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DIREITOS ECONÓMICOS E SOCIAIS: ORIGENS HISTÓRICAS E QUESTÕES CONTEMPORÂNEAS

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Abstract: By the late nineteenth century three streams flowed together and became embedded in a discourse of constitutionalism: 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 twentieth century and eventually led to the embedding of social and economic rights in constitutions throughout the twentieth century, furthering the connection between individual rights – now including social and economic rights – and 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, it is argued 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 concepts conceptually connected.

Keywords: social and economic rights; judicial enforcement; horizontal effect of rights; unconstitutionality by omission; constitutional law and private law.

Resumo: No final do século dezanove três correntes confluíram num discurso constitucionalista: as ideias socialistas da redistribuição económica, os programas de bem-estar social de Bismarck e a doutrina social da Igreja Católica. Estas correntes mantiveram a sua importância no início do século vinte e conduziram à integração dos direitos económicos e sociais nas constituições ao longo do século vinte, desenvolvendo a conexão entre direitos individuais – incluindo agora os direitos sociais e económicos – e a aplicação dos direitos pelos tribunais. No nosso tempo, a questão já não consiste tanto em saber *se* os tribunais devem aplicar os direitos económicos e sociais, mas *como* devem fazê-lo. Neste contexto, a questão mais importante consiste no desenvolvimento de um sistema global coerente de intervenção judicial. Finalmente, sustenta-se que os direitos sociais e económicos, por um lado, e a doutrina do efeito horizontal e a inconstitucionalidade por omissão, por outro,

1. Keynote Address delivered at the Lisbon International Conference on Social Rights in Celebration of the 70th Anniversary of the 'Second Bill of Rights'.

2. William Nelson Cromwell Professor of Law at Harvard Law School.

são conceitos concetualmente relacionados.

Palavras-Chave: direitos sociais e económicos; justiciabilidade; efeito horizontal; inconstitucionalidade por omissão; direito constitucional e direito privado.

Franklin Roosevelt's call for the adoption of a second bill of rights occurred against a background of more than a half-century of developing ideas about constitutionalism and a new regime of rights. After describing that historical background, I will take up some contemporary issues about the kinds of social and economic rights Roosevelt addressed, and will conclude with some thoughts about some connections among contemporary issues that, I hope to show, all implicate social and economic rights despite their initially disparate appearance.

Undoubtedly we could trace ideas about social and economic rights back to ancient times. But, they became embedded in a distinctively modern discourse, fairly called a discourse of constitutionalism, in the late nineteenth century, when three streams flowed together. The first, not surprisingly, was advocacy by socialist parties for economic redistribution as a matter of right and justice. The second and third were responses by conservatives to that socialist agitation. In Germany Chancellor Otto von Bismarck introduced programs of income support as a way of combating the socialist threat.³ And Pope Leo XIII gave voice to what came to be known as the social teachings of the Roman Catholic Church, teachings that focused on promoting social harmony by unifying society around programs of social justice. The papal encyclical *Rerum Novarum* (1891) dealt with the "duties of capital and labor," but the focus was on tempering the excesses of capitalist development in the service of economic justice.⁴ Focusing on class relations, the social teachings sought to place capital and labor on the same plane, equally reflective of human dignity.

All three streams remained important in the early twentieth century. The socialist stream was taken up in constitutions drafted after revolutionary uprisings in Mexico and Russia, where a wide range of economic rights were embedded in constitutions for the first time.⁵ The Weimar constitution in post-World War I Germany also guaranteed economic rights.⁶ Yet, because the Mexican and Russian constitutions were the products of revolutions, and the Weimar constitution was under siege from the moment of its creation, the socialist stream might have seemed diverted. Not so with the Catholic Church's social teachings. Pope Pius XI reiterated the Church's commitment to the social teachings in *Quadragesimo Anno* (1931, on the fortieth anniversary of *Rerum Novarum*).⁷ And, specifically

3. For the background, see E. P. HENNOCK, *The Origin of the Welfare State in England and Germany, 1850–1914: Social Policies Compared*, Cambridge, 2007.

4. See, e.g., *Rerum Novarum*, ¶ 3: "some opportune remedy must be found quickly for the misery and wretchedness pressing so unjustly on the majority of the working class.... [B]y degrees it has come to pass that working men have been surrendered, isolated and helpless, to the hardheartedness of employers and the greed of unchecked competition."

5. See Constitution of Mexico (1917), Title One, Chapter I, available at <http://www.latinamericanstudies.org/mexico/1917-Constitution.htm>.

