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REPORT

"THE FUNDAMENTAL SOCIAL RIGHT AS A MINIMUM FOR A BEFITTING EXISTENCE WITHIN PORTUGUESE CONSTITUTIONAL CASE-LAW"

by

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I – Introduction

1. An approach on social rights within the case-law of the Portuguese Constitutional Court was proposed. Although this is a recent institution – it commemorated its 25th anniversary in April - this issue should still be considered rather vast to be covered in a small presentation. Therefore, some limits had to be set.

2. However tempting it may be, I will obviously not embark on a description of the theory of fundamental rights in general and of the social fundamental rights more specifically.

Although fundamental rights, in their supranational scope, are a recent creation and quite connected to the harsh events of the 20th century wars, the truth is that they had, at a geographically more limited scale, precursors that date far back.

In Portuguese constitutionalism its genesis lies in the Political Constitution of the Portuguese Monarchy of 1822. Under title I with the heading "**Individual rights and duties of the Portuguese**", section 1 states: "The object of the Political Constitution of the Portuguese Nation is to maintain the **freedom, safety and property** of all the Portuguese citizens". Here one could already find, although still in an embryonic phase the fundamental rights still as classic fundamental rights and one right which is today classified as an economic right – the right to property. Social rights hadn't been acknowledged yet. However, four years later – in the Constitutional Charter of 1826 – we can find a provision that establishes the Constitution "assures **public aid**" and another that establishes "**primary education** is free for all citizens". The first of these rights is today a social fundamental right and the second, classified in the chapter on cultural rights, is comprised in the title of economic, social and cultural rights.

3. A long path was trodden from the nineteenth century until the 1976 Constitution by which we abide and which was drawn up within the context of a revolution that reinstated in the country a democratic regime and a Rule of Law.

The current concept of fundamental rights, even if it it may still be reinforced or so to speak thickened, is fortunately far from being an undetermined concept and a vast philosophical theory and legal doctrine on them has largely contributed towards its settlement.

It is, as we all know, quite common to distinguish between classic fundamental rights (defence rights) and social fundamental rights (participation rights). I will not go into detail on the specificities that distinguish these two because this audience knows them better than I. And besides, there are methodological barriers which are impossible of overcoming in such little time. I would just like to mention that the Portuguese Constitution also distinguishes between rights, freedoms and guarantees and economic, social and cultural rights, a classification of true importance. Its basis is rather objective because, in general terms, economic, social and cultural rights demand from the State the execution of measures that allow for its practice far more than in the case for rights, freedoms and guarantees. More specifically in Portuguese Constitutional Law, the rights, freedoms and guarantees benefit from a direct

application and are directly binding of public and private entities whilst on the other hand economic, social and cultural rights are not (section 18 of the Constitution). As pertains special provisions the Portuguese Constitution also presents disparities between rights, freedoms and guarantees and the economic, social and cultural rights one of which features great practical meaning, as the Portuguese Constitution includes, amongst the material boundaries of the revision of the Constitution, the rights, freedoms and guarantees and not the economic, social and cultural rights (section 288 of the Constitution).

4. Of the economic, social and cultural rights it is the social rights that are of greater importance for us here today. So it is important to clarify which social rights the Portuguese Constitution lists:

– Social security and solidarity
– Health
– Housing and Urban Planning
– Environment and Quality of Life
– Family
– Fatherhood and Motherhood
– Childhood
– Youth
– Citizens with Disabilities
– Senior Citizens

As one can see, the subject is rather vast and as I don't want to abuse of my audiences' patience I will delimit the issue. It is therefore my intention to speak merely – and as briefly as possible – of a social right that, in spite of not being autonomously consecrated in the Portuguese Constitution, arises from the principles and rights that are expressly embedded there – the **right to a minimum for a befitting existence**.

5. In fact, the **right to a minimum for a befitting existence** is, in some way, the essential, structuring right as pertains social rights. What in fact seems to unify the social rights is that they, similarly to all other fundamental rights, are based on the principle of human dignity which shall be understood as the respect for people and their right to autonomy and they all represent aspects of a complex and multifaceted right to a dignified existence in the perspective of the individual and in the perspective of the society. The evolution of fundamental rights is no more than the increasing course of how to render concrete the idea that the human being, due to its intrinsic and inalienable dignity, has constituting, founding rights which society and public authorities are to acknowledge. To acknowledge these rights for each one, leads us to the imperative need of acknowledging them for everyone in respect for equality and intrinsic indivisibility of human dignity. By acknowledging fundamental rights for the human being, this is for all human beings, a side of co-existence rights, of social rights which reflect individual rights emerges. Those are in fact the rights of the *Second Bill of Rights* of Roosevelt. "*No man is an island, entire of itself...any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee."*

6. *"Necessitous men are not free men"*. In order for a human being to be free basic needs have to be assured and said needs are undoubtedly social ones because the

individual human being cannot, without a society which will integrate him and support him, satisfy them. The circle that represents the social fundamental rights features an even more curbed internal core, the right to a minimum for a befitting existence of which the right to social security and solidarity is an evident point. It is therefore this right to a minimum for a befitting existence, within a perspective of a minimum of available material means that will allow for the threshold of subsistence that I wish to cover within the recent case-law of the Constitutional Court.

