

Collisions of social rights: the role of proportionality & other standards
Colisões de direitos sociais: o papel da proporcionalidade e de outros parâmetros

Vitalino Canasⁱ

ⁱFACULDADE DE DIREITO, UNIVERSIDADE DE LISBOA, PORTUGAL

Abstract:

Global scholarship and court decisions have been gradually assuming that social rights structure does not differ radically from political and civil rights structure. This assumption leads us into the conclusion that social rights – meaning all different claims in which they unfold – might enter in several kinds of collision with other principles, rights, interests or values. After identifying all those possible kinds of collisions one can define what are the tools or standards suitable for the due substantive process to be performed for overcoming each of them. We argue that the most suitable tools are classical proportionality (“proibição do excesso”), prohibition of the insufficient promotion of the social right (“proibição do defeito”) and the guarantee of the minimum core of the social right. Constitutional courts show considerable uniformity as far as the reactions against limitations to the negative dimensions of the social rights are concerned and also when it comes to the review of any eventual breach of the duties of promotion of the positive dimensions of the social rights.

Keywords:

proportionality; prohibition of deficit or of insufficiency; social rights; collision of duties of the lawmaker; minimum core of the rights.

Resumo:

A doutrina e parte da jurisprudência universais têm assumido paulatinamente que a estrutura dos direitos sociais não difere significativamente da estrutura dos direitos de defesa. Isto leva a inferir que os direitos sociais – ou, mais propriamente, as diferentes situações jurídicas subjetivas em que se desdobram – entrem em vários tipos de colisão com outros bens, interesses ou valores. Identificados esses tipos de colisão, pode então definir-se quais os instrumentos adequados para cumprir as exigências de um processo substantivo devido na composição de cada um deles. Sustenta-se que os instrumentos mais adequados são, variando em função de cada colisão, a proibição do excesso, a proibição do defeito e a garantia do conteúdo mínimo do direito. As jurisdições constitucionais mostram considerável uniformidade na reação às interferências em dimensões negativas, ou ao retrocesso na efetivação, de direitos sociais, bem como na situação de eventual incumprimento da dimensão positiva desses direitos.

Palavras-chave:

proporcionalidade; proibição do defeito ou da insuficiência; direitos sociais; colisão de deveres do legislador; conteúdo mínimo do direito.

Submission: 24/07/2021

Acceptance: 20/08/2021

Introduction

Portugal, Brazil and other countries in Latin America, South Africa, Germany and Canada are familiar with debates on which harmonization instruments the lawmaker should use to comply with *substantive due process* when resolving normative collisions involving social rights. This discussion intersects with, or depends on, the evolution of legal theories on the nature of social rights - for some these are less important and binding than rights

of defense –, their immediacy and the possibility of their being awarded judicially¹. This debate has gained momentum in the sphere of international human rights law, having intensified after the global economic and financial crisis of 2008, and is likely to take on new forms after the pandemic crisis (in the former, too many social rights; in the latter, perhaps, too few social rights).

In theory, one of two possible extreme options could be adopted: (i) the application of the same harmonization or harmonization control instrument for *all types of collisions* involving social rights; or (ii) the application of a specific harmonization or harmonization control instrument, which may vary from jurisdiction to jurisdiction, for *each collision or category of collisions*. In both cases, the aim is to guarantee that the decision maker observes substantive due process in resolving the normative collision. In the first case, it is argued, for example, that the principle of proportionality – possibly corrected in a case-by-case basis by structural adjustments – should be applied to all types of collision, in all legal orders and always considering the colliding goods, interests and values as *prima facie* only. In the second case, different harmonization instruments are used depending on the type of collision and the duties of the lawmaker, and the most frequently mentioned candidates here are prohibition of excess (classical proportionality), prohibition of deficit or insufficiency², reasonableness, minimum guaranteed core, prohibition of retrogression and minimum of existence, with more than one of these sometimes being simultaneously deployed. As we shall see, there is also the possibility of rejecting a *singular approach* without resorting to the *atomization* of harmonization mediation instruments.

We will analyze paradigmatic case law from sample countries – Brazil, Germany, Canada, South Africa, and Portugal – where this question is reflected in constitutional case law and in legal theory. In chapters 1 to 5, the focus of the study will be the predominant position in the case law and legal theory: a distinction is made between situations of interference with negative social rights and situations of omission of positive

¹ In Portugal see J. REIS NOVAIS. *Direitos Sociais. Teoria Jurídica dos Direitos Sociais enquanto Direitos Fundamentais* [Social Rights. Legal Theory of the Social Rights as Fundamental Rights]. Coimbra: Coimbra Editora, 2010.

² We argue that there is a concept of *modern proportionality* which is the umbrella of *classical proportionality* or *prohibition of excess* at one side and *prohibition of deficit or insufficiency* at other side. We will use these different expressions throughout the text, warning, however, that some artificialism will not be absent, as this terminology is not assumed by some of the systems, scholarships or jurisdictions. In the English language, the terms prohibition of excess and deficit, *Übermaßverbot*/*Untermaßverbot*, are generally not used.

behavior to protect and to fulfill those rights. In chapter 6 we attempt to convert this perspective, in which we simply analyze fulfillment or non-fulfillment of the State's *duties* to respect, protect and fulfill social rights³, into a finer analytical framework, in which normative collisions of deontic positions of obligation, prohibition and permission intersect with normative collisions of social rights with other goods, interests or values.

1. Brazil

1.1. The normative and legal theory context

The case of Brazil is perhaps that which, in global terms, offers the richest collection of data and reflection on social rights and their nature, implementation and limits.

Emphasis continues to be placed there on a robust doctrine in favor of applying the principle of prohibition of retrogression⁴ in different forms, including the absolute form, possibly with a tendency towards its softening. And standards such as prohibition of insufficiency^{5/6} or the guarantee of minimum existence are common currency as instruments for maximizing the effectiveness of social rights rules and their full justiciability.

³ Within the sphere of international human rights law, it is common to use a tripartite systematization of the obligations of the States, *obligation to respect, to protect and to fulfill*, on the path of the *Ashjorn Eide Report, The Right To Adequate Food As A Human Right* (1987). Despite some discussion about this systematization, and even about its applicability only to social rights or also to civil rights, it has been widespread: OLIVIER DE SCHUTTER. *International Human Rights Law*. 3rd edition. Cambridge: Cambridge University Press, 2019, p. 292; W. KÄLIN & J. KÜNZLI. *The Law of International Human Rights Protection*. 2nd edition. Oxford: Oxford University Press, 2019, p. 90; ILIAS BANTEKAS & LUTZ OETTE. *International Human Rights. Law and Practice*. 2nd edition. Cambridge: Cambridge University Press, 2016, pp. 78 ff.

⁴ Principle of prohibition of *social retrogression* or retrogression in the field of social rights, the only issue we will deal with here. But the discussion of the possibility of a principle of prohibition of retrogression does not arise only with regard to social rights. The French Constitutional Council has introduced into constitutional jurisprudence the so-called *effet cliquet* in the field of fundamental freedoms. (Decision DC 83-165 of 20 January 1984. Available at: <https://www.conseil-constitutionnel.fr/decision/1984/83165DC.htm>). According to that concept, it is not possible to repeal in full a statute on a freedom right without replacing it with other that offers guarantees with equivalent effectiveness.

⁵ The preferred concept in Brazil ranges from prohibition of insufficiency (*proibição da insuficiência*), insufficient protection (*proteção insuficiente*), defective protection (*proteção deficiente*) and others. Although we have adopted elsewhere prohibition of the defect as the basic concept, when dealing with the Brazilian case we will use prohibition of insufficiency, assuming, notwithstanding, the fungibility of the various denominations.

⁶ The prohibition of insufficiency has, however, had a greater focus within criminal issues.

Looking at the legal-constitutional reasons for this phenomenon (leaving aside any argument that Brazil or Latin America may be exceptional in sociological terms), there is one that stands out: the 1988 Constitution (reconfirming a path that has been followed since the 1934 Constitution) not only is one of the most generous in granting social rights, but also (i) lists them expressly and specifically, (ii) with significant density, (iii) does not separate them from other rights, and (iv) gives them full normative force and immediate applicability⁷.

Furthermore, the Brazilian lawmaker and executive power have not been ungenerous or tardy in implementing these constitutional rules. What happens, sometimes, is that the normative force of the Constitution and the law are faced with material constraints and constraints of implementation, due to lack of resources or administrative inefficiencies.

All of this is conducive to increased responsibility and activity on the part of the judiciary, particularly the Federal Supreme Court (henceforth STF). One question that has been much discussed in Brazil is whether the Court has remained within the limits of its powers, with strict respect for the separation of powers, or whether it has exceeded them.

We will now focus on the use that the constitutional judge makes (or does not make) of standards which, if employed without caution, may encroach more on the specific area of the lawmaker: the prohibition of insufficiency and the guarantee of minimum existence or of minimum core, in the case of failure to fulfill a social right; the prohibition of retrogression, the prohibition of excess and the guarantee of minimum existence or of minimum core, in the case of measures that as they call into question the level of implementation of a social right achieved thus far may breach the duty to respect.

1.2. Failure to fulfill positive social rights

1.2.1. The prohibition of insufficiency in duties to protect

The first mention of the prohibition of insufficiency in the case law of the STF dates back to 2006, in Extraordinary Appeal 418.376 (concerning a child who was raped and became

⁷ Article 5, Paragraph 1 of the Brazilian Constitution: “The provisions defining fundamental rights and guarantees are immediately applicable.” We assume that a unitary perspective of the regime applicable to any and all rights, which we reject for Portugal, is also not, perhaps, defensible in Brazil. We cannot go deeper in the theme.

pregnant by the rapist)⁸. However, social rights were not at issue there, but rather the possible insufficiency of criminal protection for categories of persons.

Likewise, Extraordinary Appeal 646.721, Rio Grande do Sul, of 2017 (on the rules of succession applicable to partners living in stable unions) also did not involve a matter relating to social rights. In its conclusion, we read “(...) Article 1.290 of the Civil Code is unconstitutional, since it violates constitutional principles such as equality, dignity of the human person, *proportionality in the form of prohibition of deficient protection* and prohibition of retrogression” (our italics).