6. See, e.g., Constitution of Germany (1919), arts. 161, 162, available at http://www.zum.de/psm/weimar/weimar_vve.php#Fifth%20Chapter%20:%20The%20Economy.

7. See, e.g., *Quadragesimo Anno*, ¶ 28: "a new branch of law, wholly unknown to the earlier time, has arisen from this continuous and unwearied labor to protect vigorously the sacred rights of the workers that flow from their dignity as men and as Christians. These laws undertake the protection of life, health, strength, family, homes, workshops, wages and labor hazards, in fine, everything which pertains to the condition of wage workers, with special concern for women and children. Even though these laws do not conform exactly everywhere and

with reference to Franklin Roosevelt's New Deal, the Catholic Monsignor John Ryan (1869-1945) was a forceful advocate, through the early decades of the century, of legislation that would enact the Church's social teaching. In 1919, for example, Ryan drafted a "program for social reconstruction" that anticipated many New Deal initiatives.⁸

More influential in the long run than the Mexican and Russian constitutional commitments to social and economic rights were the Directive Principles of Social Policy written into the Irish Constitution (1937).⁹ That document's preamble exhibited a Roman Catholic heritage,¹⁰ and the Directive Principles were the expression of the notion of human dignity that animated the Church's social teachings. The Constitution was predicated on the ideal of human dignity, but, as Samuel Moyn has recently argued, of a new, individualized sort: Human dignity now referred not to the equal dignity of classes of human activity such as capital and labor but to the equal dignity of each human person.¹¹ By 1937, the connection between individual rights – now including social and economic rights – and judicial enforcement of rights had come to be thought of as quite close. So, to guard against judicial overreaching of the sort that was said to characterize the *Lochner* era in the United States or, as it was called in France, the *gouvernement des juges*,¹² the directive principles were expressly made the sole responsibility of the legislature, not to be enforced by the courts at all.

During and after World War II, the idea of social and economic rights spread. Roosevelt articulated the Four Freedoms, including freedom from fear and freedom from want, and proposed a New Bill of Rights.¹³ At the end of the 1940s, the Basic Law for West Germany described the nation as a "social state."¹⁴ Importantly, the social state principle was among the provisions protected against revision by the Basic Law's "eternity clause," which said that the principles of the rule of law and the social state could never be amended.¹⁵ Almost simultaneously the drafters of the constitution for an independent India followed the Irish model in embedding directive principles dealing with social and economic rights in

in all respects to Leo's recommendations, still it is undeniable that much in them savors of the Encyclical, *On the Condition of Workers*, to which great credit must be given for whatever improvement has been achieved in the workers' condition."

8. See FRANCIS L. BRODERICK, *Right Reverend New Dealer, John A. Ryan*, New York, 1963.

9. Constitution of Ireland (1937), art. 45, available at [http://en.wikisource.org/wiki/Constitution_of_Ireland_\(original_text\)](http://en.wikisource.org/wiki/Constitution_of_Ireland_(original_text)).

10. See *id.*, Preamble ("In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred").

11. SAMUEL MOYN, *The Secret History of Human Dignity*, *Yale Human Rights and Development Law Journal* (forthcoming).

12. EDOUARD LAMBERT, *Le Gouvernement des Juges et la Lutte Contra la Législation Sociale aux Etats-Unis*, Paris, 1921.

13. For the background, see CASS SUNSTEIN, *The Second Bill of Rights: FDR's Unfinished Revolution – And Why We Need It More Than Ever*, New York, 2004.

14. Basic Law of Germany, art. 20 ("Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.").

15. *Id.*, art. 79 (3) ("Amendments to this Basic Law affecting ... the principles laid down in Articles 1 and 20 shall be inadmissible.")

the constitution.¹⁶ And, similarly cautious about judicial overreaching, they too made the directive principles unenforceable in court.

The late twentieth century saw a new wave of constitution making. Immediately after 1945 constitutions contained guarantees of social and economic rights in part because social and communist parties were politically strong. Both before and after the collapse of the Soviet Union and its empire in 1989, people in many nations had become so accustomed to the existence of social welfare benefits – the social welfare state, to be short – that late twentieth century constitutions almost had to incorporate protections for those rights. Notably, even in the United States, whose constitution dated from 1789 and had not been formally amended to include social welfare rights, an important strand of theorizing about constitutionalism began to contend that the social welfare statutes of the New Deal and thereafter were of constitutional stature, “superstatutes,” as some put it, though the precise implications of giving statutes constitutional status were unclear.¹⁷