7. The choice rests on the fact that the principle of human dignity, a mainstay of the Constitution, is a principle that calls for unanimity. It is quite impossible to take a stand against this principle. However, this unanimously accepted concept is structurally multisense. One just needs to lend some thought to the *modus operandi* of its enforcement by means of rights of which no one doubts that said principle has to be present. In spite of that, in practice, the divergences can actually be breaching. We can think on issues like the protection of the youth, the family or the right to education not to mention a truly breaching field which is that of bioethics.

II – With this objective of approaching the **right to a minimum for a befitting existence** within the most recent case-law of the Portuguese Constitutional Court, I would like to mention some judgements that show the path that the court has been treading toward the reinforcement of this right to pour the principle of human dignity into operational rights for citizens affording them the dignity of substantial existence, of its daily functioning.
I shall divide them into three groups:

- Judgements pertaining to the limit of **seizability/non-seizability** in wages, pensions, grants / allowances, etc. for the payment of **credit rights** of a third party in relation to a minimum reference subject to fixing.

- Judgments pertaining to the **seizability/non-seizability** of income for payment of **maintenance obligations**.

- A third group that represents a **miscellany of cases** whose merging element is still that the Court continues to reinforce the right to a minimum for a befitting existence and to guarantee that it is safeguarded.

1. In the first group, the Court faced the issue of **seizability/non-seizability of income** obtained under various circumstances, from wages to the guaranteed minimum income, including income received for retirement, insurance, indemnity, life annuity or any other social benefit.

The question here was the constitutionality of a norm of the Code of Civil Procedure that established the non-seizability of a percentage of the quantities (2/3) to be seized and the possibility of the judge, as to the surplus, to determine in a flexible manner the part that is concretely seizable and even decide on the total exemption of the seizure.

The Constitutional Court highlighted the issue as a case of collision between two fundamental rights, the right to property of the creditor and the right to dignity of the human being of the debtor within the scope of a right to safeguarding for a minimum

of befitting existence. It decided on the predominance of the latter right and, therefore concluded that the right to property of the creditor should be constrained, in so far as needed, in favour of the right to a minimum of befitting existence of the debtor. By enforcing this right the Court questioned: 1) the possible unconstitutionality of the norm, due to the fact that a limit of general nature for the non-seizability should be established (or, on the other hand, of constitutionality of the norm due to the proficiency of the sage discretion of the judge *a quo* to hold off the excessive consequences of the seizability in specific cases); 2) the referential of exemption of seizability, this is, the minimum that should function as limit for the *quantum* of absolute non-seizability; 3) the distinction/non-distinction of the source of income to then draw consequences in relation to the issue of seizability.

2. As to the first point – to know whether the norm should be accounted unconstitutional, the Court's decision falls predominantly on the unconstitutionality (v. g. judgements 318/99, 62/02, 177/02). The Constitutional Court considered that the values under analysis covered such a level of dignity that the norm would have to be considered unconstitutional, the discretionarity of the lower court judge would have to be put aside and the recognition of a specific right for the minimum of existence should be established.

3. As pertains the second point, this is, in relation to the referential of seizability exemption, the Court oscillated between the choice of the guaranteed minimum income or the national minimum wage as criterion to establish said referential. Therefore, whilst judgement 62/02 determines the minimum threshold for exemption is the guaranteed minimum income, judgements 318/99, 177/02 and 96/04 determine that this minimum limit is the national minimum wage.

Judgement 657/06 has even chosen not to assess as unconstitutional the attachment of any percentage of the wage of the debtor when said wage is lower than the national minimum wage or if it is higher, the remaining amount following the seizure is lower than the national minimum wage.

In fact, it shall be noted that the judgements that enforce the right to a minimum for a befitting existence feature no divergences as to the target which is to be attained – the recognition of the right *a se* – but it features significant divergences pertaining to the course and concrete shaping of the actual right. Thus, the court is divided between a conception of maximum protection that will impose a general and abstract settlement of the limit of seizability that will set aside the restrictions of the concrete settlement of the judge *a quo* and a conception of case-by-case protection. In the first part — that of general and abstract settlement of non-seizability – the Court still oscillates in considering the minimum wage as the adequate and/or constitutionally imposed criterion for an abstract total non-seizability based on the protection of the dignity of the human being or to defend that this minimum criterion should be that of the guaranteed minimum income.