This is, however, the normative scope in which the principle of prohibition of insufficiency initially came to life in German legal theory and case law. The proposal to make this principle more generally applicable to *all* areas where the lawmaker has positive duties to protect or fulfill rights, is more recent.

1.2.2. The prohibition of deficit or of insufficiency and the guarantee of minimum existence or of minimum core in social rights

The first ruling on social rights where the prohibition of insufficiency is used as a standard of control dates to 2008. Stay of Preliminary Order 235⁹ maintained the order to establish, within twelve months, a program of detention and semi-liberty for offending adolescents and the prohibition on housing them in a non-specialized unit.

The Court (through Justice Gilmar Mendes) considered that Article 227, heading and §3, in conjunction with Article 4 of the Brazilian Constitution, on the protection of children and young people, set out duties of the State that have *absolute priority* over others; if the normative conditions for fulfillment of these are not created or if they are not specifically fulfilled when created, the prohibition of insufficient protection is violated¹⁰. Now,

⁸ See the vote of Justice Gilmar Ferreira Mendes. See also, of the same, vote in ADI 3510, judged in 2008.

⁹ Available at: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/sl235.pdf> . First large flow of references to the prohibition of insufficiency occurs between 2008 and 2010, period of the presidency of justice Gilmar Mendes, the main artisan of the introduction of this instrument in the jurisprudence of the Federal Supreme Court. The second period runs from 2013 onwards, by the hand of Justice Celso de Mello, also one of the precursors. From the point of view of the themes, they highlight issues related to health benefits, with about 50% of the cases. In the overwhelming majority of cases, social benefit was granted/confirmed by the Court.

¹⁰ The framing reference to the prohibition of insufficient protection inserted in this decision will appear systematically, with minor adaptations, in all decisions signed by Justice Gilmar Mendes in which

absolute priority can only be interpreted as the impossibility of relativizing by balancing with colliding goods, interests or values. It is a fact that some legal theory currents believe that the prohibition of insufficiency is applicable precisely in these circumstances. However, if that were the case, the notion of prohibition of insufficiency would be futile, since it would not be separate from other concepts, in particular the concept of minimum core of a right. Therefore, the best option is to consider that the prohibition of insufficiency, *in the proper sense* and separate from other related or neighboring figures, is an instrument of harmonization and balancing applicable when assessing whether the failure to totally or partially fulfill State duties is constitutionally justified by balancing these with other duties or with public interests¹¹, such as budgetary consolidation. In Stay of Preliminary Order 235 the STF does not appear to have carried out any balancing exercise, merely enforcing the *absolute* nature of the priority of the rights of children and young people.

References to the need for balancing, and even to the prohibition of insufficiency in fulfilling obligations to promote social rights, appear in other judgments of Justice Gilmar Mendes, but this time in the field of the social right to health – where the case law of the STF has given rise to more intense debate. The judgment relating to Stay of Preliminary Order 228¹² was pronounced on a court order made to a municipality to transfer all patients in need of care in Intensive Care Units (ICUs) to public or private hospitals that have such units, as well as the commencement of actions to install and start using new beds.

Although there were references to balancing exercises being inevitable “in [a] context full of complex conflicting relationships between principles and policy guidelines or, in other words, between individual rights and collective goods” and it was stated that there was no “absolute right to all and any necessary procedure for health protection, promotion and recovery”, this decision was not based on a balancing approach, either typical of

the prohibition of insufficiency is relevant, including those dealt with below in the text: the social rights rules impose "on the Legislator a constitutional duty to legislate, which must be properly fulfilled (...). The total or partial non-compliance with this constitutional duty to legislate generates, unfailingly, a state of insufficient protection of the fundamental right. Thus, as I have analyzed in doctrinal studies, fundamental rights do not contain only a prohibition of intervention (Eingriffsverbote), also expressing a postulate of protection (Schutzgebote). There would thus be, to use an expression of Canaris, not only a prohibition of excess (Übermassverbot), but also a prohibition of insufficient protection (Untermassverbot)."

¹¹ VITALINO CANAS. *O Princípio da Proibição do Excesso na Conformação e no Controlo dos Atos Legislativos* [The Principle of the Prohibition of the Excess in the Conformation and Control of the Legislative Acts]. Coimbra: Almedina, 2017, p. 961.

¹² Available at: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/SL228.pdf>

prohibition of insufficiency or of another harmonization and balancing instrument. Rather, it involved a discussion of *minimums*, more related to reasoning based on the minimum core of the right, which is absolute and not susceptible to balancing.

Claim no. 4.374¹³, on the constitutionality of the legal criteria for granting the benefit of continued assistance to the elderly and disabled who prove that they do not have the means to provide for their maintenance (Article 203, V, of the Constitution, on social assistance) was judged in 2013. The STF made several references to insufficiency of the legal criteria, insufficiency of the legislation or legislative or normative insufficiency in fulfilling the Constitution, insufficient protection of the fundamental right and partial unconstitutional omission, besides inserting the recurring section on prohibition of excess (*Übermassverbot*) and prohibition of insufficient protection (*Untermassverbot*)¹⁴.

However, while the Reporting Judge and the Court clearly regarded prohibition of insufficiency as central, the fact is that it is not possible to draw any precise indications from the judgment regarding the function, structure and method of application of that mediation instrument. The admitted adherence to the doctrine developed by the *BVerfG* in the *Hartz IV* case¹⁵ raises a doubt as to whether, ultimately, the STF did not apply the same standard as the *BVerfG* applied in that case, the *minimum of subsistence*, a standard which ultimately does not involve balancing, unlike the prohibition of insufficiency.

The judgment of Extraordinary Appeal 567.985, Mato Grosso (2013), also relates to the criteria for granting a social benefit to the elderly and disabled under Article 203, V, of the Constitution¹⁶. The Court gives special emphasis to the principle of human dignity, known to be the most common ground for the guarantee of a minimum of subsistence. And although, at a certain stage, it includes within its discussion the "criterion for assessing the constitutionality of legislative mediation of fundamental rights, the so-called principle of the prohibition of deficient implementation"¹⁷, it quickly becomes attached to the idea of the minimum of existence¹⁸, where it seems to anchor the dismissal of the appeal against the judicial decision which declared the rule unconstitutional in that specific situation. The vote of Justice Gilmar Mendes (the Judgment reporter) would

¹³ Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=4439489>

¹⁴ See footnote 11 *supra*.

¹⁵ Adjudicated shortly before by the German Constitutional Court: see below.

¹⁶ Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=4614447>

¹⁷ No. 18 of the Judgement.

¹⁸ No. 24 of the Judgement.

subsequently prevail, with similar reasoning to that of Claim 4.374, presented in the two preceding paragraphs.

We may now consider some judgments handed down by Justice Celso de Mello.

Extraordinary Appeal with Interlocutory Appeal 639.337, State of São Paulo (23/08/2011)¹⁹, maintained the imposition of a duty on the Municipality of São Paulo to enroll children up to five years of age in children's education units.

The decisive standard was the guarantee of minimum existence (in the sense of minimum core of the right to education), as a direct result of dignity of the human person. Does such a guarantee of minimum existence depend on any balancing operation (or is it absolute in nature)? The rhetoric is ambiguous²⁰, but the answer appears to be negative. Although it is understood that allocation of public resources gives rise to balancing operations, these can never make fulfillment of the minimum of existence impossible.

In the judgment of Extraordinary Appeal 488.208, Santa Catarina (July 2013)²¹, there is a reference to the prohibition of insufficient protection. The Judgment declares it the duty of the Municipality of Florianópolis to create new protective councils and to make material and human resources available to councils already in existence in order to give effect to the right to education, encompassing the protection of childhood and youth. The judgment contained a sentence which, with a slight adjustment here and there, became commonplace in subsequent judgments:

“limitations to fundamental rights, such as that with which we are now concerned, are subject, in their hermeneutic process, to a necessarily restrictive interpretation, or otherwise they would offend certain parameters of a constitutional nature, such as those based on prohibition of social retrogression, protection of the minimum

¹⁹ Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=627428>

²⁰ See the following excerpt from the Judgment: "The allocation of public resources, (...) causes conflict situations, (...) resulting in contexts of antagonism that impose on the State the burden of overcoming them through options for certain values, to the detriment of equally relevant ones, compelling the Public Power, in the face of this dilemmatic relationship, caused by insufficient financial and budgetary availability, to make real "tragic choices", in a governmental decision whose parameter, based on the dignity of the human person, should have in perspective the intangibility of the existential minimum..." (p. 3/4)

²¹ Available at: http://www.crianca.mppr.mp.br/arquivos/File/juris/stf_obrigacao_do_municipio_implementar_conselhos_tutelaes.pdf

of existence (which derives from the principle of the dignity of the human person), prohibition of insufficient protection and also prohibition of excess.”

It is clear that there is broad acceptance of *limitations* to fundamental rights, including *total or partial failure* to fulfill positive social rights, and also application of the prohibition of insufficient protection (and other principles, in particular the prohibition of excess) to those limitations.

However, the novelty (among judgments of Justice Celso de Mello) of the reference to insufficient protection had no impact whatsoever, since the Judgment is built around the idea of the minimum of existence as an absolute core, which cannot be compromised, including in the light of the “reserve of the possible” clause.

The subject matter of Extraordinary Appeal 738255, AP (2013), did not differ greatly from that of the previous cases, with the protection of the rights of children and young people being the central theme.

A slight (but relevant) change of tone occurred in Extraordinary Appeal with Interlocutory Appeal 581.352, Amazonas (2013), in which obligations were imposed to extend and improve the service for attending pregnant mothers in the state maternity units in the State of Amazonia. Most of the guiding orientations of the previous judgments were kept, in particular the indication of the constitutional parameters that the constitutional jurisdiction should apply when assessing grounds for the omission of the public power (prohibition of social retrogression, protection of the minimum of existence, prohibition of insufficient protection and prohibition of excess). The central nature of the criterion of protection of the “basic core that characterizes the minimum of existence” and rejection of the importance of the reserve of the possible whenever its application may compromise that core, are reiterated. However, in various sections of the judgment we may note adherence to a balancing discourse.

