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ARTICLE

The Constitutionalization of Social Rights in Italy, Germany, and Portugal: Legislative Discretion, Minimal Guarantees, and Distributive Integration

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Abstract

In an international social rights debate disproportionately focused on English-speaking countries, redundant emphasis has been placed on justiciability. While constitutionalization does challenge stable relations between powers, especially in the post-colonial and developing world, solid insights for a workable interpretative method can be derived from continental Europe, where the difficulties typically associated with justiciability have long been settled. The constitutions of Italy, Germany, and Portugal take socioeconomic democracy seriously, tempering socialist claims and refuting libertarian stances, and have managed to spur a legitimate judicial increment of substantive equality. Through a threefold comparison, this paper describes the peculiarities of these fundamental texts across the spectrum of possible constitutional design choices, and draws from comparative constitutional caselaw to highlight a cross-national convergence on a set of interpretative standards. These blend together a strong safeguard of legislative discretion with justiciable minimal guarantees, and a value-assertive orientation of balancing coextensive with the integrationist function of constitutionalized social and economic rights.

Keywords: Social rights adjudication; comparative constitutional theory; constitutional interpretation; Constitutional Court of Italy; Constitutional Court of Portugal; Federal Constitutional Court of Germany

A. Introduction

Nestled between past derisions and future prominence, social rights continue to represent a key focus in comparative constitutional theory. As many failures of the neoliberal state become evident, the future success of constitutionalism will heavily depend on the political framing of healthcare, dwelling adequacy, and environmental sustainability in the Anthropocene.[1] Many of the challenges arisen from the 2008 financial crisis have resurfaced amid the Covid-19 pandemic and the growing awareness of ecological issues, strengthening an already existing critique of a heavily privatized, financialized, and polluted world. Whether and how constitutionalized socioeconomic rights can represent suitable strategies to address extant disparities remains highly disputed, though, at the very minimum, a consensus exists on the inherently progressive and politically contingent nature of these entitlements.

[1]Jeanne Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT. LAW J. 763 (2003). This is not a novelty by any means, though there are a few practical differences from the time of Woods's writing, namely the increased digital connection and physical mobility around the world, and the grown menace of climate change. These trends could, indeed, facilitate a global convergence on distribution rather than production dynamics.

To this day, the international discourse – surfaced towards the end of the past millennium – has disproportionately focused on the enforceability of socioeconomic rights in the sphere of English-speaking countries, paying little attention to other national frameworks. Much of the debate has revolved around South Africa[2] and other postcolonial settings arising from past deprivation and legalized inequality. Indeed, new democracies tend to be presented with a distressing dilemma of waiting for reliable welfare institutions to consolidate or fast-track socioeconomic inclusion through rights revolutions,[3] with the latter option usually entailing a stronger reliance on the judiciary vis-à-vis substantive equality goals.[4] In continental Europe, the discourse on socioeconomic rights has much older roots, and while existential questions on justiciability have long lost traction, constitutional scholarship has focused on the interpretative standards that govern the judicial review of social and economic legislation.[5] The constitutional courts of Italy, Portugal, and Germany all share a complex approach to the adjudication of social rights as a composite interaction between legislative discretion, minimal guarantees, and balancing, whereby fundamental principles guide hermeneutics toward further political, economic, and social integration.

There remain various convincing reasons why social rights belong in a constitution, the most important being the overcoming of liberal constitutionalism – and an atomized view of the individual – through a stronger textual adherence to the sociological unfolding of rights and liberties.[6] Moreover, the hurdles associated with justiciability can be softened by rebutting an

[2]*See*, among others, Dennis M. Davis, *Socio-economic Rights: The Promise and Limitation – the South African Experience*, *in* Exploring Social Rights: between Theory and Practice 193 (Daphne Barak-Erez & Aeyal M. Gross eds., 2011); Sandra Liebenberg, Socio-economic Rights: Adjudication under a Transformative Constitution (2010).

[3]Herman Schwartz, *Economic and Social Rights*, 8(2) Am. U. Int'L. Rev. 55 (1993), 561. According to a recent empirical survey, the emphasis on social rights is indeed stronger in Global South constitutions. Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions,* 62(4) Am. J. Comp. L. 1043 (2014). A similar conclusion is presented in Varun Gauri & Daniel Brinks, *Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights*, *in* Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World 1, 14 (Varun Gauri & Daniel Brinks eds., 2008), where the authors explain how modernization, urbanization, democratization, and economic development tend to make social rights "redundant."

[4]An example is the project for a new Chilean Constitution in 2022, whose failure can also be attributed to the excessive reliance on rights as tools to address complex social divides. Armin Von Bogdandy, *Chilean Insights for Progressive Constitutionalism*, 7–8 (Max Planck Institute for Comparative Public Law and International Law, Research Paper No. 07, 2023) referring to Mario Fernández Baeza, El Vuelco Constituyente (2023), suggesting that alongside certain very practical failures (among others, the inclusion of an unconditional right to abortion and the planned abolition of private pension system), the project's excessive unresponsiveness to a critique of rights contributed to the process being perceived as extremely sectoral/partisan. A similar conclusion is presented in Samuel Issacharoff & Sergio Verdugo, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond*, 40 (NYU School of Law, Working Paper No. 23-30, 2023) where the authors suspect that the Chilean "constitutional process lost sight of the median voter in whose name it had proclaimed a constituent power."

[5]On an institutional level, the matter is further complicated by the never-ending questions around EU political integration. On these tensions, *see* Andrea Sangiovanni, *Solidarity in the European Union*, 33(2) Oxf. J. Leg. Stud. 213 (2013); Bruno de Witte, *Two Charters and a Pillar: The Slow Constitutionalization of Social Rights in European Law*, *in* Constitutionalism under Stress 191 (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2020). Intriguing inputs can be derived from the tumultuous experience with the COVID-19 pandemic. Besides the interesting experiment with the SURE program (Temporary Support to mitigate Unemployment Risks in an Emergency), the collective issuance of bonds within Next Generation EU could possibly represent a first step towards a deeper Union. *See*, on this, Bruno De Witte, *The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift*, 58(3) Common Mark. Law Rev. 635 (2021); Richard Crowe, *The EU Recovery Plan: New Dynamics in the Financing of the EU Budget*, *in* The Future of Legal Europe: Will We Trust in It? 117 (Gavin Barrett, Jean-Philippe Rageade, Diana Wallis & Heinz Weil eds., 2021). As things stand, however, it still seems premature to speculate on the political trajectories that the European Union might follow in the coming years.

[6]The incidence of the so-called objections to the judicial enforceability of social rights – i.e., the problems of competence, democratic legitimacy and polycentricity – is masterly dissected in Jeff King, Judging Social Rights (2012). On the same theme, *see* also Matthias Klatt, *Positive Rights: Who Decides? Judicial Review in Balance*, 13(2) Int. J. Const. Law 354, 354–64 (2015).

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inflexible "abdication or usurpation"[7] dilemma and redirecting their focus on constructing agreeable trade-offs between political unaccountability and democratic legitimacy concerns.[8] Many national constitutions, especially recent ones, are vocal about promoting socioeconomic equality, and there is no reason why such stances should be deprived of a normative bearing. Within a wider institutional apparatus, adjudication can incrementally contribute to distributive fairness by rejecting an inflexible adherence to the separation of powers as unrealistic and by cautiously sustaining legislative and policy efforts to align with enshrined social and economic constitutional goals.

