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**A CONTENÇÃO JUDICIAL É UMA QUESTÃO DE LINHAS
DE DEMARCAÇÃO OU DE DEFERÊNCIA DEMOCRÁTICA?
UM COMENTÁRIO A “JUSTIÇA DESTOGADA” DE STAVROS
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Abstract: Prompted by Stavros Tsakyrakis Essay ‘Justice Unrobed’, this Comment argues against a theory of judicial review that divides legislative and judicial competence along substantive lines (civil rights *v.* social rights and matters of principle *v.* matters of policy) and in favor of one that asks constitutional adjudicators to defer to the legislature on democratic grounds.

Resumo: Impulsionado pelo Ensaio de Stavros Tsakyrakis ‘Justica Destogada’, este Comentário desenvolve um argumento contra uma teoria do controlo judicial que reparte a competência entre o poder legislativo e o jurisdicional segundo critérios materiais ou objectivos (direitos civis *versus* direitos sociais e questões de princípio *versus* questões de políticas) e favorável a uma concepção que convida as jurisdições constitucionais a reconhecer liberdade de conformação do legislador por respeito ao princípio democrático.

Keywords: Categories of Rights. Principle and Policy. Judicial legitimacy. Democratic Deference. Levels of Scrutiny.

Palavras-Chave: Categorias de Direitos. Princípios e Políticas. Legitimidade Judicial. Deferência Democrática. Níveis de Escrutínio.

Summary: 1. Introduction. 2. Categories of Rights. 3. Categories of Questions. 4. The Domain of Policy. 5. Democratic Deference. 6. Conclusion.

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1. Introduction.

In ‘Justice Unrobed: Judicial Review of Austerity Measures in Portugal’ Stavros Tsakyrakis uses the case law of the Portuguese Constitutional Court (PCC) on the austerity policies pursued by the Government during the peak years of the public debt crisis to articulate the content and illustrate the merits of a particular conception of the proper grounds and scope of judicial review of legislation.

Professor Tsakyrakis is highly critical of the PCC’s rulings that struck down various laws establishing spending cuts. He submits that in their opinions the judges failed to exhibit the principled restraint that would have prevented them from all but second-guessing the policy choices of the elected branches. In asserting this, he joins the ranks of those constitutional lawyers and legal theorists in this country who expressed their profound disagreement with much of the case law under scrutiny and charged the PCC with some form of ‘judicial activism’.² Yet quite apart from making an important contribution to this literature, particularly welcome in light of the fact that the author is a distinguished foreign scholar casting an outsider’s eye on a debate that has for the most part been confined to parochial terms, the attention that his paper should attract stems from the fact that it approaches the subject from the ambitious and controversial angle of a general theory of judicial review.

2. Categories of Rights.

Professor Tsakyrakis presents his theory in two main parts. The first concerns the nature of fundamental rights — the sort of rights entrenched in constitutions and human rights instruments. He argues that these rights fall into two quite distinct categories: ‘social-welfare rights’, which ‘relate to the protection of the physical and economic well-being of the members of a society (either individually or collectively)’ and ‘fundamental civil and political rights, or first-generation rights’ that ‘constitute the framework within which the status and relationships between members of the community develop.’

I must say that I find these definitions singularly inept. Indeed, if we did not share an understanding, forged in the battlegrounds of history and politics, of which rights belong into the first-generation of so-called ‘civil and political

2. GONÇALO DE ALMEIDA RIBEIRO & LUÍS PEREIRA COUTINHO (eds.), *O Tribunal Constitucional e a Crise: Ensaios Críticos*, Coimbra, 2014. See also LUÍS PEREIRA COUTINHO, Os Direitos Sociais e a Crise: Breve Reflexão, *Direito & Política*, n.º 1, Outubro-Dezembro, 2012, pp. 74 ss.; LUÍS PEREIRA COUTINHO & MIGUEL NOGUEIRA DE BRITO, A «Igualdade Proporcional», Novo Modelo no Controlo do Princípio da Igualdade? Comentário ao Acórdão do Tribunal Constitucional n.º 187/2013, *Direito & Política*, n.º 4, Julho-Outubro, 2013, pp. 182 e ss.; GONÇALO DE ALMEIDA RIBEIRO, Judicial Activism Against Austerity in Portugal, *International Journal of Constitutional Law Blog*, Dec. 3, 2013, available at: <http://www.iconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/>; LUÍS PEREIRA COUTINHO, A «Convergência das Pensões» como Questão Política, *E-Pública: Revista Electrónica de Direito Público*, Número 1, 2014, available at <http://e-publica.pt/pdf/artigos/aconvergenciadepensoes.pdf>.