The defining features of Justice Celso de Mello’s view, both in the previous judgments and in this openness to a balancing approach, are copied almost *ipsis verbis* in Extraordinary Appeal with Interlocutory Appeal 745.745, Minas Gerais (December 2014)²², which considered the constitutionality of an order to the Municipality of Belo Horizonte to adopt measures to assist persons with certain disabilities.

²² Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7516923>.

However, this openness to a balancing discourse does not seem to have substantially altered the framework of parameters within which the STF operates, even in the judgments reported by Justice Celso de Mello. That balancing discourse does not appear to be supported by any method of application that replaces, or makes a distinction with, protection of the minimum of existence. And there is nothing to suggest that the Court no longer considered the minimum of existence to be an absolute limit, not susceptible to balancing with other goods, interests or values. The reference to prohibition of insufficiency remains as a lateral *obiter dictum*. Perhaps, for those currents that adopt a non-balancing view of the prohibition of insufficiency, equating it, in particular, to the guarantee of minimum or essential core of the right, the STF applies the prohibition of insufficiency systematically and in a consolidated manner. But for those who have a balancing idea of this standard, what stands out is not its application, but rather the effective recourse to other methodical and dogmatic frameworks: the *absolute or priority duty* arising from the social right, the *minimum of existence* or *minimum core* of the right²³. In social provisions covered by the minimum core of the social right, no balancing instrument, in particular the principle of the prohibition of deficit or insufficiency, has relevance.

1.3. Interference with negative social rights

1.3.1. The principle of prohibition of social retrogression

The prohibition of retrogression or principle of non-regression can have at least five different meanings. From the strictest to the least protective of the implementation achieved, these are: (i) prohibition of any and all retrogression in the fulfillment already given to a social right; (ii) prohibition of retrogression in the fulfillment of social rights that violates the essential core of the right and/or the principle of prohibition of excess; (iii) prohibition of retrogression in the fulfillment of social rights that violates the essential core of the right; (iv) prohibition of retrogression only when this is equivalent to the *complete* suppression or reduction of the fulfillment of the social right already achieved,

²³ Eventually one can argue that in some Safety Suspensions reported by Justice Gilmar Ferreira Mendes, where the enforcement of social rights was at stake (see, namely Safety Suspension 3751), and where the principle of proportionality and its segments were called to appraise the justification for the allocation of medicines, concluding by the suitability, necessity and proportionality of this attribution, it is actually verified the application of the principle of prohibition of insufficiency – albeit under the *nomen* proportionality – with the *balancing dimension* that in our opinion identifies it.

although restrictive changes may be made, imposed by other considerations, in particular the promotion of other goods, interests or values that are constitutionally valid, with observance of the prohibition of excess; (v) prohibition of retrogression only when this is equivalent to the *complete* suppression or reduction of the fulfillment of the social right already achieved, although restrictive changes may be made, imposed by other considerations, in particular the promotion of other goods, interests or values that are constitutionally valid²⁴.

The first reference to the principle of prohibition of retrogression in the case law of the STF dates back to 2000, in Direct Action of Unconstitutionality (or ADI) 2065-0/DF. Provisional Measure No. 1.911-8, which abolished the National Social Security Council and the State and Municipal Social Security Councils, was under scrutiny. The STF did not hear the action because it understood that there had only been an indirect offence of the Constitution. However, the original reporter, Justice Sepúlveda Pertence, admitted unconstitutionality due to violation of the prohibition of retrogression. However, nothing could be extrapolated from this as regards the dominant position of the STF.

In ADI 3 128 (2004), the collection of contributions from inactive persons and pensioners established in Article 4 of Constitutional Amendment (EC) 41/03 was considered constitutional. The dissenting Justices invoked the principle of prohibition of retrogression, but the majority of the STF did not follow this line of reasoning.

Interestingly, the judgments that until recently came closest to giving an indication of what the inclination of the STF might be - or at least an indication of what the Court might be particularly sensitive to - do not pronounce, strictly, on situations of retrogression in the implementation of social rights, but rather on situations in which, with the decisive cooperation of the Court, *progress* in fulfilling a social right is sought, imposing on various levels of the State provisions *not yet given effect*.

These are the judgments reported by Justice Celso de Mello, some of which we have analyzed above: in Extraordinary Appeal with Interlocutory Appeal 639.337 (2011), the aim was to guarantee conditions for enrolling children; Extraordinary Appeal 738255

²⁴ As we shall see below, only the first version of the prohibition of retrogression has autonomy over other standards. For the remaining versions, the use of the notion of prohibition of retrogression is futile.

(2013) sought to ensure the creation and functioning of new bodies for the protection of children and young people; in Extraordinary Appeal with Interlocutory Appeal 581.352 (2013), the intention was to extend and improve the service for attending pregnant mothers in state maternity units; in Extraordinary Appeal with Interlocutory Appeal 745.745 (2014), new measures to assist certain persons were sought; in Extraordinary Appeal 727864 (2014)²⁵, the issue was to ensure that the State would pay for hospital services provided by private institutions to patients in the Single Health System (SUS) if there were no beds in the public network.

In short, the panorama regarding acceptance of the principle of prohibition of retrogression is less clear and definitive than might be expected, taking into account the theoretical and normative context and the abundant references in the rulings of the STF. Although there is an unequivocal mood favoring the autonomy of the principle of prohibition of retrogression, there is no evidence to conclude which version is endorsed by the Court - and whether it always endorses the same version - or to state that it rejects an extreme, absolute or categorical understanding of the prohibition of social retrogression and adheres to a moderate interpretation.

1.3.2. The principle of proportionality or of prohibition of excess

Some authors argue that the STF has employed the principle of classical proportionality or prohibition of excess since before the 1988 Constitution²⁶. However, it is not actually possible to find decisions of the STF that are in line with the practice of other jurisdictions i.e., the application of the prohibition of excess when considering legislative measures which intervene in subjective legal positions already effective deriving from social rights. This is the case even when these decisions deal with subjects and situations of collisions where this would, in theory, seem appropriate, such as a ruling on starting collection of monthly fees by state universities in some postgraduate courses²⁷. There are merely occasional hints.

²⁵ Available at: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ARE727864.pdf>

²⁶ See G. FERREIRA MENDES & P. GUSTAVO GONET BRANCO. *Curso de Direito Constitucional [Constitutional Law Course]*. 12th ed. São Paulo: Saraiva, 2017, p. 227.

²⁷ Extraordinary Appeal 597.854 Goiás (2017), reported by Justice Edson Fachin. The Court reversed previous case-law, including the collection of tuition fees in public universities, in certain courses.

1.4. Conclusion on Brazil

The STF is less keen on using the most advanced and intrusive techniques to guarantee substantive due process to respect, protect and fulfill social rights than we might imagine, given the accusations of activism levelled at it.

The Court does not shy away from focusing on areas other courts avoid pursuing, as is the case with the guarantee of minimum core of the social right, linked to the principle of dignity of the human person as the new *passpartout* of fulfillment of the social rights, either as a stronghold resistant to regression or as an absolute minimum to be attained.

The instrument of prohibition of insufficiency or deficit is known and called upon, but it is only used in an imprecise version, tied to the guarantee of the minimum or essential core of the right. This version, since it does not involve balancing methods, cannot be said to be that which most encroaches on the lawmaker's freedom to create law.

With regard to the prohibition of retrogression, there is no conclusive indicator that allows us to state that the extreme version, the only one that can truly claim to be autonomous in relation to other standards, is the one endorsed by the STF.

There are no clear indications of application of the principle of prohibition of excess or of classic proportionality in circumstances of interference with negative social rights.

2. Germany

2.1. Interest and specific features of the German case

Taking into account the relatively unique constitutional framework in this field, but also the specific socio-economic conditions, the German system of substantive due process in respect of social rights cannot be used to draw conclusions which can be transposed to other jurisdictions. However, recent case law deserves attention, not only because it reveals an original position, but also because it is interesting to see whether instruments such as the essential core, the prohibition of excess or the prohibition of deficit (not to mention for now *Vorbehalt des Möglichen*, *Nichtumkehrbarkeitstheorie* or *Soziales*

*Rückschrittsverbot*²⁸), projected from Germany to the World, have or are in the process of having some relevance in the sphere of social rights.

2.2. Failure to fulfil positive social rights: in particular the right to a minimum of subsistence

We shall focus on the Hartz IV decision (9 February 2010)²⁹, that laid the foundations for the new case law on the minimum of subsistence and the decision on benefits for asylum seekers, which followed on from it (18 July 2012)³⁰, both issued by the German Constitutional Court (*Bundesverfassungsgericht* or *BVerfG*).

In the first case (2010), there is no sign of application of the modern principle of proportionality, in the form of prohibition of deficit. The Court clearly defined two standards of scrutiny: (i) manifest insufficiency; (ii) procedural mechanisms to calculate the minimum of subsistence³¹. The first standard, which concerns the material aspect of the legislative solution, must not be confused with the principle of prohibition of deficit, which, as highlighted above, is not intended to guarantee a minimum level and does not dispense with operations to balance colliding goods, interests or values³² – which were not performed. The second standard consists of mere appreciation of the adequacy of the methods, procedure and information used by the lawmaker, and is not concerned with the content of the measures. In this case, the Court did not detect a situation of *manifest insufficiency* of the social benefits but ruled that the benefits provided for by law were unconstitutional on the ground that the procedural criteria had been infringed: the

²⁸ Subject to the possible, irreversibility theory, prohibition of social retrogression.

²⁹ BVerfG, Judgment of the First Senate of 09 February 2010 - 1 BvL 1/09 -, paras. (1-220). Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209_1bv1000109en.html

³⁰ BVerfG, Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10 -, paras. (1-113). Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bv1001010en.html

³¹ Some authors approximate these standards to the South African reasonableness standard as applied in *Grootboom*: I. T. WINKLER & C. MAHLER, “Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?”, *Human Rights Law Review*, 2013, 13, p. 396; others find an application of the proportionality principle: G. KATROUGALOS & D. AKOUMIANAKI, L’application du principe de proportionnalité dans le champ des droits sociaux [The application of the principle of proportionality in the field of social rights]. *Revue du Droit Public*, 2012, 5, p. 1398.

³² See once more VITALINO CANAS, cit. 12, p. 963.

legislature had deviated from the statistical model it had itself selected and presented, without a factual justification³³.