The directive principles in the Irish and Indian constitutions were said to be unenforceable in the courts. But, by the late twentieth century the notion of judicially unenforceable rights had become almost unintelligible – except to a handful of British constitutional theorists who counterposed a “legal” constitution enforceable in the courts to a “political” constitution not so enforceable.¹⁸ One can see the effect of this change in thinking in the Indian experience. That constitution contained, from the beginning, a provision guaranteeing a right to life, and that guarantee was included among those rights that *were* judicially enforceable.¹⁹ India’s judges used the “right to life” provision as the textual vehicle for making many of the directive principles judicially enforceable, as necessary components of or prerequisites to the right to life.²⁰

Constitutionalizing social and economic rights in a world where it was generally assumed courts would enforce all constitutional rights was initially quite controversial. Sometimes the objections were conceptual: For one person to have a right, it was thought, someone else had to have a duty, and collective entities like governments could not have duties. Sometimes the objections were founded on the separation of powers: Although guaranteeing classical civil and political rights was costly, guaranteeing social and economic rights placed far more substantial demands on state budgets, and the quantitative difference translated into a qualitative one. And sometimes the objections were practical or pragmatic: Courts were quite unlikely to do even a minimally decent job in enforcing social and economic rights, because to do so effectively would make informational and managerial demands on judges that they were institutionally incapable of

16. Constitution of India, Part IV (“Directive Principles of State Policy”).

17. For a general discussion, see WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A Republic of Statutes: The New American Constitution*, New Haven, 2010.

18. See, e.g., RICHARD BELLAMY, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge, 2007.

19. Constitution of India, art. 21.

20. *People’s Union for Civil Liberties v. Union of India & Others*, 2001.

satisfying.

By the beginning of this century, though, most of the arguments that courts simply could not enforce social and economic rights had fallen by the wayside. Conceptually, the idea that governments had duties fit comfortably with the assumptions of the modern social welfare state. The separation of powers and pragmatic objections merged, as courts and constitutional theorists began to develop ways of managing litigation over social and economic rights that tempered the budgetary, informational, and managerial demands on courts.²¹ Interactive or weak-form remedies for violations of social and economic rights often seemed to work at least as well as standard remedies for violations of classical civil and political rights.²²

Attention has turned from the question of *whether* courts should enforce social and economic rights to the question of *how* they should do it. Several important distinctions have emerged, on which constitutional theorizing has begun to focus. First, there is a distinction between a *substantive* approach to enforcing social and economic rights and various *procedural* (sometimes called administrative) ones. Typically, substantive approaches seek to ensure that everyone in the society has what has come to be known as a “minimum core” of rights – access to rudimentary shelter, sufficient potable water for daily life, and the like.²³

Within substantive approaches we can distinguish between what in the United States would be called tiers of scrutiny, although sometimes the distinction is obscured within the general language of proportionality. Sometimes courts hold that constitutional guarantees of social and economic rights are substantively protected as long as the government has a rational plan in place for providing them, where “rationality” is a relatively lax standard.²⁴ Sometimes, though, the courts demand more than “mere” rationality, requiring the government to demonstrate that its reasons for restricting social provision are reasonably good ones.²⁵

Procedural approaches typically involve iterated processes for the progressive realization of the guarantees. The interactions take two forms. At first, courts interacted with government planners and NGOs, requiring that the government

21. See MARK TUSHNET, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Perspective*, Princeton and Oxford, 2008.

22. For a critique of this argument, relying on experience in Latin America, see DAVID LANDAU, The Reality of Social Rights Enforcement, *Harvard International Law Journal*, Vol. 53, 2012, p. 189.

23. The approach was pioneered by the United Nations Council on Economic and Social Rights. For a discussion, see KATHERINE G. YOUNG, The Minimum Core of Economic and Social Rights: A Concept in Search of Content, *Yale Journal of International Law*, Vol. 33, 2008, p. 113.

24. This approach is expressly taken in the United States. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970), and is well articulated in *Sobramoney v. Minister of Health*, [1997] ZACC 17, 1998 (1) SA 765 (CC).

