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CONSTITUTIONALISM, WELFARE AND CRISES

CONSTITUCIONALISMO, BEM-ESTAR E CRISES

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Resumo: Tomando a sério a constituição na “idade da austeridade”, propõe-se uma leitura dos direitos sociais num mundo globalizado tendo como chave a sustentabilidade e a justiça intergeracional.

Abstract: Taking the constitution seriously in an “age of austerity”, a reading of social rights in a globalized world is proposed based on sustainability and intergenerational justice.

Palavras-chave: constitucionalismo; socialidade; direitos sociais; sustentabilidade; justiça intergeracional

Keywords: constitutionalism, sociality; social rights; sustainability; intergenerational justice

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I. Introduction

As we celebrate President Franklin D. Roosevelt's famous speech held under the famous Second Bill of Rights motto: "freedom from fear is eternally linked with freedom from want", I am proposing the following steps:

- a) to start with, lessons from Roosevelt: from a crisis to another;
- b) second, by taking a look back at the roots of modern constitutionalism, I will propose some of the possible links between constitutionalism and welfare;
- c) third, a quick glance at 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;
- d) fourth, a brief remark on social rights in an "age of austerity";
- e) fifth, a brief route from austerity to sustainability as a road for social rights in a globalized world.
- f) last, but not least, I link social rights with intergenerational justice.

II. Lessons From Roosevelt: From One Crisis To Another One

Franklin Delano Roosevelt has secured for himself a place in the annals of American and World history. His name is a key one for anyone writing on the history of social security. Facing the 1929 crisis, he offered Keynesian solutions. This is the starting point for my presentation, and I will begin by trying to identify some points in common between both situations – the one in 1944 and ours nowadays, 70 years after. Today there is no such thing as a World War: despite many years of cold war and of local, often bloody conflicts, we are living a lasting peace in Western Europe. The welfare state, though, is facing huge challenges and the heralds of its end, the advocates of the post-social State, are out there.

Living now in the "the second great contraction" and in an "age of austerity", we face an entropic or systemic crisis¹, a deep crisis of meaning that cannot be reduced to the economic and financial dimensions (the public debt).

It sounds that despite signs in the last decades of some fundamental changes affecting the premises of the Social or Welfare State the measures taken were not enough to overcome the challenges we were faced with. We remember some of the first signs: the "financial crisis of the State", title of a well-known book by James O'Connor², the famous discussion on the ungovernability

1. STEFANO ZAMAGNI, *Per un' economia a misura di persona*, Roma, 2012, pp. 38-39.

2. 1973.

(*Unregierbarkeit*) and overloading of the State (*Überforderung*)³, considering the problems that the political power had in dealing with the rise of expectations, thereby putting the political systemic capacity to meet them to the test⁴.

After the debacle of the so-called affluent society we should take seriously a “dogmatic (scholarship) of scarcity” despite the existence of a “scarcity of dogmatic (scholarship)”⁵ .. To avoid any misunderstanding, one should keep in mind that scarcity is a relational concept: despite the huge growth of factual possibilities, there is a shrinking capacity of the State to obtain the resources needed to meet the growing demands for social rights.

The “age of austerity” as an age of cuts is not only the result of a necessary financial adjustment, but is also driven by a global ideological stance that privileges the realm of the private, which can be summed up as follows: “private is beautiful”. This “free market constitutionalism” ignores the different logics underlying the “spheres of justice”⁶ and idolatrizes the economic. Idolatry, as the Torah reminds us, consists in taking the part or fragment (*pessel*) for the whole⁷.

One of the great differences between Roosevelt’s epoch and ours stems from the global and regional networks and the role played by welfare rights at both the national and international levels. Facing a “post-national constellation”⁸, we find a cosmopolitan law at the sociality level as well. We will take a closer look at this phenomenon later.

If we focus on the institutional dimension, we find that the Social State is under fire, with some voices even announcing its death. Still, the foretold death of the social State is, to quote Mark Twain, a “little exaggerated”. It is true that some voices, in Portugal too⁹, claim that we have entered a post-social State. It is true

3. HANS VORLÄNDER, *Verfassung und Konsens. Der Streit um die Verfassung in der Grundlagen- und Grundgesetz-Diskussion der Bundesrepublik Deutschland. Untersuchungen zu Konsensfunktion und Konsenschance der Verfassung der pluralistischen und sozialstaatlichen Demokratie*, Berlin, 1981.

4. See CLAUS OFFE, ‘Unregierbarkeit’ – Zur Renaissance konservativer Krisentheorien, in JÜRGEN HABERMAS, (Hrsg.), *Stichworte zur geistigen Situation der Zeit*, Bd. 1, Frankfurt/Main: Suhrkamp, pp. 294-318; Idem, *Ungovernability* (<http://www.havenscenter.org/files/Offe%20-%20Ungovernability.pdf>).

5. JOÃO CARLOS LOUREIRO, A “porta da memória”: (pós?)constitucionalismo, Estado (pós?)social, (pós?)democracia e (pós?)capitalismo. Contributos para uma “dogmática da escassez”, in ANTÓNIO RAFAEL AMARO/ JOÃO PAULO AVELÁS NUNES (Org.), “*Estado-Providência*”, *capitalismo e democracia*, Estudos do Século XX 13 (2013), pp. 109-126.