In the second ruling (2012), the *BVerfG* considered the constitutionality of benefits granted to asylum seekers. Assuming that in Germany foreign nationals are also entitled to a minimum of subsistence, the Court found the amounts allocated to them to be manifestly insufficient to ensure the minimum of subsistence required by the principle of human dignity. The Court remained faithful to the standards produced in 2010, this time rendering a decision of unconstitutionality. Here, too, the typical balancing methods of the principle of prohibition of deficit are not apparent, although, theoretically, the principle could be applied, since there was a collision between the right to a minimum of subsistence and the public interest of discouraging influxes of asylum seekers and the *BVerfG*, as will be seen in the following section, apparently does not adopt an absolute understanding of that right.

2.3. Interference with negative social rights

In the judgement regarding punitive reductions of unemployment social benefits (5th of November 2019)³⁴ the constitutionality of the amount of the social benefit aimed at ensuring the minimum subsistence was not at issue. The actual question was a restrictive interference in the minimum subsistence guarantee.

What one could see there was a collision between the duty of the State to abstain from interference in the negative dimension of the minimum subsistence and the permission to pursue the public interest in promoting the return of the unemployed to the labor market (and also the interest of the relief of the burden on public assistance resources)

The *BVerfG* examined whether the damage of the minimum subsistence resulting from the imposition of penalties - with amounts, obligation and fixed duration of 3 months established by law - was justified by the promotion of colliding interests or values, using the principle of proportionality. After accepting that the goal pursued by the lawmaker was legitimate, the Court held that the 30% reduction of the social benefit was

³³ BVerfG, Judgment of the First Senate of 09 February 2010, § 173; see also § 188, § 190.

³⁴ Available at:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/11/Is20191105_1bvl000716en.html

appropriate. However, sanctions amounting to 60% and 100% could not be accepted as appropriate and necessary, as they imposed drastic difficulties which could be counterproductive. The mandatory nature of the sanctions was found to violate the principle of proportionality in all its segments. The fixed duration of 3 months was deemed unconstitutional for violation of the adequacy and necessity segments of proportionality.

Seen from the standing point of the case law of the German Constitutional Court one can argue that it was therefore a strict application of the classical proportionality principle or prohibition of excess (although those who believe that the minimum subsistence has an absolute character that cannot be defeated by weighting/balancing operations could argue that the minimum core would be the correct standard instead of proportionality).

2.4. Conclusion on Germany

In situations of interference in the negative prong of social rights already delivered by the lawmaker, there is evidence of either the guarantee of a minimum of existence or the application of the principle of classical proportionality or prohibition of excess. Moreover, the principle of trust (*Trauengebot*), the principle of equality and others are also invoked as limits to the social retrogression.

In situations where the definition or effectiveness of the positive prong of a social right is at stake, there are no indications whatsoever that the standard of the prohibition of deficit or of insufficiency (*Untermaßverbot*, originally conceived in Germany with triangular constellations or *Dreieckskonstellationen* in mind) is applied as a standard to assess the fulfillment of social rights.

3. Canada

3.1. Proportionality in collisions involving the positive prong of social rights

In *Eldridge v. British Columbia (Attorney General)*, 1997³⁵, the Supreme Court of Canada (SCC) ruled whether the fact that the norms applicable to the provision of publicly funded medical care do not provide for the provision of sign language when patients are deaf-mute and express themselves through that language is justified in the light of constitutional rules. Among other angles examined by the SCC – the principle of equality being also central – the possible omission or failure to comply with a positive prong of a social right, the right to health, was central, since the State's refusal (in this case, British Columbia Province's refusal) to ensure such a benefit was negatively reflected in the enjoyment of the social right to health. The Court ascertained whether such an option of the State was justified under Article 1 of the Canadian Charter of Rights and Freedoms³⁶. To this end, it convened the proportionality test (or Oakes test³⁷), the analytical framework to determine whether a standard constitutes the reasonable limit to which that article of the Charter alludes³⁸. The Court concluded that the legislation under scrutiny violated the prong of necessity (or minimum impairment): to the extent that the estimated cost of providing textual language was only \$150,000, approximately 0.0025% of the total provincial expenditure on the health budget there would be other alternatives that the state had not considered capable of preserving the sanity of public expenditure³⁹.

3.2. Proportionality in collisions involving the negative prong of social rights

³⁵ Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1552/index.do>

³⁶ “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

³⁷ *R. vs Oakes or Her Majesty The Queen v David Edwin Oakes* (1986).

³⁸ Analytical framework briefly described as follows: “First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s.1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable”.

³⁹ Other example of a Supreme Court decision under the same *ratio*: *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991, Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/761/index.do>

A known case involving a collision between social rights and public policy options is the NAPE case (2004)⁴⁰.

The SCC carried out the well-known two-step analysis⁴¹. In the first, it is verified whether there is effective interference in the right; in the second it is ascertained whether there is justification for such interference.

The Court first noted that Article 15(1) of the Canadian Charter of Human Rights had been infringed. Then went on to apply the proportionality test – or Oaks test – to check whether the measure could be "*demonstrably justified in a free and democratic society*". The Court held that the reduction of the budget deficit was a legitimate end for the interference (pressing and substantial legislative objective). In addition: (i) there was a rational connection between the measure and the intended objectives: "*as the pay equity payout represented a significant portion of the budget, its postponement was rationally connected to averting a serious fiscal crisis in Newfoundland and Labrador*"; (ii) the rights of health workers had not been more restricted than reasonably necessary to achieve the pressing and substantive legislative end of fiscal sustainability (*minimal impairment*)⁴²; (iii) taken as a whole, the budgetary measures adopted did more good than harm, despite the adverse effects suffered by health workers, however serious and regrettable they were (*proportionality of salutary effects of the act to deleterious effects of the act*)⁴³.

3.3. Conclusion on Canada

Since the principle of proportionality has been applied systematically and consistently after 1986, it is not surprising to find situations in which this occurs in the sphere of interferences in negative prongs of social rights, but also in the sphere of positive prongs, although with combinations with the principle of equality. In this second situation, there is a phenomenon common to other jurisdictions: the principle of proportionality is applied

⁴⁰ Newfoundland (Treasury Board) v. N.A.P.E., 2004. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2182/index.do> See also Eldridge v. British Columbia (Attorney General), 1997. Available at: <http://csc.lexum.umontreal.ca/en/1997/1997scr3-624/1997scr3-624.html>

⁴¹ On the two step doctrine, see v.g. M. COHEN-ELIYA & I. PORAT. American Balancing and German Proportionality: The Historical Origins. *Int. J. Const. Law*, 2010, 8, 267; AHARON BARAK. *Proportionality. Constitutional Rights and their Limitations*. Cambridge: Cambridge University Press, 2012, pp. 19, 437.

⁴² Newfoundland (Treasury Board) v. N.A.P.E., n. 97.

⁴³ Newfoundland (Treasury Board) v. N.A.P.E., n. 99.

without the Court apparently feeling forced to make adjustments, not only regarding designation (also in Canada it is to invent an expression equivalent to the prohibition of deficit or insufficiency), but, above all, with regard to the structure and methodical application.

4. South Africa

South Africa is guided by a transformative and rights friendly Constitution guaranteed by a Constitutional Court (the Court or CC). Both Constitution and Constitutional Court are open to harmonization and weighting tools.

4.1. Failure to fulfil positive social rights

4.1.1. Reasonableness

Starting with the positive dimension of the social rights the test of *reasonableness* is of particular interest. Grootboom case (2000)⁴⁴ is usually seen as the founding moment of its introduction in the global doctrine of social rights⁴⁵.

As of the parameter of verification of the constitutionality of the measures adopted by the State to comply with the positive duties resulting from Article 26 of the Constitution, the CC started by removing the standard of the minimum content of the social right, primarily because it considers itself incapable of determining it⁴⁶. Instead, it resorted to the test of reasonableness as the constitutionally appropriate test for the adjudication of the case. The Court's choice is directly supported by the Constitution, since it is itself that incorporates the notion of reasonable, on article 26th, 2 (“*reasonable legislative and other measures*”⁴⁷) and in others⁴⁸.

⁴⁴ Government of the Republic of South Africa v. Grootboom and Others, 2000. Available at: <http://www.saflii.org/za/cases/ZACC/2000/19.pdf> Tried shortly after, see also TAC, Minister of Health and Others v Treatment Action Campaign and Others (5 July 2002), on the reasonableness of interferences in the treatment of pregnant women HIV positive.

⁴⁵ The Constitutional Court migrated from the Soobramoney (1998) rationality test to a reasonableness test.

⁴⁶ Government of the Republic of South Africa v. Grootboom and Others, § 33.

⁴⁷ “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

⁴⁸ Articles 24, 25, no. 5, 27, no. 2, 29, no. 1 and 2, 32, no. 2, 33, no. 1, 35, no. 1 and 3, 36, no. 1, 37, no. 6. However, the meaning of the wording is not uniform.

For the Court reasonable measures are those included in a coherent and coordinated program, addressed to the different levels of Government and dully funded and resourced. The program must be “*capable of facilitating the realization of the right*”⁴⁹, and must be reasonable in its conception and implementation. However, the measures could not be deemed reasonable if although reasonable in a medium- and long-term perspective they were not responsive to the short term needs of the most desperate: “*If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test*”⁵⁰.

The Court concluded that the national program did not overcome the reasonableness test by not predicting measures capable of providing immediate temporary relief to those in dire or desperate need⁵¹.

Unlike the methodical of the proportionality tests, the Court has refused to formally comply with the first step of the methodical of justification: to establish preliminarily the content and scope of protection of the right (including its minimum content) and verify whether it has been infringed. Moreover, also unlike proportionality tests, there is no pre-fixation of methodical steps, of precise criteria, of an order of assessment of those steps and criteria. The measurement of reasonableness is based on indicators chosen according to the context (“*reasonableness must be determined on the facts of each case*”⁵²), which could, therefore, vary, from case to case: factors of both procedural or formal order and material, such as considerations related to the dignity of human beings⁵³. It may include some specific aspects similar to prongs of the classical proportionality (suitability, necessity) and equality principles. However, reasonableness is not a vehicle of bilateral weighting or balancing, as is, for example, the prohibition of deficit or of insufficiency⁵⁴.