25. See, e.g., *Minister of Health v. Treatment Action Campaign*, [2002] ZACC 15; 2002 (5) SA 721, and the Hartz IV decision of the German Constitutional Court, described at <http://www.bverfg.de/en/press/bvg10-005en.html> (press release).

develop plans with the ordinary oversight NGOs perform on government actions, submit them to the courts for approval, implement the plans, make progress reports to the courts and sometimes the NGOs, modify the plans in light of the courts' assessment of progress, and so on, until the courts were satisfied that the plans held out real prospects for achieving substantial compliance with the constitution.²⁶ A second form of interaction has begun to develop. Here the court directs that government planners interact directly with the affected interests and relevant NGOs, in the hope that a settlement acceptable to all sides can be worked out.²⁷

Another distinction among problem cases has just begun to surface, although it has not yet generated close doctrinal analysis. We can distinguish among the proximate sources for failures to provide social and economic rights. Sometimes the source is bureaucratic failure, including corruption. So, for example, some Indian cases involving the right to food arose from situations in which the government had acquired food for distribution but failed to distribute it.²⁸ Some Brazilian cases involving the right to specific medications arose because the health ministries did not update their registers of approved medications at reasonable intervals. In contrast, sometimes the legislature directly violates constitutional rights, as occurred, according to the German Constitutional Court, when the German legislature adopted legislation integrating the nation's various systems of social support as a cost savings measure – and in the course of doing so adopted some restrictions that the court found arbitrary and indefensible.²⁹ In general, a judicial finding that a bureaucracy had violated the constitution is less intrusive on democratic self-governance than a finding the legislature has done so.³⁰ But, the importance of this distinction may vary from nation to nation depending in part on how responsible the legislature is to the nation's people, which emerging scholarship is beginning to show depends in important part on how party systems are organized.³¹

At present the most pressing issue with respect to judicial enforcement of social and economic rights is what Max Weber might have called rationalizing it – that is, developing a coherent overall system of judicial intervention. Incoherence has arisen in various forms. Sometimes, as in Brazil's right to medication cases, the judicial system is organized in ways that induce case-by-case determinations, with the effect that the budgetary demands imposed by successful are determined

26. See, e.g., *Government of the Republic of South Africa v. Grootboom*, [2000] ZACC 19, 2001 (1) SA 46 (CC).

27. Compare *Occupiers of 51 Olivia Road v. City of Johannesburg*, [2008] ZACC 1; 2008 (3) SA 208 (CC) (finding engagement inadequate and directing that it be pursued), with *Residents of Joe Slovo Community v. Thebelisha Homes*, [2011] ZACC 8 (finding adequate engagement and refusing to provide relief).

28. A valuable discussion is GUILLERMO OTÁLORA LOZANO, *Commandeering the Institutions: The Legitimacy of Structural Judicial Remedies*, *LLM paper, Harvard Law School*, May 2014.

29. See the Hartz IV decision, cited in note 23 above.

30. Even though the bureaucracy is responsible to the legislature, and operates under conditions prescribed by the legislature.

31. See DAVID LANDAU, *A Dynamic Theory of Judicial Role*, *Boston College Law Review*, Vol. 55, forthcoming.

by who gets to court most quickly: In one well-known case, an extremely large portion of a ministry's budget for medications was consumed by a judgment rendered in favor of a single litigant who required an extremely expensive medication.³² Ministries of health develop registries of medications precisely to ensure that the ministry acquires and distributes medications in the way that is most socially beneficial overall. Sometimes rationalizing the system in this way means that life-saving medications that benefit a small group are subordinated to health-improving medications that benefit more people. Though I am reasonably sure that a constitutional guarantee of a right to medications should be interpreted to allow that result, courts dealing with cases one by one are not well-positioned to make the relevant social welfare judgments. Further, judges dealing with cases involving medications cannot readily coordinate their efforts with judges dealing with cases involving a right to shelter, or a right to water. Even more difficult is coordination of these economic rights cases with the nation's overall fiscal arrangements, as has been made dramatically clear in recent European efforts to deal with fiscal crisis since 2008-9.

Substantive interventions, even if lacking Weberian rationality, might prod bureaucracies and legislatures into acting. Apparently, for example, the Brazilian right to medications cases did lead ministries of health to update their registries of approved medications on a more regular basis. But, in the end, I suspect, some sort of procedural mechanisms are likely to emerge as the most effect methods of coordination. Here constitutional theorists may play a particularly large role, because institutional innovations beyond the incremental changes that judges can develop may be required. For example, Roberto Unger long ago proposed the creation of a new branch of government, the destabilization branch, that could be turned to implementation of social and economic rights.³³ As constitutional systems have come to accommodate branches beyond the classical three (legislative, executive, and judicial) – a fourth administrative branch and more recently a fifth branch of integrity or transparency institutions – the possibility of real institutional innovation becomes more substantial.

Finally, I address a rather arcane set of doctrinal points – the relationship between 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.³⁴ I sketch an argument that the three concepts are conceptually closely connected.