6. MICHAEL WALZER, *Spheres of justice: a defense of pluralism and equality*, Oxford/ Cambridge, 1983.

7. RAPHAËL DRAÏ, *La Thora: la législation de Dieu*, Paris, 1999, p. 47.

8. JÜRGEN HABERMAS, *Die postnationale Konstellation: politische Essays*, Frankfurt a. M., 1998.

9. Cf. *Em busca do acto administrativo perdido*, Coimbra, 1996, pp. 122 seq.; Idem, *Para um contencioso administrativo dos particulares: esboço de uma teoria do recurso de anulação*, Coimbra, 1989, p. 56-6; Idem, *Estruturas da Sociedade: liberdade e solidariedade*, in Comissão Nacional Justiça e Paz, *Gaudium et Spes: uma leitura pluridisciplinar vinte anos depois*, Lisboa, 1988, p. 125-133; MARIA JOÃO ESTORNINHO, *A fuga para o direito privado*, Lisboa, 1996, pp. 47-80, p. 96, p. 354.

that the social State has undergone some changes and is assuming different faces: regulatory state, enabling or ensuring state (*Gewährleistungsstat*)¹⁰ are some of the keywords nowadays shaping the field.

But let's go a step further in order to get a picture of some of the relations between constitutionalism and welfare.

III. Constitutionalism and welfare

If we check an etymology dictionary, we will find that, although welfare is a medieval word, only in the twentieth century was it linked to sociality¹¹. Of course welfare history begun much earlier than the birth of this meaning. Over the centuries, human societies developed mechanisms of social protection, family- or group-based, from mutuality (in Anglo-Saxon countries, the classic friendly societies) to social relief (remember the poor relief).

It is true that after the liberal revolutions some of the founding fathers of modern constitutionalism were aware of the need to address material needs and fight poverty. To give a few examples: the controversial citizen revenue has its roots in a proposal by Thomas Paine¹²; the French Constitution of 1793 (which never entered into force) laid down a right to public assistance¹³, a solution also adopted by the first Brazilian Constitution (1824)¹⁴ and the Portuguese Constitutional Charter (1826)¹⁵. But we have to wait until the last century in order to see a set of social rights being constitutionally recognized. In Europe special credit is granted to the Weimar Constitution of 1919, a source of inspiration and influence after the First World War, and even after the Second World War.

The restoration of democracy after long dictatorships had a constitutional translation on an important catalogue of social, economic and cultural rights, especially in some southern European countries. The Portuguese case should

10. CLAUDIO FRANZIUS, Der «Gewährleistungsstaat»: ein neues Leitbild für den sich wandelnden Staat?, in *Der Staat* 42, 2003, 4, pp. 493-517; JOSÉ JOAQUIM GOMES CANOTILHO, “O Estado garantidor: claros-escuros de um conceito”, in: ANTÓNIO JOSÉ AVELÁS NUNES/ JACINTO NELSON DE MIRANDA COUTINHO (Coord.), *O direito e o futuro. O futuro do direito*, Coimbra, 2008, pp. 571-576.

11. As a matter of fact, the meaning of “social concern for the well-being of children, the unemployed, etc.” is first attested in 1904; the meaning “organized effort to provide for maintenance of members of a group” dates back to 1918” (Online Etymology Dictionary http://www.etymonline.com/index.php?allowed_in_frame=0&search=welfare&searchmode=none).

12. *The rights of man*; especially *Agrarian justice* (1795), where he wrote “In advocating the case of the persons thus dispossessed, it is a right, and not a charity ... [Government must] create a national fund, out of which there shall be paid to every person, when arrived at the age of twenty-one years, the sum of fifteen pounds sterling, as a compensation in part, for the loss of his or her natural inheritance, by the introduction of the system of landed property. And also, the sum of ten pounds per annum, during life, to every person now living, of the age of fifty years, and to all others as they shall arrive at that age”.

13. Art. 122 (*secours publics*).

14. Art. 179/XXXI.

15. Art. 145/§ 29.

be read as an output of a Revolution based on a typical metanarrative; history is a process of freedom from alienation, a process that means progress, the proposed key of modernity, even if there are different tales for different tastes (e.g., Marxist or even Marxist-Leninist, or the modernization tide). So the Portuguese Constitution of 1976, while trumpeting the idea of fraternity, actually points toward the building of a new society, a socialist one. This is the kind of constitutional reading that I now call constitutional neojoachimism¹⁶. Rather than a hidden reference to the Chief Justice of our Constitutional Court, Joaquim de Sousa Ribeiro, by “neojoachimism” we refer to *Joachim* of Fiore, who during the Middle Ages announced the advent of a new Age, the age of the Spirit. An interesting reception and secularization of this proposition rendered it key in the historical process, understood as a march towards societies that would ensure wholeness on earth. To quote a famous book (*Meaning in history*¹⁷) by Karl Löwith:

“[t]he revolution which had been proclaimed within the framework of an eschatological faith and with reference to a perfect monastic life was taken over, five centuries later, by a philosophical priesthood, which interpreted the process of secularization in terms of the “spiritual” realization of the Kingdom of God on earth. As an attempt at the realization the spiritual pattern of Lessing, Fichte, Schelling, and Hegel could be transposed into the positivistic and materialistic schemes of Comte and Marx”.

We cannot go here into further details on this historical reception.

According to a neojoachimite constitutional reading, a basic principle of a social constitution should be the prohibition of the so-called social retrogression or reactionary social evolution. For the orthodox or hard reading this means that the degree of normative concretization of social rights cannot be reduced. Reality shows in an unpleasant way the untenability of this principle.