Against the backdrop of the enduring centrality of social rights in modern comparative constitutionalism, this paper describes the case of the Italian Constitution, relatively unknown to the English-speaking forum,[9] by comparison with the experiences of Germany and Portugal, which are instructive on both the variety of constitutional design vis-à-vis socioeconomic democracy as well as on the hermeneutical convergence on common principles. Drawing from an established typology in comparative constitutional studies, I treat these examples as "prototypical cases" showing a considerable generalization potential due to characteristics that are (i) sufficiently broad in the range of the available theoretical models of social rights constitutionalization; and (ii) fundamentally akin to the possible characteristics that may be found outside the class of analyzed case studies.[10] The Italian Constitution is treated separately from the fundamental texts of Portugal and Germany, whose analysis is instead joined together, because of its peculiar design (that is, the differentiated recognition of social rights across a wide spectrum of immediately enforceable and more programmatic obligations) and underlying ideological fabric (constitutional solidarity as a momentous political compromise between catholic and socialist wings), which represents a middle ground between the pronounced liberal focus of the *Grundgesetz* and the strong material connotation of the 1976 version of the Portuguese Constitution. By contrast, the joint treatment of the Portuguese and German constitutions departs from their original textual and ideological idiosyncrasy to highlight the subsequent convergence on common hermeneutical standards for the social state principle. This initially unforeseeable scenario reinforces the generalization potential of the theoretical takeaway of the comparison. The primary aim of this paper is thus to bridge the two dimensions of the global social rights debate that have thus far remained largely separate, namely the English-speaking scholarly focus on social rights as a transformative means for socioeconomic equality and continental Europe's more pragmatic discussions on how historically and politically charged principles – e.g., solidarity or the *Sozialstaat* – should inform the judicial review of economic and social legislation in consonance with the societal function of constitutionalized socioeconomic rights.

[7]Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1(1) INT. J. CONST. LAW 13, 16 (2003).

[8]King, *supra* note 6, at 320–21, though the idea of legal accountability/democratic legitimacy tradeoffs is a running theme throughout the whole volume. This is, on a closer look, a specification of the views alluded to in CÉCILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE 150 (2000). According to Fabre, the objections to the democratic legitimacy of social rights adjudication can be absorbed by distinguishing between courts reminding the government of its constitutional duties (setting deadlines for compliance) and courts mandating specific ways for the government to comply with constitutional standards.

[9]*See*, Alessandra Albanese, *Italy*, *in* SOCIAL RIGHTS IN EUROPE IN AN AGE OF AUSTERITY 80 (Stefano Civitarese Matteucci & Simon Halliday eds., 2018); VITTORIA BARSOTTI, PAOLO G. CARROZZA, MARTA CARTABIA & ANDREA SIMONCINI, ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT 144–50 (2016).

[10]Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 142 (2005) arguing that whenever generalization is sought, starting from a limited number of observations or case studies "to test the validity of a theory or an argument, these should feature as many key characteristics as possible that are akin to those found in as many cases as possible."

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B. The Italian Welfare State as the Institutionalization of Constitutional Solidarity and Social Rights

Adopted in the aftermath of World War II, the Italian Constitution showcases a profound awareness of the limits of sheer political citizenship when decoupled from active social inclusion. This transpires throughout the text, from the opening "fundamental" principles (Articles 1-12), the many substantive limits constraining classical liberties (for example, the social function of property or "health, the environment, safety, liberty, and human dignity" as counterweights to free economic initiative) and, obviously, from the express recognition of rights of a socioeconomic nature (for example, health under Article 32 or social security under Article 38). However, few textual peculiarities make the Italian Constitution a comparatively anomalous case.

Article 2 has long been considered the social state's bedrock. It recognizes an open catalog of fundamental rights (*diritti inviolabili*) in exchange for corresponding constitutional duties (*doveri inderogabili*), which every individual has to bear as the flip side of political citizenship. By strongly protecting the individual in their free personal development through social relations (*principio personalista*),[11] the framers sought to overcome liberal constitutionalism and its narrow vision of human beings being seen as purely rational agents, imagining, instead, persons as imperfect beings characterized by an intimate existential tension coextensive with their shared need for relationality and self-expression.[12] Thus, a serious commitment to democracy could not simply guarantee pluralism (*principio pluralista*), but also needed to acknowledge mutual interdependency within the community, whereby one's freedom can only find legitimacy by recognizing the freedom of others. Accordingly, rights are conferred as long as duties towards others are correspondingly accepted[13] and their relation is governed by the principle of political, economic, and social solidarity (*principio di solidarietà*)[14] – the "cornerstone" of the democratic order[15] – as the textualization of constitutional rights' relativism. The mutual recognition of rights in exchange for duties is usually referred to as "horizontal solidarity."[16] The Constitution thrives with examples such as the requirement for professional freedom to "contribute to the material or spiritual progress of society" (Article 4), the connotation of the right to health as a "fundamental individual right and an interest of the community" (Article 32), and the recognition of everyone's duty "to contribute to public expenditure in accordance with it their capability" (Article 53).[17] In the context of healthcare, for instance, the protection of self-determination will not prevent

[11]Costantino Mortati, *Commento all'Articolo 1*, *in* COMMENTARIO DELLA COSTITUZIONE. ART. 1-12: PRINCIPI FONDAMENTALI 6 (Giuseppe Branca ed., 1975).

[12]MARTA CARTABIA & NICOLA LUPO, THE CONSTITUTION OF ITALY: A CONTEXTUAL ANALYSIS 3–8 (2022). In spite of the apparent simplicity, the final formulation of Article 2 was the result of a difficult compromise between leftist and Catholic wings, joined together in the shared need to reject an organicist view of the state. Augusto Barbera, *Commento all'Articolo 2, in* COMMENTARIO DELLA COSTITUZIONE. ART. 1-12: PRINCIPI FONDAMENTALI 50 (Giuseppe Branca ed., 1975).

[13]Because of this, the Constitutional Court would later recognize solidarity as the "basis for the social coexistence normatively foreshadowed by the framers": Decision of the Italian Constitutional Court, No. 75 of 1992, para. 2 (*considerato in diritto*). On the same occasion, the Court described social volunteering as the "utmost expression of the person's primal social vocation" and the "most direct realization of the solidarity principle, according to which every person is called upon to act [. . .] out of a free and spontaneous expression of the deep-rooted sense of sociality that characterizes persons themselves."

[14]Solidarity is not exclusive to the Italian Constitution. Tamar H. Brandes, *Solidarity as a Constitutional Value*, 27 BUFFALO HUM. RIGHTS LAW REV. 59 (2021). By comparison, the idea of fraternity has received greater scholarly attention. The difference between the concepts is explored in STEFANO RODOTÀ, SOLIDARIETÀ: UN'UTOPIA NECESSARIA 20–24 (2014) by reference to ALAIN SUPIOT, GRANDEUR ET MISÈRE DE L'ETAT SOCIAL 44 (2013). Unlike solidarity, fraternity would characterize the idea of interpersonal dependence along ideological lines.

[15]Vezio Cristafulli, Lo Spirito Della Costituzione, *in* STUDI PER IL DECENNALE DELLA COSTITUZIONE. RACCOLTA DI SCRITTI SULLA COSTITUZIONE 104 (1958).

[16]Serio Galeotti, *Il valore della solidarietà*, 1 DIRITTO E SOCIETÀ 1, 10–11 (1996).

[17]The Constitutional Court has considered tax evasion a "particularly severe violation" entailing "a core rupture of the loyalty bond tying together citizens" and thus a violation of solidarity duties, which are a guarantee of a "democratic coexistence structured around individual freedom and social justice." Decision of the Italian Constitutional Court, No. 51 of 1992, para. 3 (*considerato in diritto*).