rights' and which belong into the further generations of 'social-welfare' and cognate rights, such that definitions serving classificatory purposes are for the most part dispensable in this area, those suggested by Tsakyrakis would prove quite misleading. To give some obvious examples, undisputedly first-generation rights such as those to life and to bodily integrity concern the protection of the physical well-being of human beings — a distinctive trait of social-welfare rights, according to Tsakyrakis. On the other hand, the right of children to a free education and the rights of the disabled to social benefits, which clearly fall into the category of social-welfare rights, concern the status and relationships between the members of the community — that is, their social standing — on any plausible account of that notion.

I suspect that the problem here is that Professor Tsakyrakis mistakenly assimilates all 'civil rights' to the much narrower category of 'basic liberties' (such as freedom of expression and of religion) and confuses 'social-welfare rights' with the general and universal entitlements programs characteristic of the so-called 'European Social Model'.³ That is reasonably clear when we ponder the implications that he means to work out from the *summa divisio* between civil and social rights. The former — he argues — 'are not only constitutionally entrenched in theory but they are also immune from social, financial or other conjunctures in practice' and 'protection of these rights in a community can be asserted in black-or-white terms...[meaning that] one cannot claim that a right — for example, the freedom of religion — is protected "to some extent", "a lot", "a little" or anything like this in one country: the right is either protected or not.' On the contrary, 'the social right to employment or health care or housing is realized to varying degrees under different governments, in the sense that, depending on the current state of the economy and socio-economic program of each governing party, different governments subscribe to different (richer or less protective) notions of social welfare rights.'

I am afraid that these distinctions fail even if we confine them to the relatively narrow and least implausible province of basic liberties *versus* social entitlements. Tsakyrakis is right to assert that the latter are fulfilled in varying degrees depending on the means available in the country and the visions of society represented by those in power. But this is true as well, albeit perhaps to a lesser extent, in the domain of basic liberties. Apart from the well-known quibble about the 'costs of rights',⁴ which concern not only the financial means required to fund social programs but the (evidently less substantial) costs of enforcing basic liberties (through such public institutions as the courts, the police, the ombudsman, committees, and what have you), basic liberties are subject to optimization requirements constrained by reality and ideology in much the same way as social entitlements.⁵

3. ee GÖSTA ESPING-ANDERSON, *The Three Worlds of Welfare Capitalism*, New Jersey, 1990.

4. See STEPHEN HOLMES & CASS SUNSTEIN, *The Costs of Rights: Why Liberty Depends on Taxes*, New York & London, 1999.

5. See, e.g., ROBERT ALEXY, *A Theory of Constitutional Rights*, translated by Julian Rivers, Oxford, 2002, pp. 388-425; DUNCAN KENNEDY, *A Critique of Adjudication*, Cambridge, Mass., 1997, pp. 315-338; JEREMY WALDRON, *Law and Disagreement*, Oxford, 1999, pp. 211-232.

In order to determine the scope of protection of freedom of the press, for instance, we are bound to consider both the way in which contemporary technology enables the press and other forms of mass communication to encroach upon individual privacy and our views about the proper balance between freedom of the press and the right to privacy.⁶ It cannot be denied that both factors — facts about technology, on the one hand, and ideological mediations, on the other — play a decisive role in our judgments concerning the issue. No doubt the protection of basic liberties such as freedom of the press is not nearly as conditioned by a *scarcity* constraint as the protection of social entitlements to health, education, housing, old-age pensions, and other types of state-sponsored benefit is. But basic liberties are subject to *balancing* of a more general kind, dependent on the extent to which they come into conflict with other rights (including of course other basic liberties and civil rights) and the wide spectrum of political sensibilities regarding the abstract or *prima facie* weight of the rights that compete in the relevant circumstances.⁷