⁴⁹ Government of the Republic of South Africa v. Grootboom and Others, § 41.

⁵⁰ Government of the Republic of South Africa v. Grootboom and Others, § 44.

⁵¹ “[T]he nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need”: Government of the Republic of South Africa v. Grootboom and Others, § 66. More explicit, “the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need identified earlier”: Government of the Republic of South Africa v. Grootboom and Others, § 69.

⁵² Government of the Republic of South Africa v. Grootboom and Others, § 92.

⁵³ Government of the Republic of South Africa v. Grootboom and Others, § 83.

⁵⁴ Weighting or bilateral/plurilateral valuation (or balancing) is the comparison of two or more magnitudes with a view to checking whether any of them prevails over the other(s): see VITALINO CANAS, cit. 12, p. 55.

It is, moreover, a test in which the Court can practice an attitude of deference towards the legislator:

“A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable”⁵⁵.

Some scholars would criticize Grootboom, claiming that the minimum core standard would be more appropriate⁵⁶.

4.1.2. Proportionality

In Grootboom the test of reasonableness operates undoubtedly as a non-weighting test. Notwithstanding, from other decisions of the South African Constitutional Court on the fulfillment of the positive prong of social rights flows the application of a weighting exercise typical of the prohibition of deficit or of insufficiency.

This is the case of *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (2004)⁵⁷, where the constitutionality of social security and welfare law rules that restricted foreign citizens with permanent residence permits from accessing certain social benefits was examined. The Court ruled the norms unconstitutional and issued an additive decision, adding the words "or permanent resident", in order to provide that they would also be beneficiaries of the social benefits in question. The grounds are unequivocally based on balancing:

“In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would

⁵⁵ Government of the Republic of South Africa v. Grootboom and Others, § 41.

⁵⁶ See DAVID BILCHITZ. *Poverty and Fundamental Rights. The Justification and Enforcement of Socio-Economic Rights*. Oxford University Press, 2007 (and former essays); CHRISTOPHER MBAZIRA. *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice*. Pretoria: Pretoria University Law Press, 2009, p. 61. Criticism would increase towards Court decisions where the reasonableness test was allegedly used in an even more deferential fashion: e.g. Mazibuko (2010).

⁵⁷ Available at: <http://www.saflii.org/za/cases/ZACC/2004/11.html>

Other case: *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* (2001). Available at: <http://www.saflii.org/za/cases/ZACC/2001/19.html>

qualify for such assistance does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution”⁵⁸.

There is only clear expression of the application of proportionality in the strict sense, but this is consistent with the typical structure of the prohibition of the deficit whereby this segment is preponderant⁵⁹.

4.2. Interference in negative prongs of social rights

The principle of proportionality in the classical sense has applications in constitutional case law, although perhaps not so profuse, nor in the strictly segmented, ritualized and sequential style practiced in Germany, Portugal or Canada⁶⁰. That is the case especially where the constitutionality of interference with freedom rights is assessed; but also, cases of interference in negative prongs of social rights⁶¹.

In *Jaftha v Schoeman and Others and Van Rooyen v Stoltz and Others* (Jaftha, 2004)⁶², jointly adjudicated by the CC, the constitutionality of rules allowing the sale of low-cost housing, purchased with state support, in execution of a judgment for non-compliance with the payment of small debts of the owners to third parties not related to the house was assessed.

The rules were deemed unconstitutional on the basis of a proportionality judgment:

“If there are *other reasonable ways* in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate

⁵⁸ Khosa, no. 82. On the discussion on the relation between the so called proportionality test used in *Khosa* and the reasonableness test, KATHARINE YOUNG. Proportionality, Reasonableness, and Economic and Social Rights. In VICKI C. JACKSON & MARK TUSHNET, eds. *Proportionality: New Frontiers, New Challenges*. Cambridge University Press, 2017, pp. 248-272. Available at: <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2063&context=lsfp>

²⁶⁰ CHRISTOPHER MBAZIRA, cit. 57, p. 88.

⁵⁹ VITALINO CANAS, cit. 12, pp. 1020, 1027. For a presentation of the benefits of the application of this test in these situations, CHRISTOPHER MBAZIRA, cit. 56, p. 100.

⁶⁰ KATHARINE YOUNG, cit. 59, p. 259.

⁶¹ The constitutional basis is Article 36 of the Constitution, limit clause. In points (a) to (e), it only refers to the importance of the end, adequacy and necessity, but the Constitutional Court has understood that the precept points to the application of proportionality from a global perspective, including proportionality in strict sense. For example, *S v. Manamela* (2000).

⁶² Available at: https://www.escri-net.org/sites/default/files/Judgment_of_the_Constitutional_Court_-_October_2004.pdf

unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless”⁶³.

The application of the segments of necessity (which of course presupposes suitability) and proportionality in the strict sense is evident.

4.3. Conclusion on South Africa

There are points of confluence and points of divergence with other legal systems addressed here.

Points of convergence are the application of proportionality, both in situations of interference in negative prongs of social rights, and in situations where the eventual lack of fulfillment of social rights is assessed. As in Canada, there are associations with the principle of equality. Also, there is an apparent disinterest in what concerns making adjustments to the structure and methodical - not to mention the designation - of the test when it comes to the later situations.

Factors of divergence are not only the lower ritualization and specification of the steps of proportionality, but also the refusal to set a minimum content of rights and the adoption of an alternative test of reasonableness.

5. Portugal

5.1. Interference with negative social rights

5.1.1. Between prohibition of retrogression and full reviewability

During the first decades after the 1976 Constitution became in force, disputes over ideological choices were also evident in the field of social rights, where two extreme and unremitting currents fought against each other: one focusing on the full implementation of those rights, considered to be subjective rights, as an emancipatory and transforming instrument of society, in favor of an absolute principle of prohibition of retrogression and a strategy of resistance against threats to the "achievements of the revolutionary process”;

⁶³ No. 56, emphasis added.

the other diametrically opposed to the first, against the full normative force of social rights, seeing them as generators of mere claims and never of subjective rights, defending the lawmaker's freedom to create laws and the principle of full reviewability of all and any fulfillment of social rights by the lawmaker. Neither of these two currents was clearly majoritarian, they were not alone but they were certainly the most active.

Within the scope of constitutional case law, the most resounding success of the first current occurred with Judgment no. 39/84 (1984)⁶⁴. The Constitution enshrines the social right to health, with significantly enhanced features, particularly regarding the existence of a National Health Service, which is unequivocally imposed by the Constitution. Legislative rules implemented that imposition in 1979. However, in 1982 the ordinary lawmaker revoked most of those rules. In 1984 the Constitutional Court (CC) ruled with general binding force that the rules enacted by the lawmaker in 1982 were unconstitutional since they violated the principle of prohibition of retrogression.

The content of the CC's decision was something of a counter-tide. It came two years after the 1982 revision of the Constitution, which, in the minds of many, had represented a significant step in softening the ideological burden of the 1976 Constitution. After the CC's decision the question that remained to be addressed in future judgements was whether in all situations with some similarity, that is, in all situations in which it could be said that the lawmaker had fulfilled impositions of the Constitution, this would trigger a kind of eternal "*res judicata*" force at the constitutional level - a constitutional hiperprotection - with the lawmaker no longer being able to harm that which had been acquired.

In the decade following the 1984 Judgment, which coincided almost entirely with the first years of Portugal's integration in the European Economic Community, the case law pendulum swung surreptitiously towards the opposite current. The absolute principle of prohibition of retrogression gave way to a view largely deferential to the lawmaker, favoring the application of something similar - or practically equivalent - to full availability and reviewability of the fulfillment of social rights. Judgment no. 380/89, on the rules introducing payment of service fees by patients in the National Health Service, and Judgment no. 148/94, on the rules leading to an increase in higher education fees, were paradigmatic and characteristic of this period.

⁶⁴ All Judgments (*Acórdãos*) of the Portuguese Constitutional Court (*Tribunal Constitucional*) are available at: <https://www.tribunalconstitucional.pt/tc/acordaos/>

5.1.2. The guarantee of minimum core of a right and of the minimum of existence

Several years then followed without breakthrough case law decisions relating to social rights. Meanwhile, the most influential legal theory evolved to a mitigated version of the principle of prohibition of retrogression⁶⁵, which helped to lay the foundations for a third compromised approach that would form the basis of Judgment no. 509/2002, a case which scrutinized rules that amended the Law on the Social Integration Benefit. In the new legislative formulation under constitutional scrutiny, people aged between 18 and 25 were not entitled to this social benefit. The issue was whether this change, which involved a reduction in the number of beneficiaries of the social benefit on the grounds of age, was in line with the Constitution.

In the Judgment the scope of the prohibition of retrogression is significantly reduced, with it no longer having absolute value and autonomy. The CC argues that it is only violated when one of the following standards or parameters is infringed: (i) the content of a social right the features of which are clearly entrenched or established within the heart of society; (ii) the minimum core of the right to a dignified minimum existence; (iii) the principle of equality; or (iv) the principle of protection of trust.

These are standards or parameters with an established and settled structure and method of application, which do not require any association with or tempering of a principle of prohibition of retrogression. The call of the principle of prohibition of retrogression is futile; it is sufficient to apply those principles and standards⁶⁶, as the CC eventually did, when it found, in the case *sub judice*, that the "minimum core of the right to a dignified minimum existence, postulated in the first place by the principle of respect for human dignity" had been violated⁶⁷.

It was thus that a first brief of compromise was achieved: neither absolute prohibition of retrogression, nor full reviewability of the fulfillment achieved, but a guarantee of the

⁶⁵ For a review of the issue JORGE MIRANDA. *Direitos Fundamentais [Fundamental Rights]*. 3rd. ed. Coimbra: Almedina, 2020, p. 559.

⁶⁶ Likewise, JORGE REIS NOVAIS, cit. 2, p. 246.

⁶⁷ Controversial is the question - not to be addressed here - of whether the Constitution enshrines the right to a minimum of existence with both a negative and a positive side. Critical J. MELO ALEXANDRINO. *A estruturação do sistema de direitos, liberdades e garantias na Constituição portuguesa [Structuring the system of rights, freedoms and guarantees in the Portuguese Constitution]*. Coimbra: Almedina, 2006, p. 190; J. REIS NOVAIS, cit. 2, p. 190.

minimum or essential core or of the minimum of existence, in the various semantic and normative expressions that this standard would assume over the years.