To avoid dangerous misunderstandings, I would like to stress that what we are discussing is *not* whether constitutions should include social, economic and cultural rights (we can discuss, of course, some details of the constitutional regulation of each right). According to a proper reading of the Constitution, we also reject that these are merely declaratory rights based on programmatic norms. Social rights are fundamental rights. What is different is the degree of determination of rights and then the content directly enforceable, the minimal or essential content of a right relevant even in cases of statutory absence. The role that should be played by the legislature is a very important one, since we are

16. On the reception of joachimism, see HENRI DE LUBAC, *La posteridad espiritual de Joaquín de Fiore*, I and II, Madrid, 2011.

17. *Meaning in history: the theological implications of the philosophy of history*, Chicago/London, p. 159.

in domains such as those of social security and health care provisions, that rely heavily on public policies. There are different levels of judicial enforcement or justiciability in the field of welfare rights (e.g., the Portuguese Constitution lays down a controversial and weak remedy, unconstitutionality by omission¹⁸).

I am aware that the principle of protection of confidence (*Vertrauensschutz*¹⁹; the doctrine of legitimate expectations in Anglo-Saxon countries²⁰) prevents an abrupt reduction of the level of provision of some social goods, requiring an adequate transition time and so-called transitory norms.

What I strongly contest is: a) the orthodox version of the principle of the prohibition of so-called social retrogression, which has lost attractiveness (a neojoachimite constitutional reading); b) second, and this is more controversial, an acquired rights reading of the Constitution, that regards some welfare rights already individually recognized as untouchable or, in a second, more recent and softer version, legitimately reduced only during times of crises (e.g., for the duration of an international assistance program). The vested rights discourse reaches a kind of overlapping consensus in mainstream scholarship, disregarding the critical voices that, by taking seriously the intergenerational dimensions of rights, admit that pension benefits could be restricted if some legal principles are duly respected.

Iv. The Seduction Of Neoconstitutionalism And The Post-Constitutionalist Critics: The Courts As The Main Road To Sociality?

Portugal, even after closing its Imperial cycle, has not broken hundreds of years of worldwide cultural presence, now established on a new basis. So no one should wonder that in the field of law an intensive academic dialogue is taking place. Especially when we look at Brazil, we find an impressive number of neoconstitutionalism (*neoconstitucionalismo*²¹, *neoconstituzionalismo*, not

18. Article 283: “1. At the request of the President of the Republic, the Ombudsman, or, on the grounds of the breach of one or more rights of the autonomous regions, presidents of Legislative Assemblies of the autonomous regions, the Constitutional Court shall review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable.

2. Whenever the Constitutional Court determines that unconstitutionality by omission exists, it shall notify competent legislative body thereof”(http://app.parlamento.pt/site_antigo/ingles/cons_leg /Constitution_VII_revisao_definitive.pdf).

If you look for the Portuguese jurisprudence you will find out that this norm has been used in a very limited and cautious way: Paulo Otero (PAULO OTERO, *Direitos económicos e sociais na Constituição de 1976: 35 anos de evolução constitucional*, in *Tribunal Constitucional: 35.º Aniversário da Constituição de 1976*, I, Coimbra, 2012, pp. 37-55, p. 51) considers this a case of “juridical coma”.

19. On the impact of the Portuguese jurisprudence of crisis, see PAULO MOTA PINTO, *A proteção da confiança na “jurisprudência da crise*, in GONÇALO DE ALMEIDA RIBEIRO/ LUIS PEREIRA COUTINHO, *O Tribunal Constitucional e a crise*, Coimbra, 2014, pp. 133-181.

20. See ROBERT THOMAS, *Legitimate expectations and proportionality in administrative law*, Oxford, 2000.

21. LUIS ROBERTO BARROSO, “Neoconstitucionalismo e constitucionalização do direi-

be confused with *new constitutionalism*²²), supporters who place their faith in the judiciary to implement social rights. Let me illustrate with a statement of a Master's student from Brazil: when asked whether there is too much judicial activism and a misrepresentation of the principle of separation of powers, he told the members of the examination jury: "Look: The Brazilian Constitution lays down a large number of social rights norms. If the Congress (legislative branch) doesn't enforce them, we [the judges] will do the job!"

Of course, I am not denying that an area for judicial intervention does exist in the welfare rights field. What I object is the panconstitutionalism that, following the example of King Midas, wants to transform law into constitutional law. Despite the role played by constitutions in renewing legal orders, we should be aware that the emergence of fundamental goods in a community has many doors. Combining a maximalist reading of the constitution with a strong judicial intervention, some neoconstitutionalisms seem to be an expression of a neojoachimite constitutional reading.

This hard neoconstitutionalism endangers the autonomy of the different branches of law and neglects that, usually, the relationship between constitution and legislative power is not a *derivatio*, but *determinatio*, the fruit of a choice between different goods, to borrow from St. Thomas Aquinas and John Finnis' reception of the concept²³.

We cannot deny the importance of a more interactive paradigm of relationship between the constitution and the legal order that emerged especially after World War II. With few exceptions, the former was mainly understood during the nineteenth century as centered on the political dimension, establishing non-interference domains through fundamental rights. The traditional picture looks very different with respect to the role played by constitutional norms on citizen-citizen relationships (usually, but misleadingly²⁴, called 'horizontal effect', since not all relations of this kind are founded on a parity base). Then the Civil Code in the Roman-German legal family played a key role.

to: o triunfo tardio do direito constitucional no Brasil", *Boletim da Faculdade de Direito* 81, 2005, pp. 233-289; MIGUEL CARBONELL/ LEONARDO GARCÍA JARAMILLO (ed.), *El canon neoconstitucional*, Madrid, 2010; GIORGIO PINO, "Principios, ponderación, y la separación entre derecho y moral: sobre el neoconstitucionalismo y sus críticos", in *Doxa*, 2011, 34, pp. 201-228.