In fact, it is hard to follow Tsakyrakis' reasoning when he writes that one cannot say of a basic liberty that it is protected more or less. For lawyers and lay people make statements of that sort all the time — and rightly so. There is nothing absurd or even slightly awkward in statements such as 'while freedom of the press is less protected in Russia than in Germany it is surely more protected in Russia than in North Korea'; 'free speech is afforded greater protection in the United States than in the European Union — a protection which some regard as excessive and others as exemplary'; or 'laws that criminalize group defamation and hate speech are enclaves of censorship in otherwise lands of free speech'.

3. Categories of Questions.

The second part of Professor Tsakyrakis' theory concerns the division of labor between the legislature and the judiciary when it comes to decisions pertaining to the allocation of resources among social groups — the type of issue that he uniquely associates with social-welfare rights. He argues that, unlike the province of basic liberties, the promotion of social welfare is the privileged realm of democratic politics, where 'it falls upon the electorate to assess and "judge" the politicians for their choices in the subsequent elections.' Tsakyrakis states nonetheless that 'resource allocation' decided by the political branches is subject to constitutional constraints that may be lumped into two categories: the equal status and the common good requirements.

The equal status requirement is that the welfare of each person is to 'be considered with equal concern and respect'. He borrows the phrase 'equal concern and respect' from Ronald Dworkin but it is not entirely clear the extent to which

6. See SAMUEL D. WARREN & LOUIS D. BRANDEIS, "The Right to Privacy", 4 *Harvard Law Review* 193, 1890.

7. See MATTIAS KLATT & MORITZ MEISTER, *The Constitutional Structure of Proportionality*, Oxford, 2012, pp. 29-42, 51-58.

he follows the latter's views,⁸ considering not only that Tsakyrakis scarcely mentions any of Dworkin's work but also that he identifies his argument on point with the 'American approach', something that he equates without further ado with (a particular reading of) the case law of the Supreme Court on the equal protection and due process clauses of the U. S. Constitution. According to Tsakyrakis, the equal concern and respect standard outlaws any arbitrary or discriminatory classifications among the members of society who receive the benefits (or bear the detriments) of a decision.' He eventually concedes that 'this version of the rational basis requirement becomes meaningless unless some restriction is placed on the kinds of purposes the legislature may pursue' and goes on to state his thesis that, in addition to those purposes that are expressly proscribed by specific constitutional provisions (e.g., subsidies for believers in what the government regards as the true religion), the equal concern and respect standard rules out any state measures that deny benefits or impose burdens on a class of people 'because [the government] disapproves of their beliefs or status' or 'an individual's chosen lifestyle.'

Tsakyrakis considers that to be a 'question of principle' that falls within the province of the judiciary — that is, since citizens have a justiciable right not to be discriminated against in the allocation of resources (benefits and burdens) decided by the political branches, the courts may properly review such decisions under the equal concern and respect standard. On the other hand, it is for the political branches, and them alone, to decide whether a particular allocation of resources serves the common good. The proper way for the citizenry to express its disagreement with the decision taken on that account — that is, on a 'question of policy' — is not to present the issue before a court of law but to vote the government out of office; should a constitutional case of that nature be pressed forth the judiciary ought to resist any temptation to double-guess the legislature. Tsakyrakis illustrates this distinction with two different responses to a severe financial crisis: the expulsion from the country of individuals living below the poverty line, a measure that is inadmissible on grounds of principle irrespective of its policy merits, and raising taxes on the income of the middle class, a measure that is constitutionally admissible, once again irrespective of its policy merits.

These examples are forceful but they do not speak much to the force of Tsakyrakis' own theory. Any plausible account of the proper scope of judicial review would come to similar conclusions, and I cannot imagine any court that would not. What is distinctive about Tsakyrakis' approach is that he would want constitutional judges to divide the issues into two neat camps — questions of *principle* and questions of *policy* — and exert *complete* control over the former while dismissing the latter as the province of democratic politics.⁹ Here his theory faces two insurmountable difficulties. The first is that what can be easily shelved as a political question such as raising taxes on the income of the middle

8. See RONALD DWORKIN, *Taking Rights Seriously*, Cambridge, Mass., 1978, pp. 180-83, 272-78; *Id.*, *A Matter of Principle*, Oxford, 1985, pp. 181-204; *Id.*, *Justice for Hedgehogs*, Cambridge, Mass., 2011, pp. 330-31.