Other Judgments, such as Judgment no. 590/2004 and Judgment no. 336/2007, consolidated this *third way*, although without a ruling of unconstitutionality. The former concerned rules that abolished subsidized credit mechanisms and subsidized youth credit for home ownership. The latter assessed the constitutionality of the rule which eliminated the exemption of costs in favor of an injured person not represented or supported by the Public Prosecutor's Office, in cases arising from an accident at work.

5.1.3. Application of the prohibition of excess

A reading of some Judgments handed down in the same period – early 2000s – suggests that the *third way* set in motion by Judgment 509/2002 did not stop there. The extreme solution of prohibition of retrogression as an absolute principle was set aside, and the minimum core of social rights was protected from interference by the lawmaker, but a question remained: outside that minimum core was the lawmaker completely free from judicial control or was this possible, using however another standard of judicial review?

In situations where in order to satisfy public interests that it believes should be promoted the lawmaker cut back subjective legal positions arising from social rights already made positive (directly by the Constitution itself or by law) and incorporated into the subjective sphere of individuals, the lawmaker's is under a negative duty: a duty to refrain that is structurally equivalent to the duties to refrain that primarily characterize defense rights. The instrument of harmonization and weighting applicable to this collision, between the public interest at one side and goods, interests or values that are not part of the minimum core of the social right at the other side, is prohibition of excess or classical proportionality.

Now, at the same time as it has gained increasing confidence and skill in the use of prohibition of excess in the sphere of interference with rights of defense, since the beginning of this century at least, the CC has followed a persistent line of applying the classic principle of proportionality or prohibition of excess in collision situations

involving social rights⁶⁸. The fact that, in some cases, this application is not adjusted to the nature of the collision in question⁶⁹ and that, in others, the principle has not been applied according to a method which is immune to criticism, does not change this conclusion.

Judgments nos. 88/2004, 67/2007, 612/2011, 858/2014 and 660/2019 were concerned with rules which cut back social rights with the aim of pursuing public interests.

The rules scrutinized in Judgment no. 88/2004 concerned a collision between the right to social security [Article 63(1) of the Constitution, in the specification of paragraph 3)] and a (possible⁷⁰) supra-individual objective of the lawmaker to encourage marriage rather than *de facto* union. Those considered in Judgment no. 67/07 related to a collision between, on one hand, the social right of Article 64 of the Constitution (right to health protection), in its negative dimension of a social right already implemented by the law in the form of the universal and generally free of charge nature of the NHS and, on the other hand, the aim of encouraging the population to use an NHS user card, thereby simplifying access and reducing bureaucracy related thereto. The rules reviewed by Judgment no. 612/2011 resolved a collision between the social right of private charitable institutions to State support (Article 63(5) of the Constitution) and the purpose of safeguarding fair competition (Article 81 f)).

Judgment no. 858/2014 gives rise to some considerations (which can be extended *mutatis mutandis* to Judgment no. 660/2019).

The CC addressed a rule which provided that Police officers to whom a disciplinary penalty of dismissal was applied at a time when they had already retired would have that penalty replaced by a penalty of loss of a retirement pension for a period of four years. The following conclusions were presented in the Judgment:

“In view of the foregoing, it is understood that the rule in Article 26(1)(c) of the Disciplinary Rules of the Public Security Police, in so far as it determines for

⁶⁸ This statement is not undisputed: see C. BLANCO DE MORAIS. De novo a querela da “unidade dogmática” entre direitos de liberdade e direitos sociais em tempos de “exceção financeira” [Again the quarrel of “dogmatic unity” between liberty rights and social rights in times of “financial exception”]. *E-Pública*, December 2014, I, no. 3, pp. 59-85. Available at: <http://www.scielo.mec.pt/pdf/epub/v1n3/v1n3a05.pdf>

⁶⁹ See *infra*, 5.2.

⁷⁰ Just possible, because the reporter Gil Galvão expressed doubts on the real goal of the norm (no. 10 of the judgement). Check also Judgements no. 67/07 and 512/08.

retired officials and agents the loss of the right to a pension for a period of 4 years, in lieu of the penalty of dismissal, without safeguarding the notion of a minimum income to meet basic needs, violates the principle of proportionality”⁷¹.

There was a collision between, on the one hand, the social right to a retirement pension and, on the other, the interests or purposes of retribution and general prevention. This is a situation to which, in fact, the principle of prohibition of excess is applicable, although with the peculiarities it has in the field of the law of penalties in general, which for the moment are not relevant⁷². However, in situations such as that of the Judgment it is imperative to use two distinct and autonomous standards, depending on the pension instalments. An amount of EUR 500 or so is for sure wholly linked to the minimum of subsistence, which is an absolute standard not applicable through weighting or balancing. Differently an amount of EUR 5.000 cannot be linked to that minimum alone. Consequently, a distinction must be made between the instalment of the pension which guarantees the minimum of subsistence and that which falls outside that scope, if any. The minimum of subsistence must be protected against any legislative measure, and it is unconstitutional for it to be interfered with. For protecting the minimum of subsistence, the prohibition of excess need not be summoned. The instalment which falls outside the minimum of subsistence is the peripheral part of the social right to a retiring pension. Restriction of this may or may not be justified according to whether it is in line with the principle of prohibition of excess.

The so-called case law of the crisis (2011-2014) could have been a key moment to consolidate and improve the application of the prohibition of excess. Several Judgments dealt with measures that interfered with social rights provisions *already fulfilled* by law, with the aim of pursuing fiscal consolidation objectives and containing or reducing public debt, aims that were deemed constitutionally legitimate by the CC. Often the principle was invoked by applicants in judicial review proceedings and appreciated by the Court. However, the collapse of rules due to their violating the prohibition of excess was rare. This did occur in Judgment no. 187/2013, which declared that a rule in the 2013 State Budget was unconstitutional with general binding force, since it violated the principle of proportionality. The rule in question required individuals receiving welfare benefits to

⁷¹ No. 6, final.

⁷² On the issue, VITALINO CANAS, cit. 12, specially at 1055.

make a contribution of 5% of sickness benefits and 6% of benefits granted in the event of unemployment, which constituted a reduction in the corresponding social benefits.

5.2. Failure to fulfill positive social rights

The Court applied the classic principle of proportionality or the prohibition of excess, by name, in Judgments nos. 263/2000, 302/2001 and 309/2001. However, in none of these was there a concern to prevent the *excess* of the lawmaker. Rather the aim was to make sure that the fulfillment duties of the lawmaker that eventually collided with subjective legal positions of partially incompatible implementation were not fulfilled with a deficit or insufficiency.

5.3. Conclusion on Portugal

A detailed look will bring to the fore apparent discrepancies in the constitutional case law. However, this does not detract from certain trends, which have been gradually consolidated since the early 2000s. The Portuguese constitutional judge, having rejected the absolute principle of prohibition of retrogression, but also the principle of the free and unrestricted reviewability of social rights, seems to accept as established that the minimum or essential core of rights, the minimum of subsistence or the social minimum (variants of the same normative *quid*) are justiciable and non-derogable.

Moreover, application of the principle of proportionality has been regularly tested, both in situations of interference with negative social rights and in situations demanding positive fulfillment of those rights. In relation to the latter, a relevant reminder is that the CC, despite having already, and more than once, used the principle of prohibition of deficit or of insufficiency as a criterion for investigating the constitutionality of rules that deal with collisions between duties to protect rights of defense and duties to refrain from interfering with (other) rights of defense, has not yet given any sign that it recognizes the autonomy and application of that standard also when it comes to the point of examining the positive fulfillment of social rights. It has limited itself to call the *nomen* principle of proportionality and seeking to adapt its structure and method to spheres that are not its

own, as is the case, in fact, with almost all the other constitutional jurisdictions focused on this paper⁷³.

6. The inferences: substantive due process mediated by various parametric instruments

6.1. The question: total dominance or irrelevance of proportionality?

At the peak of the sovereign debt crisis some authors were encouraged to announce that the era of proportionality had arrived for social rights⁷⁴: proportionality would now be a global practice in reviewing violations of social rights. This contrasted however with the position of those which found it surprising that proportionality was absent from the adjudication of economic and social rights⁷⁵ or raised the question of whether positive rights (including social rights) were proportionality's next frontier or a bridge too far⁷⁶.

However, the reality is not contained within such dichotomous terms. On the one hand, it cannot be said that the instruments included under the concept of modern proportionality (in particular, prohibition of excess and prohibition of deficit or of insufficiency) completely and authoritatively dominate the substantive due process of fulfillment of or interfering with social rights, and it is crucial to bear in mind that not everything that calls for *rationality, reasonableness, weighting or balancing*, leads back to proportionality⁷⁷. Yet, on the other hand, it is also not correct to speak of proportionality being almost irrelevant or absent.

Going beyond the analytical framework that simply focuses on the duties to respect, protect and fulfill rights, let us now adopt another angle, that of the normative collisions in which these rights may be involved (from the angle of *all of the lawmaker's deontic*

⁷³ See some explanations in LAURA CLÉRICO. Proportionality in Social Rights Adjudication: Making it Workable. In DAVID DUARTE & JORGE SILVA SAMPAIO, eds. *Proportionality in Law. An Analytical Perspective*. Springer, 2018, pp. 25-48.

⁷⁴ See a powerful example of this position in XENOPHON CONTIADES and ALKMENE FOTIADOU. Social rights in the age of proportionality: Global economic crisis and constitutional litigation. *Int. J. Const. Law*, 2012, 10, p. 660.

⁷⁵ KATHARINE YOUNG, cit. 59, p. 13.

⁷⁶ STEPHEN GARDBAUM. Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?. In VICKI JACKSON & MARK TUSHNET, eds. *Proportionality: New Frontiers, New Challenges*. Cambridge University Press, 2017. Also available at: SSRN <https://ssrn.com/abstract=2726794> (later version has been used here).