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the state from legitimately prescribing mandatory vaccinations even when these imply a specific health risk,[18] insofar as political determinations remain within the realm of scientific reasonableness, meaning that the potential harm to the single individual shall be outweighed by the expected benefit for society as a whole (especially for vulnerable groups).[19]

The framers knew that mutual recognition would not suffice and envisaged an institutional complex ("vertical or paternal solidarity," proceeding from the state to citizens), meant to give teeth to social and economic duties and to guarantee everyone's shared need for relationality in equal terms, making sure that factual and distributive asymmetries did not foreclose equal participation in the community.[20] Constitutional solidarity, in this sense, joins forces with the principle of substantive equality in Article 3 (enshrining the Republic's positive commitment to "removing obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country") as the guarantee of a complex of agencies, rights, and regulations – that is, the welfare state – functional to ensuring everyone's subsistence and equal opportunities for material, spiritual and cultural development. The State is not expected to force people into artificial equality, but rather to homogeneously ensure social minimums and gradually augment personal opportunities for material, spiritual, cultural, and civil growth. This institutionalized form of solidarity transpires either from provisions (i) outlining clear-cut obligations and thus justiciable socioeconomic rights (for instance, the right to free medical care for the indigent under Article 32, Article 34 on compulsory and free basic education or Article 38 on social assistance to people unable to work); (ii) introducing vaguer social objectives (for example, Article 47.2 on the protection of savings as a means to access housing);[21] or (iii) providing for instruments or methods functional to ensuring welfare services (for example, the tax leverage imposed in Article 53).

In sum, the main peculiarity of the Italian constitutional social architecture coincides with a collectivist justification of social rights as inevitable complements to the protection of individual self-reliance and well-being[22] but goes a step further in linking the need for institutional mechanisms for socioeconomic equality to a more realist idea of relational autonomy.[23] This

[18]Decision of the Italian Constitutional Court, No. 307 of 1990, para. 2 (*considerato in diritto*).

[19]In Decision 14 of 2023, the Constitutional Court dismissed arguments against COVID-19 vaccination mandates for health workers by reference to the decisive relevance of constitutional solidarity in justifying the social distribution of benefits and burdens. The Court held that during sanitary emergencies the precautionary principle warrants therapies whose benefits, despite the lack of certain data, are projected to outweigh the potential harm for society at large: Decision of the Italian Constitutional Court, No. 14 of 2023. This approach is complemented by the Court's requirement that, in the case of adverse effects arising from the individual's exposition to sanitary risks, the collectivity shall bear the costs of the damages being suffered by means of reparation: Decision of the Italian Constitutional Court, No. 268 of 2017, para. 6 (*considerato in diritto*). Sticking to the same rationale, in the successive Decision 15 of 2023 the Court assessed positively also the reasonableness of vaccine mandates for paramedical workers. Decision of the Italian Constitutional Court, No. 15 of 2023.

[20]Beniamino Caravita, Oltre L'Eguaglianza Formale. Un'analisi dell'articolo 3 comma 2 della Costituzione 29 (1984). The resulting vision has been wittily described as a combination of the Marxist and socialist critiques of formal equality, the Beveridge Report and the Catholic social doctrine. Sabino Cassese, *L'Eguaglianza sostanziale nella Costituzione: Genesi di una norma rivoluzionaria*, 1 La Carta e la Storia 5 (2017).

[21]Since its very first decision, the Constitutional Court of Italy has rejected a watertight distinction between prescriptive and programmatic precepts (*norme precettive* and *norme programmatiche*), reading the Constitution as a normative instrument while distinguishing between different types of normativity. Therefore, the peculiar difficulties entailed by the recognition of certain inherently progressive social rights does not make them redundant or facultative but, rather, requires their actuation to follow different criteria. Antonio Baldassarre, *Diritti Sociali*, *in* Enciclopedia Giuridica 28–32 (1989, Volume XI).

[22]Fabre, *supra* note 8, at 39. The constitutionalization of social rights would be warranted by the universally shared fundamental interest in leading a decent life, for which autonomy and well-being are two ineliminable conditions. Autonomy in particular is morally conceived as the capacity "to frame, to revise, and to pursue a conception of the good, and to deliberate in accordance with it" drawing from Joseph Raz, The Morality of Freedom 369 (1986) while personal well-being is mostly understood as the absence of physical suffering.

[23]Erik Longo, *I diritti sociali nella Costituzione italiana: Un percorso di analisi*, 2 Rivista del Diritto della Sicurezza Sociale 201, 217 (2017). "Our interests in social relations are sufficiently weighty to ground positive social rights. These [legal rights] include the right to adequate access to all those conditions that, firstly, allow us to nourish and sustain our social

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somewhat precursory feminist justification of social rights is devoid of any moral connotation and is rather entirely centered on the relational nature of human beings, in a way that bridges the classical Catholic emphasis on personal interdependence with emerging empirical arguments (especially those of cognitive psychology) against the atomized nature of the person, that feminism has acquired in critiquing liberal individualism.[24] These views are all channeled in the Constitution through the principle of constitutional solidarity.

C. The German and Portuguese Social States: Constitutional Asymmetries and Hermeneutical Convergences

The Italian case provides an example of a centrist constitutionalization of social rights because of the compromise between socialists and Christian democrats that sustained the final formulation of Article 2 and the envisaged differentiation between a set of normatively defined and *per se* enforceable provisions and vaguer standards entailing greater latitude for the legislature. The constitutions of Germany and Portugal present, instead, more radical outlooks.

Mitigating the textual absence of constitutional social rights,[25] Article 20 of the Basic Law describes Germany as a "democratic and social federal state" and outlines the so-called *Sozialstaatprinzip*. Drawing from Otto von Bismarck's social policy and Weimar constitutionalism, this principle gives the state a permanent equalization role to reconcile individual freedoms with the sociality of living[26] and, despite the little attention it received in the discussions of the Parliamentary Council, has emerged as one of the cornerstones of German constitutionalism, due to the Federal Constitutional Court's extensive reliance on it.[27] By contrast, the post-revolutionary Portuguese Constitution of 1976 (approved only three months after the entry into force of the International Covenant on Economic, Social and Cultural Rights) recognizes a broad catalog of socioeconomic rights, materially conceived by the framers (under the oversight of the *Conselho da*

abilities and, secondly, enable us to maintain social connections, reach social inclusion, live a public life and do other things with our peers." It follows that "[n]o one cannot, in fact, think of well-being as a set of goods that one possesses but rather as the range of relationships useful for fulfilling the needs that each person expresses. Thus, the recognition of social rights entails the reversal of the approach that viewed the person almost exclusively as an economic subject and largely identified their capacity to make decisions with their patrimonial capacity."

[24]Much of the feminist critique of liberal individualism rests precisely on the reinterpretation of personal autonomy as relational autonomy, on the premise that "that persons are socially embedded, and that agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity." CATRIONA MACKENZIE & NATALIE STOLJAR, RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (2000). More recently, this critical line has been reinforced and further developed in JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW (2012), where the author explains that a "relational approach to autonomy points to the ubiquitous structures of dependence and interdependence that characterize everyone's lives. It thus denies most conventional claims to independence. It denies that autonomy is fundamentally about independence, and so it challenges the claim to autonomy by those who base it on their (usual illusory) independence. The result is that it challenges people's beliefs about themselves as autonomous, a highly valued component of relative power and privilege." The structural similarity between certain elements of Article 2 and the feminist critique were first highlighted in ERIK LONGO, LE RELAZIONI GIURIDICHE NEL SISTEMA DEI DIRITTI SOCIALI: PROFILI TEORICI E PRASSI COSTITUZIONALI (2012).

[25]With the only exception being maternity protection in Article 6(4).

[26]The idea of freedom underlying the *sozial Rechsstaat* can never be adversarial to the community, it is a freedom in the social that achieves its truest meaning when it is oriented towards the other. Hans Zacher, *Die soziale Staatsziel*, *in* HANDBUCH DES STAATSRECHTS DER BUDNESREPUBLIK DEUTSCHLAND 1101–04 (Josef Isensee & Kirchhof Pauk eds., Volume I, 1987).

[27]The principle is then confirmed in Articles 23 and 28 of the Constitution, where its respect is required for the legitimacy of EU law and *länder* constitutions. Though the dominant narrative holds that the failure of Weimar constitutionalism and the horrors of National Socialism compelled the Parliamentary Council to approach issues of socioeconomic justice with extreme caution, Christian Bommarius underscored the fact that the drafters already had a clear view of what the social state would mean – in continuity with Bismarck's *Sozialpolitik* and Weimar constitutionalism. Christian Bommarius, *Lecture - Germany's Sozialstaat Principle and the Founding* Period, 12(11) GERMAN L.J. 1879, 1885 (2011).