9. Compare RONALD DWORKIN, *Taking*, pp. 82-84.

class may quickly raise the eyebrows of a constitutional lawyer if the income tax is raised to 90% for the middle class — for those whose income is close to the median earner — while it is reduced to 1% for the super-rich. Whether or not such a measure would be constitutionally admissible, the view that it ought not be subject to judicial scrutiny is simply implausible.

Professor Tsakyrakis may argue that the decision can indeed be reviewed if the question is framed as one of principle: not a question about the economic and fiscal effects of the measure but about its arguably discriminatory character. Now (and here lies the second difficulty) it is precisely at this point that Tsakyrakis' distinction between matters of principle and matters of policy ceases to perform the critical role that he assigned to it. For virtually all questions decided by the PCC were presented as 'matters of principle' in that broad sense and nearly all of the rulings were based on what in Tsakyrakis' own terms are principled grounds. The Court, for instance, argued that the government failed to treat civil servants as equals to the rest of the citizenry when, in the effort to reduce the public deficit, it decided to slash their income instead of raising universal taxes. The argument proceeded precisely from the principled concerns that Tsakyrakis asserts as legitimate grounds of judicial review of legislation — and the point can be safely generalized to encompass the bulk of constitutional adjudication in any jurisdiction.

Of course we may agree with Tsakyrakis that 'there is no point in analogizing public with private sector servants' for any number of reasons. But that misses the point entirely: in asserting that, Professor Tsakyrakis is merely expressing his disagreement with the PCC on a question of principle instead of showing that the judges second-guessed the government's policy judgments. Indeed, and quite ironically, had the Court followed his strictures on constitutional principle, it would not have said that slashing the pay of civil servants might be (as the government claimed) a particularly effective remedy in the circumstances, such that the measure (albeit unprincipled) could be accepted up to a threshold. It could not have said any of that because Tsakyrakis insists that policy reasons must give way — uncompromisingly — to the requirements of principle. Far from curbing judicial power, therefore, his theory licenses a robust form of juristocracy.

4. The Domain of Policy.

Notwithstanding its failings, there is a kernel of truth in Professor Tsakyrakis' account. He is right to insist that questions of policy — that is, those pertaining to whether a 'decision advances or protects some collective goal of the community as a whole'¹⁰ — fall squarely on the shoulders of the political branches. We do not expect constitutional courts to strike down laws establishing new excise taxes or subsidies for agricultural production on the grounds that they hurt economic growth or laws restructuring public services or regulating the use of

10. *Id.* at p. 82.

office supplies in ministerial cabinets on account of their alleged inefficiency. Indeed, we do not expect courts to uphold any laws on those grounds either; they should uphold them because the issues of policy they address are not for the judiciary to decide.

However, even in this relatively unproblematic area we must qualify Tsakyrakis' statements. First, he is wrong to assume that questions of policy concern solely the allocation of resources in society, emerging only in the field of social-welfare rights — and that quite apart from the undisputable fact that even the protection of basic liberties is costly, thus being subject to some extent to precisely the kind of scarcity constraint that Tsakyrakis associates with social-welfare rights alone. As questions of policy concern the propriety of a means towards some goal, implicating therefore all manner of *instrumental* uses of rationality in the political process, they extend far beyond the domain of resource allocation. Issues such as how to regulate church zoning, the ownership of the media, the organization of street protests, and many others which relate to the choice of the most suitable means to protect a basic liberty are undoubtedly of policy. It is true that policy questions are both less prominent and harder to disentangle from questions of principle in the field of basic liberties than in the area of other fundamental rights, including not just social-welfare rights but some first generation rights such as access to justice or the right to property. But that is a difference of degree rather than in kind. When a question is strictly of policy it should be entrusted to the political branches, whether or not it concerns the promotion of an economic or other types of goal.