⁷⁷ STEPHEN GARDBAUM, cit. 77.

positions in the light of these, rather than merely the obligations and prohibitions)⁷⁸. These include collisions between:

- (i) the duty to refrain from interference with a negative social right directly effective in the Constitution and *permission to act* (discretion) to pursue constitutionally recognized public interests⁷⁹ (*duty not to act vs. permission*);
- (ii) the duty to refrain from restrictive interference with a negative social right effective in ordinary law and *permission to act* (discretion) to pursue constitutionally recognized public interests (*duty not to act vs. permission*);
- (iii) the duty of positive action to fulfill a social right and *permission to act* (discretion) to pursue constitutionally recognized public interests (*duty to act vs. permission*);
- (iv) the duty of positive action to fulfill a social right and the duty to refrain from restrictive interference with another social right already fulfilled by the ordinary law or by the constitution (*duty to act vs. duty not to act*);
- (v) the duty of positive action to fulfill a social right and the duty to refrain from interference with a defensive right (*duty to act vs. duty not to act*);
- (vi) the duty of positive action to fulfill a social right and the duty of positive action to fulfill another social right (*duty to act vs. duty to act*);
- (vii) the duty to act to protect a negative social right and the duty to refrain from interference with a defensive right (*duty to act vs. duty not to act*);
- (viii) the duty to act to protect a defensive right and the duty to refrain from interference with a negative social right (*duty to act vs. duty not to act*).

Sub-paragraphs (i), (ii) and (iii) reflect an aspect with specific and intense implications in the field of social rights: the general permission to the lawmaker to counterbalance them with the reserve of the possible and sustainable, the public interest of fiscal consolidation or the principle of sustainable public finances⁸⁰.

⁷⁸ More restrictive DAVID DUARTE. Gains and Losses in Balancing Social Rights. In DAVID DUARTE & JORGE SILVA SAMPAIO, eds. *Proportionality in Law. An Analytical Perspective*. Springer, 2018, p. 58.

⁷⁹ The issue on whether public interests which are not specifically recognized by the Constitution may also be a ground for interferences in fundamental rights will not be addressed here.

⁸⁰ On the later see however STEPHEN GARDBAUM, cit. 77, p. 29.

6.2. Restrictive interference with negative social rights

Regarding the collisions in (i) and (ii), which correspond to the possibility of *social retrogression*, normally justified by arguments of unsustainability and excessive fiscal burden for taxpayers, it is important to begin by noting the unanimous inclination of constitutional jurisdictions towards zero receptivity to instruments that are extremely intrusive on the lawmaker's freedom to create law, such as the principle of prohibition of social retrogression *in an absolute sense*, even in cases where the effectiveness of negative social right is directly rooted in the constitution (as in (i)). It may be the case that the constitutional judge invokes extreme versions of the prohibition of retrogression but limits himself to protecting something that is not far from the guarantee of the minimum core (as, in one possible interpretation, appears to be the case in Brazil). However, it also seems to be accepted that there is no general principle of *unconditional self-reviewability* of legislative options. Retrogression is subject to limits: it is admissible provided it is justified in accordance with relevant parameters.

Now, consultation of important constitutional case law shows us that classic proportionality or prohibition of excess is gradually becoming established as a parameter applicable to collisions of type (i) and (ii) ⁸¹. We can find examples in the case law of South Africa, Germany, Canada, and Portugal⁸².

Answers diverge, however, on whether the principle of prohibition of excess shares the protection of negative social rights with other criteria. In this regard, the main "candidate" is the guarantee of minimum core.

⁸¹ As argued in a previous note, when the legislator interferes in negative rights to pursue a public interest the applicable instrument of harmonization and weighting should also be the prohibition of excess even if it does also positively reflect in the fulfillment of one or more social rights. In the classical example of limitation of advertising of tobacco brands there are interferences in negative rights, such as freedom of expression and communication, free initiative and others, aiming primarily at safeguarding public health as a public interest. Inseparably, these legislative measures also contribute to the implementation and materialization of the social right to health, but this does not affect in any way the application of the prohibition of excess as the applicable tool of collision resolution.

In Portugal, see Judgment of the Constitutional Court No. 47/2019. Available at: <http://www.tribunalconstitucional.pt/tc/acordaos/20190047.html>

⁸² KATROUGALOS & AKOUMIANAKI, cit. 32, p. 1398, showcase examples collected in France, Latvia, Greece and in the European Court of Human Rights that would go in the same direction (although in some cases the evidence is not enough).

Some are skeptical regarding the criterion of minimum core as an instrument for the adjudication of social rights⁸³. It is true that one can see a "shy away" from this parameter in South Africa. However, it is not clear why the choice must be between *only* that parameter or *only* proportionality.

Dispensing with the standard of guarantee of the minimum or essential core of the right is, from the outset, not feasible in legal systems where the standard is enshrined in the constitution. This is the case of the Portuguese Constitution, where it is expressed with regard to the defensive rights in broad sense [Article 18 (3)]. Furthermore, the dominant inclination of scholars and the case law is to consider that it extends to social rights⁸⁴. When the object of the duty not to act are subjective legal dimensions or positions which, since they are intrinsically linked to the principle of the dignity of the human person, as part of the minimum or essential core of the social right, this is a *definitive duty* which cannot be balanced or compromised in relation to other colliding goods, interests or values⁸⁵. In such cases, it is simply the guarantee of the minimum or essential core of the social right that is valid. One might say that this is one of the external *deontological* limits to proportionality principle in the modern sense⁸⁶.

In this resistance to balancing there is divergence with authors who argue that the very minimum core of the right may justifiably be disregarded by the lawmaker (or, more broadly, by the State) if, when balanced against other goods, interests or values, these should prevail⁸⁷. Even if it is argued that in such circumstances the most basic interests of individuals, those which are covered by the minimum core, would have "a strong priority and weight in any proportionality inquiry"⁸⁸, the fact is that despite carrying such strong priority and weight in the proportionality test, they could be defeated. Now, it does not appear that minimum core can be subject to the contingency of *possible defeat* to other goods, interests or values in the context of a harmonization operation guided by the

⁸³ "[D]efining a minimum core at a time of crisis does scare the judiciary away, as opposed to following the steps of proportionality": XENOPHON CONTIADES & ALKMENE FOTIADOU. Socio-economic rights, economic crisis, and legal doctrine: A reply to David Bilchitz. *Int. J. Const. Law*, 2014, 12, pp. 740-746, p. 743. Available at <https://doi.org/10.1093/icon/mou045>

⁸⁴ Judgement no. 509/2002, seen above; J. MELO ALEXANDRINO, cit. 68, p. 605.

⁸⁵ VITALINO CANAS, cit. 12, p. 961.

⁸⁶ VITALINO CANAS, cit. 12, pp. 495, 1162.

⁸⁷ As ROBERT ALEXY. *A Theory of Constitutional Rights* (translation by Julian Rivers). Oxford: Oxford University Press, 2002, p. 343; AHARON BARAK, cit. 42, p. 496.

⁸⁸ DAVID BILCHITZ, cit. 57, p. 738: "while there may be some circumstances in which such limitations could be justifiable, these will be very limited and the state will bear a strong burden of justification in this regard which will affect the manner in which the necessity and balancing inquiries are evaluated".

principle of proportionality. At most, a reserve may be valid, in line with the guidance of the United Nations Committee on Economic, Social and Cultural Rights⁸⁹: the State can only be exonerated from regarding the minimum core of the right if it proves that it has made every effort possible and only the absolute lack of material resources or the occurrence of insurmountable obstacles (for example, a situation of war or armed internal conflict, lack of control of national territory, public calamity) has prevented its preservation, rather than a choice mediated by a balancing operation.

Hence, the South African judicial system's deliberations to provide Irene Grootboom and her neighbors with housing and subsistence conditions until they had access to a permanent housing solution awarded *definitive* rather than *prima facie* minimum social benefits, and these could not therefore be reversed based on a proportional justification, were any to exist. In the case before the Argentine Supreme Court in 2012, concerning the situation of a mother and a child with severe disabilities, who were homeless and had not received an adequate response from the competent authorities, the most essential core of the rights to housing, health and social protection was being disregarded, which could not be justified and therefore could not be assessed within the framework of modern proportionality⁹⁰. Once minimum conditions of housing and assistance for the child had been provided, those minimum benefits could not be restricted or abolished by the State, even if some sort of justification could be invoked legitimized by any principle. In the case decided by the Portuguese CC⁹¹, the police officer punished after retirement would be entitled to a minimum retirement pension, even if there were substantial reasons for a disciplinary policy justifying the sanction of full suspension of that pension.

In short, the principle of prohibition of excess coexists with the guarantee of the minimum core of the right, each one with its own scope, function and method⁹².

6.3. Non-compliance with positive duties related to social rights

⁸⁹ Cfr. CESCR General Comment No. 3: *The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990, no. 10.

⁹⁰ LAURA CLÉRICO, cit. 74, p. 35, discusses the case from a different angle.

⁹¹ *Supra*, 5.1.3.

⁹² Likewise, KATROUGALOS & AKOUMIANAKI, cit. 32, p. 1409. On the equivalent situation within the scope of the ICESCR, BANTEKAS & OETTE, cit. 4, p. 413.

A distinction will be made between (i) situations where the lawmaker has positive duties to *fulfill* social rights and (ii) situations where the lawmaker is subject to positive duties to *protect* negative social rights.

6.3.1. Omission of social rights fulfilment

As regards to failure to fulfill duties of positive action to give effect to social rights (sub-paragraphs (iii) to (vi)), the case law analyzed shows that tests which fall under the umbrella of proportionality in the modern sense have already been used in South Africa, Canada and Portugal. However, in none of those legal orders the relevance in the field of social rights of the distinction between the classic proportionality or prohibition of excess and prohibition of deficit or insufficiency seems to be accepted or perceived. The latter figure is summoned by the constitutional case law of Brazil, but therein lies another problem: the principle of prohibition of insufficiency seems to be understood in a sense that does not allow it to be separated from the guarantee or implementation of the minimum core of the right.

However, it would not be exact to say that the case law most representative of the global movements accept that everything must be regarded as *a matter of application of proportionality* adapted (or not) to fulfillment of positive social rights. Even in some legal systems where the proportionality test has been incorporated into this field, it rivals or is supplemented by other non-balancing parameters, such as the South African reasonableness or the guarantee of the minimum core of the right.