22. Vd. MAURO BARBERIS, *Stato costituzionale*, Modena, 2012, pp. 18-24. According to this Italian Professor, new constitutionalism functions as a label to designate post World War II constitutions, in Europe and elsewhere. He identifies three common notes: a (rights-centered?) approach; judicialization; and the international dimension of the process (*maxime*, the supranationalization conducted by the European Court of Justice). A closer look shows the complexity and diversity disguised under the name. For instance, reading authors starting from a critical theory stance, new constitutionalism is presented as an engine for neoliberal institutions (see STEPHEN GILL/ A. CLAIRE CUTLER, *New constitutionalism and world order*: general introduction, in Idem, *New constitutionalism and world order*, Cambridge, 2014), a pro-market and privatization perspective, a tool for ensuring capitalism in a "global political economy".

23. JOHN FINNIS, *Aquinas: moral, political, and legal theory*, Oxford, 1998.

24. JOSÉ CARLOS VIEIRA DE ANDRADE, *Os direitos fundamentais na Constituição Portuguesa de 1976*, Coimbra, 2012, p. 230, n. 2.

Of course, I don't ignore doctrines such as the "radiating effect" of the German Federal Constitutional Court and I am aware of the importance of understanding the Constitution as the locus of societal fundamental values (*Grundwerte*). What I vehemently contest is the constitutional *hybris* (the excess) both at the substantive and the control levels.

This contrasts with another trend: (*post*)*constitutionalism*. Starting from the hyper-diversity and fragmentation, which is now a feature of our societies where some, such as Engelhardt²⁵, defend that we are "moral strangers". The scarcity of common meaning and consensus seems not to spare constitutional readings. To quote Lawrence Lessing, there is now a loss on "constitution vigor": "When constitutional commands don't appear clear, or when they rest transparently upon contested, heated, non legal debate, courts are more reluctant. They are reluctant to resolve disputes in these contested domains, because resolution of matters of contest seems within the domain of the democratic branches. *The effect of the contest then is to shift questions from constitutional control to political control, from constitutionalism to democracy*"²⁶.

If the common point of reevaluating the political power is stressed, this approach has many faces, but it cannot be understood as a return to pre-constitutionalism. Constitutionalism should not be wrongly understood as synonymous with intensive judicial control, but rather as a project that should be taken seriously by the different powers of the State. In a certain way, stronger courts are weaker courts. We say "stronger", because resisting the seduction of activism spares some troubles that can undermine the *auctoritas* of courts; we say "weaker", taking as standard the intensity of control – a "method of differentiation" seems to be indispensable – since judges should not confuse control with decision²⁷, which means not forgetting the importance of the separation of powers and the different functional adequacy. In looking at the Anglo-American Saxon panorama, we find trends such as popular constitutionalism (USA) and political constitutionalism (UK)²⁸. We may discuss the label, and whether it is really a post-constitutionalism.

Even if not subscribing to post-constitutionalism, one should pay attention to the importance of a robust public sphere. The difficult art of balancing constitutional values requires a new atmosphere challenging the post-democratic²⁹ flaws that are affecting our societies. The Häberlian idea of an "open society of constitutional interpreters"³⁰ should be stimulated.

25. H. TRISTRAM ENGELHARDT, *The foundations of bioethics*, New York/Oxford, 1996; Idem, *Morale e bioetica in un mondo laico*, Torino, 2014.

26. Post constitutionalism, in *Michigan Law Journal* 94 (1996), pp. 1422-1470, p. 1424.

27. PIERRE MOOR, Le juge administratif et l'application de la loi, in *Recht als Prozess und Gefüge: Festschrift für Hans Huber zum 80. Geburtstag*, Bern, 1981, pp. 667-683.

28. MARK TUSHNET, *An advanced introduction to comparative constitutional law*, Cheltenham, 2014, p. 44.

29. *Post-democracy*, Cambridge, 2004.

30. "Die offene Gesellschaft der Verfassungsinterpreten: ein Beitrag zur pluralistischen und "prozessualen" Verfassungsinterpretation", in *JuristenZeitung*, 1975, pp. 297-305.

V. “Winds Of Change”: Social Rights In An “Age Of Austerity” Or A Dogmatic Translation

We have learned from German constitutional theory that social rights are enforceable “under condition of possibility” (*Vorbehalt des Möglichen*). But this was usually understood as a constraint to the improvement of rights in societies that were seen on the road to welfare growth, even when faced with economical crises.

Is crisis a relevant argument for constitutional jurisprudence?

My main thesis might be summarized as follows: crisis as a legal *topos* operates especially through a public interest argument. If you take a look at the jurisprudence of the Constitutional Court of Portugal, you will find that some solutions are accepted only because of the crisis and within a short time span.

Living in times of internormative networks – in which the national constitution level is linked with the international and supranational levels (despite the flaws of the level metaphor, as Peter Häberle³¹ stressed), which could be considered to be constitutional, at least to some extent –, we cannot ignore the challenges arising from the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the realization of social rights. Actually Article 2(1) lays down:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.