A second error into which Tsakyrakis lapses is to conflate resource *allocation* with resource *distribution*. The following statement is representative of that confusion: 'the political branches...should have the final say [regarding] how resources should be allocated among the members of society. (...) Under this scheme, the political branches of government are entitled and required to make choices as to whether, for example, to give precedence to health over education or over employment.' The issue of whether subsidizing pharmaceutical research is good for the economy or promotes the right to health is one of resource allocation: resources are channeled in a particular direction in order to improve a goal or to reduce waste. The issue of which social groups stand as winners and which stand as losers when taxpayers' money is diverted from one goal to another is of resource distribution: it concerns how the available means are ultimately partitioned among the members of society. In a nutshell, resource allocation purports to maximize the size of the social pie while resource distribution purports to slice it fairly. It follows that resource allocation is indeed a question of policy, since it involves the choice of means to achieve certain goals. But resource distribution, which Tsakyrakis confuses with allocation, is a question of principle concerning the relative weight of rival claims over society's scarce resources — claims that are not grounded in expediency (e.g., 'society would be better off if the government subsidized industry rather than agriculture') but in justice (e.g., 'it is unfair that the government neither provides nor subsidizes health care while it spends a third of the state budget in subsidies for sports teams').

5. Democratic Deference.

I am afraid that if we were to follow Professor Tsakyrakis and confined democratic politics to matters of policy, instead of judicial restraint we would have a particularly strong version of judicial activism. This is an ironic twist in a paper that scolds the PCC for having exceeded its constitutional mandate in ruling unconstitutional a number of austerity measures.

Yet upon closer inspection that is hardly surprising. Tsakyrakis' theory is to all appearances heavily indebted to Ronald Dworkin's, who wrote famously at the near end of his *magnum opus* on jurisprudence that 'the courts are the capitals of law's empire and judges are its princes...'.¹¹ In fact, Dworkin's view of constitutional adjudication as 'the forum of principle'¹² is far more empowering of the judiciary in political cultures, such as those of the countries that sailed democracy's so-called 'third wave',¹³ that welcomed the extensive constitutional entrenchment of social-welfare and cognate rights. Tsakyrakis fails to see this because he plays fast and loose with the distinction between principle and policy, seriously overestimating the sharpness of the distinction and underestimating how easily a policy question may be refurbished as a question of principle. Put briefly, the point is that any theory of judicial review of legislation that systematically assigns the last word in matters of principle to the judiciary pays no more than lip service to the democratic ideal of collective self-government.

It would be interesting to learn more about Tsakyrakis' reasons to assume that democratic legislatures are incompetent or illegitimate decision-makers in matters of principle. He states that 'in any given society there may be various — if not infinite — conceptions of what the "common good" is or how it will be best served, and many conceptions among them are reasonable' and that 'these [questions of policy] are not questions that can have only one reasonable answer.' But this is obviously true of questions of principle as well: the judgments of political morality that they call for are subject to reasonable and obdurate disagreement in any pluralist society of moderately reflective persons.¹⁴ Perhaps what Tsakyrakis means is that questions of principle, unlike questions of policy, are the kinds of questions for which there is a single right answer to be found. However, even if we grant this point, the institutional implications that Tsakyrakis wishes to draw from it trade on confusion between the metaphysical level — there being a truth of the matter in questions of principle — and the epistemological level — there being a *demonstrably* right answer to such questions.¹⁵ Reasonable pluralism, unlike moral relativism, plays out at the latter level, since it concerns the fact that in matters of principle, no less than in those

11. RONALD DWORIN, *Law's Empire*, Cambridge, Mass., 1986, p. 407. Dworkin's 'constitutional conception of democracy' and his critique of the 'majoritarian premise' are perhaps presented more clearly and forcefully than anywhere else in his *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, Mass., 1996, pp. 1-38.

12. *Id.*, *A Matter*, pp. 33-71.

13. SAMUEL P. HUNTINGTON, Democracy's Third Wave, 2 *Journal of Democracy* 12, 1991.

14. See JOHN RAWLS, *Political Liberalism*, Expanded Edition, New York, 2005, pp. 36-39.

15. *Id.*, *Political*, pp. 54-65.

of policy, there is a plurality of reasonably held convictions in society.¹⁶ The question is hence by what procedure a collective decision is to be had on these matters despite the intractable disagreement that they engender on us.