The conclusions that can be drawn from situations where there is relevant case law on implementing positive social rights demonstrate that the constitutional judge generally focuses on protecting the most basic, highest priority, *clearly due* benefits, even when the concept of the minimum core of the social right is not explicitly invoked or when other more powerful figures are called on, such as prohibition of insufficiency, or even when this is expressly waived in favor of other tests, such as South African's reasonableness.

Therefore, we cannot agree with those which grant proportionality the functions of a tool for forming the content of the right, including the minimum core and a mediating role in

the dialogue of negotiation between the lawmaker and the judge on the content of the right⁹³.

In fact, despite all the progress noted in the acceptance of the normative force of social rights and their justiciability, there is still an asymmetric perspective that leads to the mechanisms to control their fulfilling being used with greater prudence, self-restraint and deference to the lawmaker. The background of this perspective is the recognition that the true passive subject of social rights is not the State, but rather taxpayers in general. Any progress in fulfilling social rights presumably implies enhanced interference with taxpayers' property.

Moreover, there is an emerging analytical specification of normative collisions involving social rights, which must take into consideration *all the deontic positions of the law maker and not just some of them*. Furthermore, an imperfect perception of the structure and method of the various harmonization instruments – particularly those developed more recently as the prohibition of deficit or of insufficiency – remains. For instance, regarding the prohibition of deficit or of insufficiency there continues to be significant disagreement on issues as basic as the structure, scope or method of application or scope of the constitutional judge's powers of review and on its modalities⁹⁴. And there are also marked differences of opinion as to whether this instrument is a balancing standard (as we regard it) or not⁹⁵.

6.3.2. Omission of social rights protection

Sub-paragraphs (vii) and (viii)⁹⁶ refer to collisions where the lawmaker has positive duties to *protect* negative social rights (or defensive rights) against possible interference from third parties based on their own fundamental rights. In Portugal, the Constitutional Court applied the classic principle of proportionality or prohibition of excess in Judgments nos. 263/2000, 302/2001 and 309/2001. The first two concerned type (vii) collisions and the third a type (viii) collision. The intention in none of them was to counteract the *excess* of

⁹³ XENOPHON CONTIADES & ALKMENE FOTIADOUD, cit. 75. Besides a defensive side proportionality would assume also a creative role as a “tool for forming the content of the right. This is of particular importance for determining the content of social rights, a task which requires a balancing of various interests – a balancing that can be done only through the use of proportionality”.

⁹⁴ It is argued that there are at least two modalities of the prohibition of deficit or of insufficiency: (i) parity; (ii) non-parity. The former is applicable when the colliding state duties have the same *prima facie* abstract weight; the latter is applicable when *prima facie* abstract weight of the colliding duties and permissions may be unequal: VITALINO CANAS, cit. 12, p. 990.

⁹⁵ In Portugal, for a different view, see for instance J. REIS NOVAIS, cit. 2, p. 307.

⁹⁶ *Supra*, 6.1.

the lawmaker; the aim was rather to make sure that the duties of the lawmaker that collided with subjective legal positions of partially incompatible implementation were not fulfilled with a deficit or insufficiency. Therefore, the appropriate harmonization instrument is the prohibition of deficit or of insufficiency, and the considerations of the previous section are *mutatis mutandis* valid here too.

7. General conclusion

We began by presenting two extreme alternatives: (i) the application of the same harmonization or harmonization control instrument (proportionality) for *all types of collisions* involving social rights; or (ii) the application of a specific harmonization or harmonization control instrument, which may vary from jurisdiction to jurisdiction, for *each collision or category of collisions*.

The conclusions that can be drawn from the research outlined above are that neither of these extreme alternatives is favored by the majority of the legal theory or by the constitutional case law and neither of them is theoretically nor dogmatically correct.

Insofar as it is possible to detect universally recognizable standards of substantive due process, even if there are uncertainties and inconsistencies and their structure, method of application, levels of requirement and boundaries involve adjustments to the circumstances of each jurisdiction, the second alternative (ii) is neither proven by the practice of the constitutional jurisdictions nor recommended from the theoretical and dogmatic point of view. Yet, the same is also true of the first alternative (i): the fact that there are different types of normative collisions and that rights have different protection “cores” means that there must be more than one instrument to mediate those collisions. We cannot, therefore, speak of a total concentration in a sole standard.

For each of the collisions involving social rights, one of three harmonization or harmonization control instruments is applicable: a) *guarantee of minimum or essential core*; b) *prohibition of excess*; c) *prohibition of deficit or of insufficiency*.

The general trend in constitutional jurisdictions appears to be to resort to the standard of minimum or essential core of the social right or an equivalent, such as the minimum of existence (Brazil, Portugal, Germany). It is possible that in South Africa the reasonableness test also functions, ultimately, as a vehicle to ensure the minimum core,

although this is not its only scope. The explanation may be *human dignity exceptionalism*⁹⁷. The constitutional judge may feel morally inhibited from including conditions of dignified existence in the balancing operation.

However, there are subjective legal dimensions or positions not included in the minimum or essential core of the social right. Regarding these, the State has duties to perform acts to fulfill the social right in terms which ideally correspond to the achievement of indicators close to the *average standard* of society or to refrain from restricting its fulfillment when this has already been achieved. The State under the rule of law may not dispense with judicial review in this area either. The principles of prohibition of excess and of prohibition of deficit or of insufficiency apply, respectively, to any restrictive positive acts or omissions.

These two instruments, although grouped under the heading of modern proportionality (an expression that makes the distinction with classic proportionality, which simply coincides with the prohibition of excess), are distinct and separate, with different structures and methods of application⁹⁸, thus justifying their different *nomens*. One of the problems of the literature in the English language – which does not occur in other languages, such as German, Portuguese or Spanish – is that even those who recognize the application of a harmonization and balancing instrument for collisions where positive State duties are at stake, have not yet adhered to something like “prohibition of deficit or of insufficiency”, and continue to use, for all circumstances and collisions, the expression proportionality or principle of proportionality.

REFERENCES

1. NOVAIS JR. Direitos Sociais. Teoria Jurídica dos Direitos Sociais enquanto Direitos Fundamentais. Coimbra: Coimbra Editora; 2010.
2. SCHUTTER O. International Human Rights Law. 3rd edition. Cambridge: Cambridge University Press; 2019.
3. KÄLIN W, KÜNZLI J. The Law of International Human Rights Protection. 2nd edition. Oxford: Oxford University Press; 2019.

⁹⁷ STEPHEN GARDBAUM, cit. 77, pp. 3, 31.

⁹⁸ For a different vision, DAVID DUARTE, cit. 79, p. 64.

4. BANTEKAS I, OETTE L. International Human Rights. Law and Practice. 2nd edition. Cambridge: Cambridge University Press; 2016.
5. CANAS V. O Princípio da Proibição do Excesso na Conformação e no Controlo dos Atos Legislativos. Coimbra: Almedina; 2017.
6. MENDES GF, BRANCO PGG. Curso de Direito Constitucional. 12th ed. São Paulo: Saraiva; 2017.
7. WINKLER IT, MAHLER C. Interpreting the Right to a Dignified Minimum Existence: A New Era. In German Socio-Economic Rights Jurisprudence? Human Rights Law Review; 2013;(13).
8. KATROUGALOS G, AKOUMIANAKI D. L’application du principe de proportionnalité dans le champ des droits sociaux [The application of the principle of proportionality in the field of social rights]. Revue du Droit Public; 2012;(5).
9. ELIYA MC, PORAT I. American Balancing and German Proportionality: The Historical Origins. Int. J. Const. Law; 2010;(8).
10. BARAK A. Proportionality. Constitutional Rights and their Limitations. Cambridge: Cambridge University Press; 2012.
11. BILCHITZ D. Poverty and Fundamental Rights. The Justification and Enforcement of Socio-Economic Rights. Oxford: Oxford University Press; 2007.
12. MBAZIRA C. Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice. Pretoria: Pretoria University Law Press; 2009.
13. YOUNG K. Proportionality, Reasonableness, and Economic and Social Rights. In JACKSON VC, TUSHNET M, editors. Proportionality: New Frontiers, New Challenges. Cambridge: Cambridge University Press; 2017. pp. 248-272. Available at: <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2063&context=lsfp>
14. MIRANDA J. Direitos Fundamentais [Fundamental Rights]. 3rd. ed. Coimbra: Almedina; 2020.
15. ALEXANDRINO JM. A estruturação do sistema de direitos, liberdades e garantias na Constituição portuguesa [Structuring the system of rights, freedoms and guarantees in the Portuguese Constitution]. Coimbra: Almedina; 2006.
16. MORAIS CB. De novo a querela da “unidade dogmática” entre direitos de liberdade e direitos sociais em tempos de “exceção financeira” [Again the quarrel of “dogmatic unity” between liberty rights and social rights in times of “financial exception”]. e-Pública; December 2014; I;(3):59-85. Available at: <http://www.scielo.mec.pt/pdf/epub/v1n3/v1n3a05.pdf>
17. CLÉRICO L. Proportionality in Social Rights Adjudication: Making it Workable. In DUARTE D, SAMPAIO JS, editors. Proportionality in Law. An Analytical Perspective. Berlin: Springer; 2018. pp. 25-48.

18. GARDBAUM S. Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far? In JACKSON V, TUSHNET M, editors. *Proportionality: New Frontiers, New Challenges*. Cambridge: Cambridge University Press, 2017.
19. DUARTE D. Gains and Losses in Balancing Social Rights. In DUARTE D, SAMPAIO JS, editors. *Proportionality in Law. An Analytical Perspective*. Berlin: Springer; 2018.
20. CONTIADES X, FOTIADOU A. Socio-economic rights, economic crisis, and legal doctrine: A reply to David Bilchitz. *Int. J. Const. Law*; 2014;(12):740-746. Available at: <https://doi.org/10.1093/icon/mou045>
21. ALEXY R. *A Theory of Constitutional Rights* (translation by Julian Rivers). Oxford: Oxford University Press; 2002.

Biographical notes

Vitalino Canas

Professor Law Faculty, University of Lisbon.

FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA
ALAMEDA DA UNIVERSIDADE - CIDADE UNIVERSITÁRIA
1649-014 LISBOA – PORTUGAL

vitalino.canas@gmail.com or vc@vitalinocanas.pt