This “maximum available resources” criterion is a product of the sixties, a time where to quote a famous Paul VI’s phrase, “Development is the new name for peace”³². It is true that a parallel formulation was later to be found in the UN Convention on the Rights of the Child (CRC)³³.

First, I agree that there is a line that can not be crossed (minimal level of provision of social goods for those in need). This is a requirement based on human dignity as the founding principle of our legal systems and societies. This

31. PETER HÄBERLE, Kritik an der Metapher vom sogenannten “Mehrebenkonstitutionalismus”– Diskussionsbeitrag auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Rostock vom 4. Bis 7. Oktober 2006, in PETER HÄBERLE, *Verfassungsvergleichung in Europa- und weltbürgerlicher Absicht: späte Schriften*, Berlin, 2009, pp. 204-205.

32. *Ibid.*, 76, 87 *Populorum Progressio*, 5.

33. See Article 4.

minimum can not in any way be understood as a minimum required for survival. It is determined by social-cultural standards, considering what is essential for human flourishing. In light of that, the guaranteeing of such minimum legitimates closer scrutiny of the measures taken or even omitted.

Secondly, in a Constitutional type of state, social or welfare rights can not be reduced to this minimum of provision, even if read through generous socio-cultural lens. A minimalist vision of the realization of welfare rights is not an adequate reading of constitutions such as the Portuguese one, with its vast catalogue of social rights, the German Basic Law (*Grundgesetz*), enshrining a Social State principle (Article 20), or the international standards. Concerning the latter, it is noteworthy that the Committee on Economical, Social and Culture Rights, aware of the challenges put forward by the crisis to realization of welfare rights, has openly recognized the admissibility of retrogressive measures. In a letter addressed by the Chairperson of the Committee to State Parties³⁴, it was required that such measures should be temporary (limited to the period of crisis), necessary, proportionate and, last but not least, non discriminatory. One fundamental requirement is the guarantee of “the minimum core of all Covenant rights”³⁵.

There is considerable room for political decisions on social policies which is not a blank check for the legislature.

A crisis works as a *topos* for judicial decision, upholding solutions that otherwise would not stand up in constitutional control. Crisis could operate at least on a dual mode: on the one hand, as a substantive argument that shall be taken on court balancing processes; on the other hand, as an argument for greater self-restriction concerning judiciary control or review.

Crises also operate as a “trigger for constitutional reforms”³⁶, as illustrated by the clauses of a balanced budget (e.g., Spain³⁷ and Italy³⁸, but not Portugal or Greece), expressing the yearn for financial sustainability, despite the prior existence of European Union criteria that were clearly violated even by some of the most important States.

Even if the idea of state of exception is not used, it is true that some Constitutional Courts – for instance, the Portuguese one – used emergency to justify not having

34. *Apud* AOIFE NOLAN, ESR-based budget analysis into practice: addressing the conceptual challenges, in AOIFE NOLAN/ RORY O’CONNELL/ COLIN HARVEY (ed.), *Human rights and public finance: budgets and the promotion of economic and social rights*, Oxford, 2013, pp. 49-50.

35. AOIFE NOLAN, *ESR-based budget*, p. 51.

36. XENOPHON CONTIADES/ ALKMENE FOTIDAU, How constitutions reacted to the financial crisis, in XENOPHON CONTIADES (ed.), *Constitutions in the global financial crisis: a comparative analysis*, Farnham/Burlington, 2013 p. 22.

37. Art. 131 (amended in 2011): DIEGO LÓPEZ GARRIDO (dir.)/MARÍA LUZ MARTÍNEZ ALARCÓN (coord.), *Reforma constitucional y estabilidad presupuestaria: el artículo 135 de la Constitución española*, Madrid, 2013.

38. Constitutional Law 1/2012 amended Article 81

declared some measures unconstitutional, given their temporary and exceptional character. However, this does not take seriously into account cases like Portugal, where the crisis is structural, and one leading to the “normalization of the exception”³⁹.

Faced with some constitutional defeats at the Constitutional Court, some voices herald a specific anticonstitutionalism, supporting constitutional amendments or even proposing a new constitution. But with a few exceptions this strategy seems to ignore that fundamental pieces of crisis jurisprudence draw on juridical principles such as protection of confidence, proportionality and equality, that are part of the core of the legal order, imposing themselves even to the constitution-making power.

On the social rights field the consequences of these crisis programs are strong. If in some countries the first measures taken to deal with the crisis were aimed at reinforcing social benefits, the austerity programs paved the way for another panorama, summed up in the omnipresent word: cuts.

VI. From Austerity To Sustainability: A New Reading Of Social Rights In A Globalized World

The time is ripe for a constitutional reading taking sustainability as the keyword linking different approaches. Following the idea of sustainability as a federative or a complex concept (*Verbundbegriff*), to quote Wolfgang Kahl⁴⁰, one should take sustainability as a new structural principle of the Constitutional order⁴¹. At first glance, it seems that nothing is new if you compare this claim with the austerity speech. But since we refuse to reduce sustainability to economic and financial dimensions, one identifies different types of sustainabilities as follows: ecological or environmental sustainability, economic sustainability, financial sustainability, social sustainability, political (democratic) sustainability and demographic sustainability.