Now if we are serious about democratic rule we must regard with puzzlement the suggestion that the normal procedure to settle these disagreements is a vote among a handful of nonelected and unaccountable judges.¹⁷ A democracy is a self-governing community of equals, meaning that the decisions by public authorities should ultimately be traced back to the authorship of the very people to whom they are addressed. On the many issues of policy and of principle that divide the citizenry, that translates into a requirement that each citizen's opinion, either about the issue itself or about who should decide it, be given the exact same weight as any other's — one person, one vote. It follows that the political branches representative of and directly accountable before the people enjoy a presumption of legitimacy when they take a side in the ongoing dispute within society about which of a plurality of rival views about individual rights, the common good, or other dimensions of communal life should have its way. For the opinion of a majority of judges to prevail over that of a majority of elected and accountable representatives unusual circumstances must obtain, and the burden of justification regarding them lies with the authority whose democratic legitimacy is comparatively feeble.

My own view is that judicial review of legislation is only legitimate in a democracy if it meets three fundamental conditions.¹⁸ First, courts should not double-guess the legislature's policy judgments, and may only intervene at this level if there is conspicuous evidence of error or deception; in matters of policy, then, judges owe near *unconditional deference* to the political branches. Second, courts should normally defer to legislative decisions in matters of principle if these survive an obviousness or reasonableness test, that is, if these can avail themselves to intelligible arguments; judicial review in this very broad area involves *light scrutiny* and embodies the editorial stage of democratic law-making, since it clears the statute books of arbitrary laws that cannot claim the allegiance of reason-giving agents.¹⁹ Finally, courts may deploy strict or *heightened scrutiny* when reviewing laws that draw on suspect classifications of race, gender, sexual orientation, age, and others that may serve to oppress political minorities or disenfranchised social groups.²⁰ In this relatively narrow area a public authority that is electorally unaccountable and is bound to offer arguments for its decisions, such as a constitutional court, plays the vital task

16. JEREMY WALDRON, *Law*, pp. 149-187.

17. *Id.*, The Core of the Case Against Judicial Review, 115 *The Yale Law Journal* 1346, 2006.

18. For a more developed account, see GONÇALO DE ALMEIDA RIBEIRO, O Constitucionalismo dos Princípios, GONÇALO DE ALMEIDA RIBEIRO & LUÍS PEREIRA COUTINHO (eds.), *O Tribunal*, pp. 92-100.

19. See MATTIAS KUMM, Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review', 1 *European Journal of Legal Studies* 1.

20. See JOHN HART ELY, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge, Mass., pp. 135-180.

of preventing democratic government — the rule of majority *judgment* and *deliberation* — from degenerating into a tyranny of the many — the rule of majority *interest* and *prejudice*.

6. Conclusion.

Professor Tsakyrakis is explicitly hostile to the type of conception of judicial review that I just sketched. ‘I do not argue — he writes — that courts must perform no judicial review of political decisions, nor that they should defer, as a matter of comity or who-knows-what, to the political branches when it comes to “political questions” or other sensitive subjects; on the contrary, a Constitutional Court can and must review all decisions which may compromise the equal concern and respect owed by the state to the citizens.’ Instead of democratic deference and levels of scrutiny, his theory relies on bright line distinctions between categories of rights — basic liberties *versus* social-welfare-rights — and categories of questions — questions of principle *versus* questions of policy — to isolate an area of unrestrained judicial rule.

I have tried to show both that these distinctions are not nearly as tidy as Tsakyrakis believes them to be and that a theory of judicial review grounded in them is hopelessly undemocratic. The noblest share in the *travails* of government concerns the issues of principle that the community faces, and no political system should be dignified with the mantle of democracy if it assigns them primarily to the judges whom Professor Tsakyrakis pledged to unrobe. Constitutional courts owe a great deal of deference to the legislature for its democratic pedigree. Their role in a democracy is to serve as junior partners in the law-making process and stewards of the integrity of self-government.