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Revolução) as socialist conquests of workers against the bourgeoisie.[28] From the 1980s, however, constitutional revisions would gradually open the socialist state to liberal worldviews, facilitating the establishment of a market economy in alignment with the Maastricht Treaty and reshaping the welfare state through the inclusion of a German-inspired principle of *democracia económica, social e cultural* in Articles 2, 9, 80 and 81 of the Constitution.

Overall, the designs of the welfare state in the German and Portuguese constitutions could not be more distant from each other. The *Sozialstaatprinzip* sees in itself a range of different ideological traditions and has generally been described as providing a counterweight to the strong liberal thrust (which Hans Michael Heinig has described as "anti-libertarian and anti-Marxist"[29]) running through the Basic Law.[30] As a fundamental constitutional principle, the social state is meant to balance the inevitable distortions ensuing from the pronounced emphasis on individual freedom when they are detrimental to the community's overall welfare and peace. Under the Portuguese Constitution's original auspices, the state has to take responsibility for hardcore and socialist socioeconomic equalization, whose immediate necessity was considered a logical premise for individual freedom by the framers.[31] In some ways, these diametrically opposed constitutional architectures would, over time, come to mean similar things; such interpretative convergence goes a long way toward reinforcing an understanding of constitutional social rights as the balanced mitigation of liberal and socialist claims, combining the assurance of minimal guarantees and a limited integrative judicial check on the exercise of political discretion.

The Federal Constitutional Court has long conceptualized the Basic Law as an objective and hierarchical order of values (*objektive Wertordnung*), towered by its commitments to human dignity and the social state, in the sense that the framers would have combined a number of principles to establish "a state which is ideologically neutral but not value-neutral."[32] This conceptualization was weaponized to react to the country's authoritarian past and approach social change progressively.[33] Basic rights would comprise non-interference injunctions as well as

[28]In the findings of a 2008 quantitative study, Portugal stood out among 68 countries for the highest degree of commitment to the constitutional protection of social rights. Avi Ben Bassat & Momi Dahan, *Social Rights in the Constitution and in Practice*, 26 J. Comp. Econom. 103, 108 (2008). For an historical reconstruction of the constitutionalization of social rights in Portugal, *see* Mónica Brito Vieira & Filipe Carreira da Silva, *Getting Rights Right: Explaining Social Rights Constitutionalization in Revolutionary Portugal*, 11(4) Int. J. Const. Law 898 (2013).

[29]Hans M. Heinig, *The Political and the Basic Law's Sozialstaat Principle - Perspectives from Constitutional Law and Theory*, 12(11) German L.J. 1887, 1895 (2011). The various ideological components of the *Sozialstaatprinzip* are discussed in Hans M. Heinig, Der Sozialstaat Im Dienst Der Freiheit: Zur Formel vom 'Sozialen' Staat in Art. 20 Abs. 1 GG (2008).

[30]It is no secret that the Parliamentary Council discussion were heavily influenced by the demands of the Allies. In consonance with American constitutionalism, and in stark contrast to Weimar, the first nineteen articles of the Basic Law strongly emphasize the protection of classical freedoms and fundamental rights, the limitation of constituted powers, and the provision of protective mechanisms against majoritarian political institutions. Donald Kommers, *German Constitutionalism: A Prolegomenon*, 40 Emory L. J. 837, 845–52 (1991).

[31]The socialists, in particular, defended the idea that the protection of social rights could not be separated from the collectivization of production means without the risk of abandoning socialism for social democracy, a hypocritical form of socialism, "liberal, not Marxist, whose social harmony is founded on abundance and superabundance for my comrade [. . .] and not on social justice." Session 43 of 10 September 1975. Also, the rants by Vital Moreira, a renowned constitutional lawyer, against the hypocrisy of the idea of constitutional solidarity are instructive on the Assembly's adversity to centrist views. In Session 45 of 12 September 1975, he spoke in the following terms: "there have always been attempts to detach [economic, social and cultural rights] from their historical and political framework. There have always been attempts to separate them from the socialist struggle, trying to ideologically erode them with concepts of social solidarity, social justice, sociality, fraternity *etcetera*. Also here, one can notice the renowned capacity of dominant classes and of the bourgeois ideology to co-opt, to take over (neutralizing them and reversing their meaning) some of the political banners of the popular struggle [. . .]. The present general debate on the design proposed by the Commission on economic, social and cultural rights and duties has shown the attempt by certain parties to neutralize them, to remove their class connotation, to detach them from the struggle for socialism."

[32]Kommers, *supra* note 30, at 844.

[33]Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65(3) Am. J. Comp. L. 527, 543–44 (2017).

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axiological determinations imposing positive obligations and would thus channel a social democratic connotation of the rule of law (beyond a mere set of individual rights and restrictions on state power), including the state's duty to ensure a just social order (*gerechte Sozialordnung*).[34] Reading the "supreme constitutional principle" of human dignity[35] and the principle of equality together with the equalization goals associated with the *Sozialstaatprinzip*, the Court has reviewed social and economic legislation against a variety of standards, including the negative externalities caused by a disproportionately individualistic exercise of classical liberties and fundamental rights (for instance, property rights and professional freedom) as well as the need for the state to ensure that everyone had a minimally dignified existence through welfare services, expanding horizontally fundamental rights to include social and economic aspects.[36] The most renowned testament to the latter stance is the *Hartz IV* case, where the Federal Constitutional Court censored the criteria for calculating unemployment benefits because conducive to quantitative determinations that were insufficient to guarantee a minimally dignified existence.[37]

By contrast, the Portuguese Constitutional Court has eased the transition from an original commitment to a Marxist state, the so-called *decisão socialista*,[38] to the subsequent liberal opening of the system from the 1980s – a change urged internally and externally (Portugal entered the European Economic Community in 1986). Even though the revisions did not touch the substance of social rights provisions,[39] the Court would gradually refocus its interpretation on a liberal construction of the newly entrenched principle of *democracia económica, social, e cultural* (under Articles 9, 80 and 81) by continuous reference to German scholarship as an open mandate for the legislature to reconcile individual rights and freedoms with collective welfare.[40] In its basic form,

[34]BVerfGE 1, 97 and BVerfGE 22, 180. The *Sozialstaatprinzip* acquired centrality in the Court's jurisprudence from the *Lüth* case in 1958, though the Court had already considered the importance of Articles 20 and 28 of the Basic Law in previous ruling; for instance, when it decided on the dissolution of the SRP (Socialist Reich Party) and the KPD (Communist Party). As commented by Hans Zacher, the *Sozialstaat* "is a mandate to distinguish unreasonable inequalities from reasonable or at least tolerable ones (or less important ones), and to eliminate, compensate for, or at least diminish the unreasonable ones." HANS ZACHER, SOCIAL POLICY IN THE FEDERAL REPUBLIC OF GERMANY: THE CONSTITUTION OF THE SOCIAL 24 (2013).

[35]Ernst Benda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 SMU L. REV. 443 (2000), 444 referring to Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 19, 1982, 61 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 126 (Ger.), at para. 31.

[36]On the point, *see* Andreas Voßkuhle, *Der Sozialstaat in der Rechtsprechung des Bundesverfassungsgerichts*, 4 DIE SOZIALGERICHTSBARKEIT 181 (2011); Dieter Grimm, *Legitimation by Constitution and Socioeconomic Rights from German Perspective*, 98 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 206, 208–09 (2015). For a general overview of the many applications of this interpretative approach, *see* Stylianos-Ioannis Koutnatzis, *Social Rights as a Constitutional Compromise: Lessons from Comparative Experience*, 44 COLUMBIA J. TRANSNATL. 74, 131 (2005); Jeff King, *Social Rights, Constitutionalism, and the German Social State Principle*, 3 E-PÚBLICA: REVISTA ELECTRÓNICA DE DIREITO PUBLICO 20, 35–37 (2014).