The ecological awareness of the scarcity of natural goods has contributed first to affirm a principle of responsibility⁴² and the idea, both at international and national levels, of a sustainability principle⁴³. From a constitutional perspective we find a shifting focus on future generations. We know that at the beginning of modern constitutionalism the main question was what would be the legitimacy

39. GIORGIO AGAMBEN, *Estado de exceção*, Lisboa, 2010.

40. WOLFGANG KAHL (Hrsg.), *Nachhaltigkeit als Verbundbegriff*, Tübingen, 2008.

41. See JOSÉ JOAQUIM GOMES CANOTILHO, Sustentabilidade: um romance de cultura e de ciência para reforçar a sustentabilidade democrática, *Boletim da Faculdade de Direito* 88, I, 2012, pp. 1-11.

42. HANS JONAS, *Das Prinzip Verantwortung: Versuch einer Ethik für die technologische Zivilisation*, Frankfurt a. M., 1979 (transl.: *Imperative of responsibility: in search of an ethics for the technological age*, Chicago/ London, 1985).

43. FELIX EKARDT, *Das Prinzip Nachhaltigkeit: Freiheit und Gerechtigkeit in der Welt und zwischen den Generationen*, München, 2005.

of a generation (for instance, that of the Founding Fathers) to bind the next generations. Thomas Paine⁴⁴ and Thomas Jefferson⁴⁵ penned important pages on this issue.

Although this still remains a constitutional question, we are now faced with another demand: can future generations bind us? I would answer yes, even if I cannot recognize rights to future generations. As a matter of fact, we have duties towards future generations, duties that are not rights-correlated⁴⁶.

Coming back to the problem of ecological sustainability and welfare rights, we are aware of some tensions between both. At a short term, in a global competition process, respecting environmental standards could be seen, at least *prima facie*, as a barrier to rights more economy dependent (e.g. right to work). The constitutional global level seems to be still very imperfect.

Economic and financial sustainability reminds us the double face of the Roman god Janus: on the one hand, without taking care of it, social rights, soon or later, are more or less endangered, reducing this part of the constitution to a mere “piece of paper”⁴⁷; on the other, a blind constitutional policy focused on economic and financial sustainability can jeopardize social rights.

Reevaluating constitutional democracy and the role played by the Parliament and the Government is a keystone on a project aimed at taking the constitution seriously.

At a time of the “end of the great metanarratives”⁴⁸, symbolic scarcity has consequences concerning constitutionalism and courts as the main actors.

We should also keep in mind how the level of social rights is dependent on economic and financial sustainability. The idea of social citizenship advanced by T. H. Marshall⁴⁹ should not be seen in sharp contrast with the market.

44. *The rights of man: being an answer to Mr. Burke's attack on the French revolution*, Part II: “[w]hen a man leaves property to his heirs, he does not connect it with an obligation that they shall accept it. Why, then, should we do otherwise with respect to constitutions?”.

45. *Writings*, New York, 1984, p. 962: “[b]y the law of nature, one generation is to another, as one independent nation to another”.

46. On intergenerational justice and constitutional protection of future generations, see, *inter alia*, WOLFRAM HÖFLING, Intergenerationelle Verantwortung und Verfassungsrecht, in Dieter BIRNBACHER/ Gerd BRUDERMÜLLER (Hrsg.), *Zukunftsverantwortung und Generationensolidarität*, Würzburg, 2001, pp. 107-113; PETER HÄBERLE, A constitutional law for **future generations** – the other form of social contract: the generation contract, in JOERG CHET TREMMEL (ed), *Handbook of intergenerational justice*, Cheltenham, UK/ Northampton, MA, 2006, pp. 215-228; RAFFAELE BIFULCO, *Diritto e generazioni future: problemi giuridici della responsabilità intergenerazionale*, Milano, 2008; JOÃO CARLOS LOUREIRO, Autonomia do direito, futuro e responsabilidade intergeracional: para uma teoria do *Fernrecht* e da *Fernverfassung* em diálogo com Castanheira Neves, in *Boletim da Faculdade de Direito* 86, 2010, pp. 15-47.

47. FERDINAND LASSALLE, *Über Verfassungswesen* (orig.: Berlin, 1862).

48. JEAN-FRANÇOIS LYOTARD, *A condição pós-moderna*, Lisboa, 1989.

49. *Citizenship and social class and other essays*, Cambridge, 1950.

Political citizenship and democratic sustainability are social rights-sensitive. For example, access to basic social goods such as education is key to building a robust and free public arena. Still, no one should forget that social policies implementing welfare rights should aim at improving personal capabilities⁵⁰, while avoiding the classical trap of making citizens dependent upon the social benefits with the perspective usually summed up as “sit down and wait”. As noticed before, the Social State and welfare rights, although being part of a civilized way of living which cannot be waived, could function as a “colonization of the lifeworld” by an instrumental rationality⁵¹.

There is another dimension of sustainability that, in this “age of austerity”, is usually forgotten: social sustainability. As a matter of fact, some of the measures that have been taken on the social benefits field, especially in European countries dramatically affected by so-called sovereign debt crisis, are deepening social inequality, poverty and social exclusion.

But is sustainability really a juridical principle or a mere “constitutional presupposition”? How can one distinguish between constitutional presuppositions and juridical principles? Consider, for example, social security’s dependence on demography: it is indeed a constitutional presupposition; yet, from a constitutional standpoint, there is a duty not only to maintain social security, but also to care about its generational renewal⁵². The constitutional dimension of (demographic) sustainability should represent a legitimate task for the State to fulfill under a fundamental rights framework. For instance, a social security right is particularly dependent on demographics, which works as a presupposition relating to fundamental rights (*Grundrechtsvoraussetzung*). To care about it is not an easy task to do in a democratic society: no one can be forced to breed for the republic’s sake. There is only what is called a “constitutional expectancy”⁵³, which technically is not a duty. There is a personal responsibility and a trust that the common good will prevail.