The doctrine of horizontal effect is concerned with the circumstances under which relations among non-state actors are directly governed by constitutional norms. That is, it deals with private law – in common law terms, the law of property, contract, and tort. The law of property, contract, and tort lies in the background of all private transactions otherwise unregulated by law: A seller

32. See OCTAVIO LUIZ MOTTA FERRAZ, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, *Texas Law Review*, vol. 89, 2011, p. 1643. The case is described at pp. 1656-58.

33. ROBERTO MANGEBEIRA UNGER, *False Necessity*, Cambridge, 1987.

34. I treat unconstitutionality by omission as equivalent to a state of unconstitutionality because the state exists as a result of legislative failure to act.

can set whatever price she chooses because she owns the good and has the right to withhold it from the market. To say that the constitutional has direct horizontal effect is to say that some constitutional norm affects (modifies, alters) some background right. So, for example, giving the protection of freedom of expression horizontal effects limits an employer's right to fire an employee for any reason not prohibited by statute.

Consider what it means to give horizontal effect to a constitutional right to shelter. Suppose that a group of homeless people simply move into an unused or under-utilized building. Ordinarily the building's owner would have a property right to exclusive possession of the building, and could call upon state resources to enforce that property right through eviction. But, giving the right to shelter horizontal effect means that the owner's property right might be limited by the constitution. So, for example, the constitution might be held to require that the owner give something like an easement to the occupiers pending his making more socially desirable uses of the building. The precise content of the modifications of background law will of course vary, and I do not mean to suggest that the "easement" argument just made is the only possible interpretation of a right to shelter with horizontal effect. The general point, though, holds: Giving horizontal effect to constitutional rights affects background rights.

The same is true of the doctrine of the state of unconstitutionality as invoked in connection with social and economic rights. Again, consider the people lacking shelter. With respect to them there is a state of unconstitutionality. And, as before, that state arises from the operation of the background rules of private law. Holders of rights under private law exercise them in a way that creates the state of unconstitutionality. Finally, the doctrine of unconstitutionality by omission imposes a duty on government to act – which is to say, a duty to modify a state of affairs that is, absent government action, unconstitutional. So, applying the doctrine of unconstitutionality by omission to social and economic rights implies that the government has a constitutional duty not only to provide the rights directly, as by developing a program of public housing, but also – at least if public provision is inadequate (perhaps because of the fiscal burdens on the government) – a duty to modify private law, for example, by creating the sort of easement described above.

At this point one might think that all the doctrines merge into that of indirect horizontal effect. That doctrine requires that courts with the authority to do so develop the background rules of private law in light of constitutional values, including the constitutional protection afforded social and economic rights. Rather than saying that the building's occupiers have a constitutional right to occupy the building, for example, a court with authority to do so could modify private law to create an easement for occupiers when buildings suitable for housing are unused or under-utilized.

At this point an ideological and an institutional concern arise. Ideologically, many "ordinary," that is, non-constitutional, courts are committed to a comprehensive ideology that they see penetrating deep into all areas of private law. Such courts

will strongly resist the intrusion of constitutional values into this domain, on the ground that its integrity would be fatally impaired by doing so. I understand that this objection exists, though I am sufficiently unsympathetic to the underlying ideology that my response is likely to be unpersuasive: For me, the system of private law can absorb quite a bit from “outside,” without losing its conceptual integrity. But, it would take a scholar of private law, which I am not, to work out that response in enough detail to make headway.

For me, the institutional concern is more substantial. Constitutional courts do not always have the power to develop the rules of private law themselves.³⁵ The co-existence of a constitutional court with high courts for other areas of law is quite common.³⁶ This complicates the constitutional court’s ability to give indirect horizontal effect to constitutional rights. Its tools are limited. In form, all the constitutional court can do is tell the other courts that they have failed to give sufficient consideration to constitutional values in administering the domains of law under their control. Pushed to the limit – through repeated reversals on exactly the same legal point – this can lead to the adoption by the other courts of the precise rule the constitutional court believes required. But, for reasons of administration and inter-court politics, ordinarily the constitutional court will ask only that the other courts exhibit good faith in their attempt to develop the law under their control in a manner consistent with constitutional values.

Having moved from the history of the idea of social and economic rights to contemporary issues arising from judicial enforcement of such rights, I conclude with the thought that the institutional issues of coordination and the conceptual ones of horizontal effect are the ones that may occupy constitutional theorists and judges on constitutional courts in the years to come.

35. The Canadian Supreme Court does have that power, which eases its task of developing a jurisprudence of horizontal effect.

36. Federalism in the United States poses a similar problem for the U.S. Supreme Court, which does not have the authority to develop state-based rules of property and contract. For a brief discussion, see MARK TUSHNET, *Weak Courts*, p. 198.