[37]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 9 Feb. 2010 (*Hartz* IV), 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 175 (Ger.). For a discussion of the decision, *see* Stefanie Egidy, *The Fundamental Right to the Guarantee of a Subsistence Minimum in the Hartz IV Decision of the German Federal Constitutional Court*, 12(11) GERMAN L.J 1961, 1964–1968 (2011).

[38]As agreed in the two pacts concluded between the *Movimento das Forças Armadas* and political parties across 1975 and 1976, the fundamental socialist orientation of the process was by and large transposed in the Constitution from the very outset (Article 1 originally envisioned a "transformation into a classless society" whereas Article 2 linked the democratic nature of the Portuguese state to the transition to socialism) across the entire constitutional text, openly oriented towards the "construction of a socialist society" (Art. 91). For a general discussion, *see* Pedro C. Magalhães, *Explaining the Constitutionalization of Social Rights: Portuguese Hypotheses and a Cross-National Test*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 432, 438–40 (Denis J. Galligan & Mila Versteeg eds., 2013).

[39]With the constitutional revisions of the 1980s, the third part of the Constitution was reorganized, cleared of all express references to Marxism, and generally liberalized, for instance through the recognition of free private economic initiative and the reformulation of property, expropriation, and collective appropriation clauses.

[40]JOSÉ J. GOMES CANOTILHO & VITAL MOREIRA, CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA ANOTADA: ARTIGOS 1° A 107° 209–10 (4th ed., 2007, Volume I). As regards the proximity with the *Sozialstaatprinzip*, Jorge Novais described its influence on the interpretation of the Portuguese Constitution as "dominant." JORGE R. NOVAIS, DIREITOS SOCIAIS: TEORIA JURÍDICA DOS DIREITOS SOCIAIS ENQUANTO DIREITOS FUNDAMENTAIS 377 (2010).

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the social principle would (i) prohibit overtly anti-social policies, (ii) govern the organization of state duties and tasks in the area of socioeconomic equality and minimal subsistence, and (iii) safeguard legitimate expectations vis-à-vis already established welfare services.[41] Over time, the Court would safeguard and expand, whenever possible, the discretion enjoyed by the legislature in the pursuit of the *democracia económica, social e cultural*, vetting welfare policies in a self-restrained way and striking down legislation only in marginal hypotheses of abnormal constitutional violations, avoiding direct reliance on the socioeconomic rights enumerated in the Constitution and, mostly, justifying its interventions by reference to fundamental principles of equality, proportionality and legal certainty (for instance, in the notorious *jurisprudença da crise*). With the sole exception of gross legislative omissions (*inconstitucionalidade por omissão*),[42] the entrenched social and economic rights have been mostly demoted to programmatic specifications of the social principle and social minimums guarantees.

D. Constitutional Social Rights amid Rights Revolutions, Legislative Discretion, and Distributive Integration

There is an inherent fascination with how socioeconomic rights issues reflect the political and social challenges that constitutional states face worldwide, because of their tight connection with the distribution of resources and active inclusion within any given polity. This is one of the reasons why the international debate has mostly focused on post-colonial countries rising from systemic injustice and deprivation in the past, contexts where social rights have frequently been associated with transformative potential.[43]

With all due respect being paid to the contextual variability of social rights issues and judicial review, surely supportive of the progress that certain progressive or activist courts have managed to attain under dire circumstances, the convergence in Italy, Germany, and Portugal on a set of hermeneutical standards well reflects, at least from a European perspective, the fundamental features of a workable interpretative method for social rights adjudication. Three shared macroscopic features emerge from the comparison, which jointly composes a cautious and incrementalist approach to reviewing socioeconomic rights claims.[44]

I. Non-Reviewability of Discretional Legislative Determinations Leading to Presumptive Judicial Deference

The first standard coincides with the strong judicial shielding of discretional choices in the design of social legislation. Courts tend to interpret the social state as a binding goal, usually paraphrased as the commitment to making sure that the protection of fundamental rights builds into a durable social equilibrium without, *per se*, entailing bonds on the specific paths that shall be followed to that end. For instance, the Federal Constitutional Court of Germany interprets the *Sozialstaatprinzip* as requiring the state to prompt a just social order, leaving open any option

[41]Canotilho & Moreira, *supra* note 40, at p. 211.

[42]Gomes Canotilho famously described the radical transformation of social rights from material claims to mere programmatic principles as the "state's introversion of sociality." José J. Gomes Canotilho, *Metodología Fuzzy y Camaleones Normativos en la Problemática Actual de los Derechos Económicos, Sociales y Culturales*, 6 Revista de Filosofia del Derecho y Derechos Humanos 35 (1998).

[43]*See*, among others, Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89(7) Tex. L. Rev. 1587 (2011); Oscar Vilhena, Upendra Baxi & Frans Vilkoen (eds.), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa (2013).

[44]In the sense that their "decision-making should ordinarily proceed[ed] in small steps, informed by past steps, and small steps might affect large numbers of people, but in ways that preserve latitude for adaptation." King, *supra* note 6, at 293.

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to achieve this goal,[45] as "only the legislator can accomplish what is essential for the realization" of it.[46] This setting has been followed in almost identical terms by the Portuguese Constitutional Court, which reads the *democracia económica, social, e cultural* in the context of the objectives envisioned under Articles 9, 80, and 81 as entailing a wide margin of legislative discretion (*liberdade de conformação legislativa*) in policy design.[47] For instance, in Decision 330/89, the Court accepted the admissibility of minor charges for certain public health services, arguing that the mandate to establish "a universal and general national health service which [. . .] shall tend to be free of charge" (Article 64) did not prevent the Parliament from balancing the envisaged gratuity with the need to rationalize the use of limited financial resources, insofar as those charges did not pose substantive impediments to the access to services themselves.[48] Similarly, the Constitutional Court of Italy has defended the non-reviewability of political determinations (*insindacabilità della discrezionalità del legislatore*), usually by reference to Article 28 of the law on the establishment of the Court (Law No. 87 of 1953, stating that "any political evaluation and any review of the use of discretion by the Parliament shall be excluded from the constitutionality control of the Court"), alternating inadmissibility pronouncements with decisions where the claim is accepted and then dismissed alongside an explanatory view on the limits of legislative discretion. The legislature's margin of discretion would extend to "the specific ways and criteria, also quantitative, that shall regulate the matter," but must comply with the socioeconomic directives expressed in the Constitution; for instance, the proportionality between the quantity/quality of the work undertaken and the treatment in the case of pension treatments under Article 36.[49] In a similar vein, the Court interpreted the gratuity of compulsory education in Article 33 as binding the legislator only to the establishment of a schooling system, without on its own extending to textbooks and other ancillary services (for example, public transport), which remain subject to legislative discretional choices.[50]

Clearly, constitutional design does have an impact on the width of legislative latitude. To this end, the objectives and instruments outlined by the more assertive constitutions of Italy and Portugal provide useful guidance on parliaments' undertaking, while the German Basic Law does not. Apart from specific requirements, within wider or narrower margins of discretion, the exercise of legislative discretion vis-à-vis socioeconomic equality is not, in principle, reviewable by courts, and judges tend to presumptively defer to political determinations.

II. Minimal Guarantees against Political Determinations: Legislative Omissions, Minimal Welfare Guarantees, and Arbitrariness

Beyond the aprioristic safeguard of legislative discretion, courts enforce minimal counter-limits against political determinations. First, under normatively detailed texts, the constitutional courts of Italy and Portugal have consistently censored gross legislative omissions vis-à-vis provisions casting clear-cut and immediately justiciable obligations on the state, especially in the areas of healthcare and education. In 1984, the Portuguese Constitutional Court struck down a law decree

[45]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 18 Jul. 1967 (*Jugendhilfe*), 22 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 180 (204) (Ger.).