VII. Social Rights And Intergenerational Justice: The Forgotten Dimension Or The “(Un)Justice Of Transfers”

Some of our headaches about the Social state are, somehow, the proof of its own success. If we go back to President Roosevelt’ speech, the institution of a system that “frees from want”, combined with an incredible technological revolution, especially in the biomedical field, and despite protective failures and national

50. On capabilities, see AMARTYA SEN, *Development as freedom*, New York, 1999; IDEM, *The idea of justice*, London, 2010, Part III; MARTHA NUSSBAUM, *Creating capabilities: the human development approach*, Cambridge (Mass.)/ London, 2011.

51. JÜRGEN HABERMAS, *Theorie des kommunikativen Handelns*, Frankfurt a. M., 1981.

52. See ARNDT UHLE, *Verfassungsvoraussetzungen*, in *Leitgedanken des Rechts: Paul Kirchhof zum 70. Geburtstag*, I, Heidelberg, 2013, pp. 149-157, p. 154.

53. JOSEF ISENSEE, *Grundrechtsvoraussetzungen und Verfassungserwartungen an die Grundrechtsausübung*, in JOSEF ISENSEE/ PAUL KIRCHHOF (Hrsg.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, V, *Allgemeine Grundrechtslehren*, Heidelberg, 2000.

or regional differences, drives to larger gains concerning life expectancy. The growing individual freedom from family as a mechanism for ensuring care and economic support in times of illness and aging, associated with a deep culture change, has a visible impact on the demographic basis of social constitutionalism. Productivity gains prove insufficient to face a combined demographic phenomenon: higher life expectancy and the shrinking birth rate. The picture is now getting worse in countries like Portugal, with an overwhelming public (and also private) debt that makes intervention increasingly difficult.

In order to test some of the solutions, let me illustrate with examples from the field of social security law. The Portuguese Constitution lays down an important article (63) on the right to social security: “1. Everyone shall have the right to social security”.

Although in the public arena the great discussion on social security is centered on the nominal reduction of the amount of contributory-based pensions that are already being paid, the non contributory benefits of social security should not be ignored. Unfortunately, not only the ones affected are voiceless, but many of them are among the poorest in society. We should be aware that a socio-culturally identified minimum for a dignified human existence could be in danger, which might open the doors to a strict (although controversial) scrutiny by Constitutional Courts. From a comparative perspective, we recall two decisions of the German Federal Constitutional Court⁵⁴.

Back to the controversies on pension reductions we should remember that the traditional central tenet is its untouchability: we are in the domain of the so-called vested or acquired rights. But as a Brazilian author has stated, “rights don’t grow on trees”⁵⁵. Although both civic and social rights have costs – remember the lesson of Stephen Holmes and Cass Sunstein⁵⁶– we will stress some intergenerational dimensions of constitutionalism extending also to sociality issues.

There are two central metaphors in the history of Western political and constitutional thought⁵⁷: first, the covenant metaphor, stemming from from Jewish-Christian tradition and shaping, for instance, part of XVIIth century

54. BVerfG, 1 BvL 10/10 of 1/7/2012 (http://www.bverfg.de/entscheidungen/ls20120718_1bv1001010en.html): “The proceedings on the constitutionality of a specific statute raise the question whether the amount of the cash benefit provided for in the Asylum Seekers Benefits Act to secure one’s existence is compatible with the Basic Law”. BVerfG, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 of 02/09/2010 (http://www.bverfg.de/entscheidungen/ls20100209_1bv1000109en.html): “The proceedings on the concrete review of the constitutionality of a statute, which have been consolidated for joint adjudication, relate to the question of whether the amount of the standard benefit paid to secure the livelihood of adults and children until completing the age of 14 in the period from 1 January 2005 to 30 June 2005 according to § 20.1 to § 20.3 and according to § 28.1 sentence 3 no. 1 of the Second Book of the Code of Social Law in the version of Article 1 of the Fourth Act for Modern Services on the Labour Market of 24 December 2003 (Federal Law Gazette I p. 2954) is compatible with the Basic Law”.

55. FLÁVIO GALDINO, *Introdução à teoria dos custos dos direitos: direitos não nascem nas árvores*, Rio de Janeiro, 2005.

56. *The cost of rights – Why liberty depends on taxes*, New York/ London, 2000.

57. ADELA CORTINA, *Alianza y contrato: política, ética y religión*, Madrid, 2001.

history, both in England (the “Hebrew Republic”⁵⁸) and America; second, the contract metaphor, one which, despite its medieval roots, played a central role on modern constitutionalism and has been the object of renewed interest after John Rawls released one of his critically important books⁵⁹. Every constitution depends on material and cultural presuppositions. The same is true, of course, of social rights. And paraphrasing a famous statement by Ernst-Wolfgang Böckenförde⁶⁰ about “the liberal secular state”, we could also say that the Social State “lives on presuppositions that it cannot itself guarantee”. Demographics is one of such presuppositions. After the Second World War, in the social public pensions system there was an important shift from capitalization systems to a pay-as-you-go system. I find it stimulating to look back at XIXth century German, where mandatory social insurances emerged in the last decades of that century – the so-called Bismarckian model which would soon be widespread. Nowadays some scholars and the public in general argue the following thesis: concerning contributory-based public pensions, there is a social contract that must be fulfilled. For the supporters of this statement this means that the pension amount cannot be touched, despite the fast change of presuppositions. *Clausula rebus sic stantibus* should not be considered.

