characterizing the European Union (hereinafter "EU"). She then assesses to what extent the Court's case-law has the effect of reshaping Member States' welfare policies. Finally, Lena Boucon identifies the key-features of the EU cross-border rights, claiming, as a result, that such rights *(i)* have a far-reaching scope, since they cover matters over which the EU has no, or very limited, jurisdiction; and *(ii)* have a limited substance, since, despite their cross-border dimension, they remain first and foremost national. The essay of Lena Boucon is the object of a critical analysis by Rui Lanceiro.

According to Saša Sever, it is now hardly a disputed matter that fundamental rights in the EU may apply in proceedings between private parties (horizontal effect). So far, the Court of Justice of the European Union (hereinafter Court of Justice) has recognized such an effect with regard to the general principle of equality as it is expressed in different forms in various legal acts of the EU. Such is an example of the Chapter on 'Equality' of the Charter of Fundamental Rights of the European Union (hereinafter Charter), which prohibits discrimination on various grounds and imposes directives to implement it. It is however less explored what is a rationale for the application of fundamental rights in relationships between private parties. While some authors argue that this rationale consists in the promotion of social justice, Sever argues that the

horizontal effect of fundamental rights of the Charter pursues this objective only partly. The contribution of Saša Sever is the object of a commentary by Mariana Melo Egídio.

Borja Barragué and César Martínez Sánchez present a proposal for the implementation of a 'guaranteed minimum income system'. According to them, in the wake of the 2007 financial crisis, fundamental questions about economic inequality and one of its main consequences, i.e. poverty, have again garnered attention after a period in which they were largely ignored. As a contribution to the debate on the socio-economic effects of the 2007 crisis, they draw attention to the Spanish social safety net. They start by evaluating the impact of the economic crisis in the Spanish households in terms of poverty, unemployment, and inequality. They then examine the safety net in Spain, with special focus on the guaranteed minimum income system, from a comparative perspective within the legal framework of the EU's Active Inclusion Strategy adopted in 2007. Finally, the authors develop a proposal for the implementation of a guaranteed minimum income system at the national level, focusing on the relevant costs and the necessary tax measures to bear them.

This brief overview of the contributions herein published clearly shows the importance and vitality of the debate about social rights. This debate shows that the existence of a Welfare State it is not dependent on the existence of constitutional social rights. In fact, it is unclear whether the existence of social benefits is dependent on the constitutional entrenchment of social rights. But, on the other hand, if one decides to entrench them on the constitution this cannot be indifferent from a legal point of view.

As guest editors of this special issue, we would like to thank the Editors of *e-Pública* for giving us the opportunity to publish these articles in a way that resembles the context in which they originated and allows emphasizing their unity. Our special thanks, of course, go to all the participants of the *Lisbon Conference on Social Rights celebrating the Second Bill of Rights* who accepted our challenge to transform their papers in the articles appearing herein.

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