[46]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 19 Dec. 1951 (*Hinterbliebenenrente I*), 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 97 (105) (Ger.) The Court usually recalls that "in the social and socio-political area, the legislature has a wide margin for discretional design." Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 14 1970 (*Jahresarbeitsverdienstgrenze*), 29 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 221 (235) (Ger.)

[47]Jorge R. Novais, Os Princípios Constitucionais Estruturantes da República Portuguesa 314–15 (2004).

[48]Decision of the Portuguese Constitutional Court, No. 330 of 1989, para. 7 (*fundamentos*). The Court did, in fact, recognize a wide margin of discretion for the legislature in the implementation of social rights, encompassing both "*ás concretas soluções normativas a adoptar* [. . .] *quanto ao próprio quando e ritmo da legislação*."

[49]Decision of the Constitutional Court of Italy, No. 57 of 1973.

[50]Decision of the Constitutional Court of Italy, No. 7 of 1967.

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dismantling a major part of the national health system established only three years earlier, reading Article 64 as a "proper constitutional imposition" that left no choice to the legislatures but to establish "a national health service that shall be universal and general." For the judges, the partial revocation of the public health service resulted in an unconstitutionality by omission.[51] In the following years and decades, the Court then resorted to this interpretative technique on many other occasions, including the landmark Decision 474/02, where the limitation of unemployment benefits to privately employed individuals, to the exclusion of public employees, was found to contradict the clear wording of Article 63 on the right to social assistance for individuals in situations of involuntary unemployment.[52] In a similar vein, the Constitutional Court of Italy had long censored legislative omissions (as per the so-called *teoria delle rime obbligate*) even when compliance required additional expenditures.[53] In Decision 467 of 2002, for instance, the judges found an unjustifiable legislative omission in the lack of extension of schooling benefits to disabled kids under the age of three while, in Decision 152 of 2020, the limitation of the prospective increase in disability pensions for people older than sixty was voided because openly defying the requirement that "[e]very citizen unable to work and without the necessary means of subsistence is entitled to welfare support" under Article 38. Regarding maternity protection under Article 6(4), the Federal Constitutional Court of Germany has stressed the required existence of legal guarantees, holding that, in any case, "pregnant women and mothers cannot remain without effective labor law protection against dismissal after childbirth."[54] Allegedly, the assessment of public interests may impact the specifics of the treatment assured to maternity but can never curtail the very existence of protective laws.[55]

Second, courts enforce to a varying degree an essential content of social rights (translating into the guarantee of minimal welfare services or benefits) as a relative quantitative threshold intimately linked with commitments to human dignity and equality, very different from the so-called minimum core approach which defends instead judicial intervention in the determination of absolute standards.[56] Courts follow two alternative interpretative tracks, which can be paraphrased as dignitarian existentialism and fundamental rights essentialism. The first approach expands on the close ties between material needs, personal autonomy, and human dignity – which, in Portugal and Germany, ranks as the supreme constitutional value – and the social state principle to defend the constitutional guarantee of a subsistence minimum through welfare services. The idea of an existential minimum would, therefore, allow courts to review the quantitative adequacy of welfare services and benefits from the standpoint of their capacity (as in monetary capacity) to ensure a minimally dignified life, in the sense that the legislature would retain the monopoly over the quantification of benefits while courts would eventually censor their insufficiency when factually decoupled from living costs. Notoriously, the approach has been

[51]Decision of the Portuguese Constitutional Court, No. 39 of 1984 para. 2.3.1.

[52]Decision of the Portuguese Constitutional Court, No. 474 of 2002.

[53]*Ex plurimis*, Decisions Nos. 96 of 1991; 243 of 1992; 436 of 1992; 110 of 1999.

[54]The reference is to Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 24, 1991 (*Warteschleife*), 84 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 133 (Ger.). In its case law on the unification of public service after the fall of the Berlin Wall, the Court extended this sympathy to other categories of vulnerable workers, including disabled and elderly persons. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 10 Mar. 1992 (*Akademie-Auflösung*), 85 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 360 (Ger.) as discussed in Donald Kommers & Russell Miller, The Constitutional Jurisprudence of the Federal Republic of Germany 703–04 (3rd ed., 2012).

[55]The same approach is applied to legislative omissions of the duty to protect health and life under Article 2(2) of the Basic Law. Accordingly, the Court "can only find a violation of such a duty of protection if safeguards have either not been put in place at all, or if the provisions enacted and measures taken are evidently unsuitable, entirely inadequate, or fall significantly short of achieving the required aim of protection." Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jul. 26, 2016 (*Zwangsbehandlung*), 142 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 313 (Ger.), at para. 70.

[56]Especially in the more robust version proposed in David bilchitz, Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights (2007).

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championed by the German Constitutional Court,[57] which has guaranteed the *Existenzminimum* in various legal areas, clearing, for instance, taxation on personal income that is necessary for a person's[58] and their family's subsistence,[59] identifying deductible expenses,[60] and providing quantitative criteria for social assistance and unemployment benefits.[61]

The Constitutional Court of Portugal has also prioritized the dignitarian existentialism track, though under a very different constitutional text.[62] Picking up steam from the constitutional revisions, from 1991 the Court has transplanted the right to an existential minimum (*direito a um mínimo de sobrevivência condigna*) from Germany,[63] estimating, for instance, the assurance of a minimally dignified existence over the creditor's right to retrieve its money when an income or pension is lower than the nationally guaranteed minimum salary.[64] The extended reliance on the supreme principles of human dignity and the social state has thus contributed to the overall rethinking of the constitutional system away from its socialist premises, watering down the prescriptiveness of the social rights provisions[65] and centering the Court's review of social and economic legislation on a vaguer yet historically less contentious endorsement of minimal subsistence guarantees. In Decision 509/02, the Court rebutted the argument that the exclusion of individuals in the 18–24 age bracket from unemployment benefits (*rendimento social de inserção*) violated the essential content of the right to social security (under Article 63) and struck it down because of its adverse and discriminatory effects on the possibility to live with dignity. Later cases (such as Decisions 88/04 and 67/07) and the crisis jurisprudence would confirm the Court's ossified unwillingness to rely on the essential content of fundamental social rights and its predilection for dignitarian existentialism.[66]

[57]Though the very first example was set by the Federal Administrative Court which, in a case involving the indexing of social assistance benefits to the cost of living, expressly linked the idea of a *sozial Rechsstaat* to the protection of human dignity and the fundamental rights to life and health under Article 2 of the Basic Law. Bundesvewaltungsgericht [BVerwG] [Federal Administrative Court] Jun. 24, 1954, 1 ENTSCHEIDUNGEN DES BUNDESVEWALTUNGSGERICHT [BVERWGE] 159 (Ger.). The Federal Constitutional Court would then develop its *Existenzminimum* jurisprudence starting from the Survivor's Pension case in 1951. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jun. 21, 1977 (*Lebenslange Freiheitsstrafe*), 45 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 187 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jun. 18, 1991 (*Waisenrente II*), 40 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 121 (Ger.).

[58]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1990 (*Steuerfreies Existenzminimum*), 82 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 60 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 25 Sep. 1992 (*Grundfreibetrag*), 87 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 153 (Ger.).

[59]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 10, 1998 (*Kinderexistenzminimum I*), 99 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 246 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 16, 2005 (*Kinderbetreuungskosten*), 112 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 268 (Ger.).

[60]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 13, 2008 (*Steuerfreis*), 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 125 (Ger.). In this important case, the Court voided the exclusion of private health and nursing care insurance contributions from deductible expenses relevant for the calculation of a family's social assistance benefits.

[61]BVerfGE 125, 175.

[62]JOSÉ C. VIEIRA DE ANDRADE, OS DIREITOS FUNDAMENTAIS NA CONSTITUTIÇÃO PORTUGUESA DE 1976 97–103 (3rd ed., 2006).