Whatever we mean about the properly use of contract in this context, there is a term missing that should not be forgotten. As Hans Zacher⁶¹ stresses, we cannot reduce the so-called social contract to a bilateral agreement between those retired and those who pay for it. There is a third term that can not be ignored: social contract as a generational contract includes three, rather than two generations⁶². Which means that children and young people should matter. If you take a look back to the proposed design during the fifties (1957) in Germany, Wilfried Schreiber, the architect of the model, supports “children pensions” (*Kinderrente*), a kind of “investment credit”. I will not go into the details, since my aim here is not to discuss the solutions to the problem; is is rather that of pointing out a forgotten element of the system.

VIII. An Open Ending

I began by arguing the need to contextualize the discussion on social rights, and by making a short comparison between Roosevelt times and our circumstances. Despite the fact that both times have in common a crisis situation, a close look discloses important differences. Then, I turned to the question of sociality and

58. ERIC NELSON, *The Hebrew republic: Jewish sources and the transformation of European political thought*, Cambridge (Mass.)/ London, 2010.

59. *A Theory of Justice*, Cambridge (Mass.)/ London, 1971.

60. Die Entstehung des Staates als Vorgang der Säkularisation, in Idem, *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, Frankfurt am Main, 1992, pp. 92-114.

61. HANS ZACHER, Das Wichtigste: Kinder und ihre Fähigkeit zu leben – Anmerkungen zur intergenerationellen Solidarität, in Idem, *Abhandlungen zum Sozialrecht II*, Heidelberg, 2008, pp. 281-306.

62. HANS ZACHER, *Das Wichtigste*, cit., p. 283.

constitution(alism), and I stressed both the importance of social rights and some of the challenges and limits they faced. I firstly criticized a constitutional imperialism that seems to transform everything into constitutional law but disregards the autonomy of the different branches of law; then, I criticized the prophetic role played by some judges and courts (i.e. hard judicial activism⁶³). Despite the ambiguities of the word, these are trends that could now be considered as a form of neoconstitutionalism. This, as shown, is at least in some versions a late reception of some outdated neojoachimite constitutional readings that is still attractive to some scholars. On the other hand, we found the post-constitutionalism challenge, that points to the role played by the constitution in deeply fragmented and radicalized societies.

I propose a middle ground, by refusing both a reality-blind and a reality-slaved constitutionalism, and by pointing to the need of a scholarship that takes seriously (relative) scarcity I took the public pensions systems as a test case to show that vested rights theory faces some flaws and that the challenges of (economic and financial) sustainability cannot be ignored.

Perhaps for those more engaged in praxis-oriented and judicial conversation, at least some of the remarks could be *useless*. To them I will answer that, even if you disagree with my proposals, we all agree that theory does illuminate praxis. Without trying to compare myself – a humble Constitutional Law scholar – with legendary Orpheus, I should keep in mind that when Jason prepares the expedition for the Golden Fleece quest, it wasn't an easy task to convince the other Argonauts to accept the presence of a musician that, *prima facie*, seems really *useless*. But as they were approaching the mermaids' island, Orpheus joined the music, neutralizing their effect⁶⁴.

If, as John Elster explicated⁶⁵, Ulysses still remains as an important metaphor to explain constitutional self-binding, Orpheus emphasizes other dimensions of rationality (a value rationality instead of a means-ends rationality)⁶⁶. As a constitutionalist I dare hope that the arguments brought up to the debate will prove to be food for thought, and that at least in some moments I was able to mix Apollo and Dionysus, by arguing with joy, with plenty of life. Because all I meant to say is about our personal life, our collective life...

Back to President Roosevelt, the claim nowadays should not be for a Third Bill of Rights: as a matter of fact, we have already identified large lists of rights, both at the national and the international levels (although the US have not yet ratified the International Covenant on Economic, Social and Cultural Rights). Some stress the need for recognizing new subjects, such as animals and nature, understood as rights-holders; others argue for the need to bind more effectively transnational

63. MARIA BENEDITA URBANO, *Curso de justiça constitucional: evolução histórica e modelos de controlo da constitucionalidade*, Coimbra, 2012, p. 76-77.

64. STEFANO ZAMAGNI, *Per un' economia*, pp. 50-52.

65. JON ELSTER, *Ulysses unbound: studies in rationality, precommitment and constraints*, Cambridge, 2000.

66. STEFANO ZAMAGNI, *Per un' economia*, p. 52.

global players, seen as a real threat to millions of persons worldwide. The discussion about how far should the courts go in the social-economic field seems to be a never ending story. The crisis of democracy and politics, the inability to limit the power of some private entities threatening individuals and even States confronts us with important risks for social rights.

Still, sometimes mystics and poets help us to enhance our vision. So after so many scholarly pages and speeches, it is time to ask with T. S. Elliot's magnificent words⁶⁷:

“Where is the wisdom we have lost in knowledge?

Where is the knowledge we have lost in information?”

And, as Bob Dyllan sings, “The answer is blowin’ in the wind”.

And the wind brings back the 1944 waves of a radio speech: “freedom from fear is eternally linked with freedom from want”.

67. *Choruses from «the Rock»*, London, 1934 (we used a bilingual edition: *Coros de A Rocha*, Coimbra, 2013, p. 58).