[63]Decision of the Portuguese Constitutional Court, No. 232 of 1991, para. 9 (*fundamentos*). José C. Vieira de Andrade, *O "direito ao mínimo de existencia condigna" como direito fundamental a prestações estaduais positivas – Uma decisão singular do Tribunal Constitucional*, 1 JURISPRUDÊNCIA CONSTITUCIONAL 3 (2004).

[64]Decisions of the Portuguese Constitutional Court, Nos. 62 of 2002 and 177 of 2002, para. 9. Admittedly, the seizure of pensions below the national minimum salary would constitute a violation "*do princípio da dignidade da pessoa humana, contido no principio do Estado de direito.*"

[65]José J. Gomes Canotilho, *Bypass Social e o Núcleo Essencial de Prestações Sociais*, *in* ESTUDOS SOBRE DIREITOS FUNDAMENTAIL 265 (José J. Gomes Canotilho ed., 2nd ed., 2008).

[66]Mónica Nogueira de Brito, *La Jurisprudencia de la "crisis" del Tribunal Constitucional Portugués,* 38 TEORÍA Y REALIDAD CONSTITUCIONAL 575, 588–93 (2016). Nevertheless, signals in the opposite direction timidly emerge from (the controversial) Decision 187/2013. In the ruling, the Court emphasized the relation between the right to an existential minimum and the essential content of social rights (once again, the right to social security under Article 63) recalling doctrinal opinions on the direct justiciability of the latter. The Court, however, relied once again on human dignity and proportionality analysis to strike down the suspension of holiday and Christmas payments to public employees. *See* Pedro Fernández Sánchez, *Breve Nota*

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The caselaw of the Constitutional Court of Italy signals an opposite interpretative taste for fundamental rights essentialism, especially in the aftermath of the 2001 revision of Article 117 on state-regions relations, whose letter *m)* attributes to the exclusive competence of the state the quantitative determination of essential welfare services (*determinazione dei livelli essenziali delle prestazioni*). Long before its clarificatory stances in Decision 282 of 2002,[67] the Court relied upon the essential content of constitutional social rights to ensure, inter alia, minimal health,[68] education,[69] social assistance,[70] pensions,[71] and housing[72] services. Human dignity considerations are still central in the case law and some oscillation between the poles of fundamental rights essentialism and dignitarian existentialism exists. However, unlike its Portuguese and German counterparts, the Italian Court has not subscribed to a hierarchical ordering of constitutional values where human dignity would take priority, sticking instead to the understanding that all fundamental rights are subject to proportionality analysis and balancing.[73] Here lies the specificity of fundamental rights essentialism, as a more positivist and relativist view of constitutional rights and values, paired with a strong assertion of the essential content of social rights as a negative "counter limit to legislative discretion [. . .] created by the Court as a more incisive standard than sheer reasonableness review."[74]

Third, courts will also strike down social and economic legislation when this transcends the legitimate boundaries of reasonableness into sheer arbitrariness. Though the judicial reliance on this essentially contested concept varies to a relevant degree, arbitrariness is usually found in the presence of severe departures from the text of the constitution, irrational disconnections between the legislative goals and the means designated to that end,[75] or when regressive measures are insufficiently motivated or discriminatorily applied. Social regression remains theoretically feasible within reasonable designs and against various negative standards, such as the reproduction of legislative omissions (*proibção de recriação de omissoes incostitucionais*)[76] or full-on anti-social policies.[77] Moreover, excessively expansive social measures may also slide into arbitrariness when they harm concurrent constitutional principles or values, such as the need for balanced public finances.[78]

sobre uma Inovação na Jurisprudência Constitucional Portuguesa, 56(1) Revista da Faculdade de Direito da Universidade de Lisboa 93, 104–10 (2015).

[67]Where the Court commented that Article 117 *m)* empowers the national Parliament to "adopt the necessary measures to ensure to everybody, in the entire national territory, the enjoyment of guaranteed services as the essential content of [socioeconomic] rights."

[68]Decisions of the Constitutional Court of Italy, Nos. 184 of 1993 (on the exemption of service payments for pensions below certain thresholds), 307 of 1990 (compensation for health damages ensuing from compulsory vaccinations), 27 of 1998 (compensation for health damages ensuing from non-compulsory yet publicly incentivized vaccinations), 260 of 2010 (on health services for irregular migrants) and 157 of 2020 (on budget allocations to regional health systems).

[69]Decisions of the Constitutional Court of Italy Nos. 215 of 2016 (on access for disabled kids to secondary school); 175 of 2016 (on public transportation for disabled students).

[70]Decision of the Constitutional Court of Italy No. 42 of 2002, on the proposed abrogative referendum on social assistance structures.

[71]Decision of the Constitutional Court of Italy No. 173 of 2016 on minimum pension levels.

[72]Decision of the Constitutional Court of Italy No. 217 of 1988.

[73]Decision of the Constitutional Court of Italy, No. 85 of 2013.

[74]Alessandro Mangia, *I diritti sociali tra esigibilità e provvista finanziaria*, *in* I Diritti Sociali dal Riconoscimento alla Garanzia Il Ruolo della Giurisprudenza 581, 595 (Elisa Cavasino, Giovanni Scala & Giuseppe Verde eds., 2013).

[75]King, *supra* note 6, at 186.

[76]Decision of the Portuguese Constitutional Court, No. 39 of 1984. The standard is well explained in Decision 590/04, where the Court held that socially regressive measures "will only pose a problem of constitutionality if there are no other measures whatsoever in this area, giving rise to a situation of sheer non-compliance with constitutional determinations, corresponding to an unconstitutionality by omission."

[77]Roman Herzog, *Die Verfassungsentscheidung für die Sozialstaatlichkeit*, *in* Grundgesetz: Kommentar 201 (Theodor Maunz & Günter Dürig eds., VI, 1993); Canotilho & Moreira, *supra* note 40, at 211.

[78]On the interpretative changes brought along by the 2012 constitutional amendment introducing the requirement of a balanced budget, *see* Andrea Morrone, *Pareggio di Bilancio e Stato Costituzionale*, 3 Lavoro e Diritto 357 (2013).

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III. Balancing as Judicial Oversight of Politically Integrative Distributions of Social Benefits and Burdens

The last domain of interpretative convergence coincides with the fundamental orientation towards distributive integration that the reliance on fundamental principles performs in the judicial balancing socioeconomic rights and goals vis-à-vis civil and political rights, when the proportionality of welfare legislation is reviewed. The idea of the integrative function of fundamental texts is a recurring theme in comparative constitutionalism and, in general terms, points to the capacity of constitutions to further a communal spirit and strengthen inclusiveness and participation within a given polity.[79] From this angle, social rights adjudication is a particularly useful indicator of the tendencies towards more substantive or formalist styles of legal reasoning, that in turn corresponds to the fundamental distinction between a context-sensitive judicial role and old positivist myths of absolute coherence and legal certainty. Balancing within proportionality analysis usually offers an opportunity for judges to contribute to the legislative alignment with constitutional goals and principles,[80] though consistency is a notorious challenge for legal interpretation here.[81]

In this context, the heavy interpretative reliance on thick and versatile interpretative principles such as solidarity, proportional equality, and the *Sozialstaatprinzip* (in connection with the protection duties inferred from basic rights provisions) corresponds to an assertive approach to the judicial review of legislative distributions of burdens and benefits, in the sense of a cautious orientation towards more equality and political integration. In the crisis jurisprudence, for instance, the reliance on proportional equality enabled the Constitutional Court of Portugal to ensure that the costs and sacrifices required by the debt crisis were fairly distributed across the population. In the decisions affecting the state budgets for 2012 and 2013, the judges struck down austerity measures that disproportionately burdened public employees without asking for corresponding sacrifices from other categories of workers, estimating distributive fairness (and the prohibition of discrimination) over the anticipated cost savings. In Decision 187/13, the Court clarified that "the combined and continuous effects of the sacrifices imposed upon public sector workers, which has no equivalent for the general population with income obtained from other sources, corresponds to a difference of treatment that no longer finds justification in the objective of reducing the public deficit."[82] In sum, the Court engaged in a typical exercise of counter-majoritarianism by contrasting asymmetrically regressive measures and by facilitating a fairer

[79]Dieter Grimm, *Integration by Constitution*, 3(3) Int. J. Const. Law 193 (2005). On the complex question of how to balance and harmonize coexisting needs for pluralism and some degree of political unity, *see* Frank I. Michelman, *Social Minimums and Democracy*, *in* The Oxford Handbook of Economic and Social Rights (Malcolm Langford & Katharine Young eds., 2022).

[80]For an overview of the normative debate on balancing, *see* Niels Petersen, Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa 39–59 (2017).

[81]An example may give practical meaning this point. In Decision 10 of 2015, the Constitutional Court of Italy struck down the so-called Robin Hood Tax (imposing an extra 5.5% tax burden on oil companies) because the legislature's anchoring of the increased taxation on the conjunctural difficulties of the debt crisis was contradicted by the structural nature of the measure. However, the Court postponed the effects of the ruling as the decision was expected to cost around $6 billion (US) per annum in already collected taxes. In Decision 70/2015, the Court quashed the biannual suspension of the automatic indexing of pensions to living costs as an arbitrary restriction of the proportionality between the quality and quantity of work and the pension treatment (Article 36) without even considering the opportunity for postponement, triggering an estimated cost burden of roughly $20 billion (US) per annum on state finances.

[82]As translated in Mariana Canotilho, Teresa Violante & Rui Lanceiro, *Austerity Measures under Judicial Scrutiny; the Portuguese Constitutional caselaw*, 11 Eu. Const. Law Rev. 155, 165 (2015). In Decision 413/14, the Court once again struck down pay cuts in violation of proportional equality, arguing that some of the salaries affected by the measure were "so low in the first place that any reduction has a strong negative impact and produces a sacrifice much greater than its objective quantification."

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distribution of socioeconomic burdens and benefits (*princípio da justa repartição dos encargos públicos*).[83]

The pandemic case law is also particularly instructive on this point. In Decision 128 of 2021, the Constitutional Court of Italy upheld the government's renewal of the eviction moratorium (*blocco degli sfratti*), holding that constitutional solidarity justified reinforced protection during the sanitary emergency of the fundamental right to housing "to the benefit of more vulnerable individuals," given the harsh consequences of evictions compared to the relatively harmless postponement of the homeowners' right to retrieve their credits.[84] Besides this theoretical justification, the Court struck down the renewal as unreasonable because it prorogated criteria originally meant for the first phase of the pandemic and was no longer justified by epidemiological evidence. The reference to constitutional solidarity was also at the core of the Court's positive assessment of vaccination mandates for health workers in Decision 14 of 2023. The Court agreed that during a sanitary emergency, the precautionary principle can justify "the recourse to therapies [. . .] that ensure more benefits than risks, given that the risk of adverse events for a single person [. . .] is by far lower than the damage brought to society as a whole, if that medication is not to be utilized," as the right to sanitary self-determination entails "the person's duty not to endanger or harm with their behavior someone's else health [. . .] as a matter of the horizontal solidarity that binds together every member of the community." The Federal Constitutional Court of Germany reached a similar conclusion one year earlier, expanding on the state's duties to protect health, life, and professional freedom under Articles 2(2) and 12 of the Basic Law (because "affected persons are *de facto* confronted with a choice between giving up their occupation or consenting to impairments of their physical integrity"). The Court concluded that the right to self-determination, conceptualized as the requisite lack of adverse consequences stemming from one's decision, had to stand back in the face of the state's obligation to "take precautionary measures against health impairments" including "the protection of vulnerable groups from any risk to health and life following from infection" as a matter of the value determination inherent in Article 2.[85]

A similar rationale also underpinned the *Climate Decision* in 2021, where the Federal Constitutional Court reviewed Germany's carbon dioxide emission reduction goals (towards 2030) against a range of duties to protect vis-à-vis the risks posed by climate change (including health, life, and personal freedom under Article 2, property and the protection of future generations under Article 20a.)[86] The Court estimated that the unambitious goals established by the disputed federal legislation (*Bundes-Klimaschutzgesetzes*) in the implementation of the Paris Agreement cast a disproportionate burden on the freedom of future generations because these are likely to suffer more severely from the adverse consequences of an insufficient ecological transition, and will be forced to sustain heavy costs to reconstruct environmental equilibria. Expanding on the intertemporal dimension of fundamental rights protection, the Court drew from the protection of health, life, freedom, and future generations the state's duty to protect

[83]For an overview, *see* Teresa Violante & Patrícia André, *The Constitutional Performance of Austerity in Portugal*, *in* Constitutions in Times of Financial Crisis 229 (Tom Ginsburg, Mark D. Rosen & Georg Vanberg eds., 2019); Miguel P. Maduro, Antonio Frada & Leonardo Pierdominici, *A Crisis between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*, 4(1) E-Pública: Revista Electrónica de Direito Publico 6 (2017).

[84]Decision of the Constitutional Court of Italy, No. 128 of 2021, para. 9 (*considerato in diritto*). Besides the abstract justification of the measure, the Court struck down the renewal as unreasonable, because it prorogated criteria that were originally meant to address the first phase of the pandemic and was no longer justified by the evolution of the epidemiological evidence.

[85]This is consonant with the Court's long-established understanding that "[p]rotecting life and health and maintaining the proper functioning of the healthcare system are both exceptionally significant interests of the common good in their own right, and are thus constitutionally legitimate legislative purposes." Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 27, 2022, Neue Juristische Wochenschrift [NJW] 1999, para. 155.

[86]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021 (*Klimaschutz*), 157 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 30 (Ger.).

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against the greenhouse gas emissions-related reduction burdens, viewed as future limitations on fundamental rights. This hermeneutical solution allowed the Court to affirm the need to mitigate and fairly distribute ecological efforts and freedom opportunities across generations. A similar distributive attentiveness was key to the 2019 Decision on the *Mietpreisbremse*, a federal rent control scheme, where express reliance on human dignity and the social state structured the Court's pondering of the need to promote housing affordability and counter gentrification against the freedom to economically exploit property by homeowners. The Court concluded that the risk of socially stratified cities, where dwellers would be geographically distributed according to their market power, was weighty enough to justify rent caps in particularly strained housing markets.[87]

E. Conclusion

The justiciability of social rights has engendered an intense debate over the past two decades – reinforced by increased centrality in contemporary constitution-making experiences, especially in the developing world and in post-colonial countries – as the chosen tools to address complex and rooted social divides. South Africa has set a prominent example and provided a historical opportunity for global discussions on the desirable features of constitutional design and interpretation vis-à-vis socioeconomic inequality. The outcomes of this debate are crucial for the future of the welfare state and adjacent discussions on environmental constitutionalism, environmental rights, and sustainable development.

Generally speaking, it is now well established that courts worldwide enforce socioeconomic rights, albeit in different terms. These variations are occasioned by a range of legal, historical, social, and institutional factors; for instance, the level of consolidation of the welfare state contributes to the context of constitutional adjudication. The cross-examination of the experiences of the constitutional courts of Italy, Germany, and Portugal with these rights has highlighted a common convergence on a set of interpretative standards under very different fundamental texts. In these countries, the judicial review of social rights tends to coincide with a threefold composition of presumptive judicial deference, minimal guarantees against unreasonable and arbitrary political determinations (including constitutional omissions, the *Existenzminimum,* and fundamental rights essentialism), and a mild inclination in balancing towards interpretative outcomes that are favorable to more and better integration within the polity, corresponding to a ban on disproportionate distributions of social benefits and burdens, especially during crises. By relying on these hermeneutical canons, courts have consolidated a democratically uncontentious adjudication of social rights that minimally strains its relation with the political process and is coherent with the very premises of constitutionalized socioeconomic rights as banners for more and better equality and integration.

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[87]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jul. 18, 2019, Neue Juristische Wochenschrift [NJW] 3054.

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