4. Obviously the third point – whether or not the issue of distinguishing the income according to its source (on the one hand income obtained from wages, on the other hand, income obtained in other forms) is relevant for the judgement of constitutionality – so as to, from the different source of income, draw consequences pertaining to the issue of seizability, is closely linked to the perception that the Court

has had of the actual conception of suitable shaping of the right to a minimum for a befitting existence. It is not by chance that the already mentioned judgement 657/06 that issues a judgement of constitutionality of the norm is relative to amounts received as wages.

III. 1. Let us now take a look at the situation in which the conflict of rights is not between the principle of human dignity, in the sphere of the right at a minimum for a befitting existence and the right to property within the sphere of credit rights but instead between the **right to human dignity** and rights within the scope of **maintenance obligations**.

Upon request to rule on the constitutionality of the imposition that the **entitlement of the right to survivor's pension**, in the case of a civil partnership, would depend on the evidence rendered by the living partner of the impossibility of obtaining maintenance from the estate of the deceased partner, the Court does not assess the norm as unconstitutional (Judgements 159/05, 614/05, 134/07). In fact these judgements raise the issue of the availability of material assets that can be essential for survival with a contiguous issue which is the constitutional legitimacy of dealing differently with the judicial institute of the marriage and the parafamily relationship of the civil partnership. When emphasis is given to this latter issue, the Court decides on constitutionality. However, when the need not to place excessive judicial obstacles to the right to a minimum for a befitting existence of the requesting party is viewed, the Court then decides on unconstitutionality (judgement 88/04).

2. Upon request to rule on a norm by the Act for the Protection of Minors that allows the deduction, for the provision of a **maintenance obligation for a minor**, of a portion of the invalidity pension of the parent, that will deprive the latter of the necessary income to meet his basic needs, the Court assesses it as unconstitutional (judgement 306/05). The Court considers that it is facing a conflict of rights where the same constitutional element is under analysis - the principle of human dignity (of the parent and of the child). As pertains the remaining minimum threshold to be assured to the debtor, the Court believes it should be the social integration income (which, at the time of this judgement had replaced the guaranteed minimum income).

IV. Let us now take a look at the third group where I have placed situations that do not fit in any of the categories already mentioned but which have in common the fact that the decisions aim at the protection of the same social right – the right to a minimum for a befitting existence – which we have been analysing.

1. Upon request to rule on the constitutionality of norms that foresee the **replacement of disciplinary sanctions** for inactivity, resignation and compulsory retirement, when applied to retired employees and agents, **for the sanction of loss of pension** for variable periods, the Court does not assess them as unconstitutional (judgements 442/06, 518/06, 28/07).

Here the conflict of rights appears between the right to a minimum for a befitting existence (if this minimum might be affected by the loss of pension) and the disciplinary authority of the State.

The Court decides on “jus puniendi” of the State in disciplinary matters and justifies this choice due to the need of not forfeiting the community value of the “functional discipline in the relation of public employment”. It invokes also an analogous line of reasoning taken from the existence of a sanction of dismissal. By doing this however, the Court does not consider that it is violating the right to a minimum for a befitting existence as it justifies that the legal system features mechanisms that aim at assuring survival with minimum dignity and so the fundamental principle of the dignity of the human being shall not be violated.

Nevertheless, judgement 28/07 features two dissenting opinions where the opposite theory is strongly asserted – that of the unconstitutionality of the norms that allow for the replacement of disciplinary sanctions applied to retired persons for the loss of pension – based on the principle of human dignity and on the principle of proportionality when a minimum of adequate subsistence is not safeguarded and on reasons pertaining to the constitutional limits of the disciplinary sanctions.

2. Upon request of the Ombudsman, within the scope of abstract *ex post facto* review on constitutionality and legality of the norm that established that a situation of retirement would be discontinued if Portuguese nationality was lost, when said nationality had been required for the party to carry on the functions that led to his retirement (judgement 72/02), the Court declared, with general mandatory force, the unconstitutionality of the norm.

The principle in force in the Portuguese Constitution as pertains the treatment to foreigners and stateless persons is the principle of assimilation of rights to national citizens, even though there might be some exceptions. The question here was in relation to retirement pertaining to functions that were an exception to the principle of assimilation and for which Portuguese nationality was required. The answer of the infra-constitutional legislation was that the situation of retirement would be discontinued if Portuguese nationality was lost. The Constitutional Court stated that the right to retirement is also a trait of the right to social security and which aims at assuring those who have ceased their active career, a humanly befitting life.

V. I would still like to mention a request for abstract prior review by the President of the Republic of Portugal as to the replacement of the regime of guaranteed minimum income by the social integration income (judgement 509/02).

In the first regime, the access was assured as of the age of 18 if all the respective conditions were met. In the social integration income, whose regime was in this judgement under observance of constitutionality, income would only be accessible as of the age of 25. The decision pronounced the unconstitutionality of the norm “due to the violation of the right to a minimum of befitting life inherent to the respect for human dignity”, a violation that was grounded on the violation of the principle of human dignity and on the right to social security and solidarity, from where it drew the recognition of the right to a minimum of befitting life. In fact, in spite of the request for abstract prior review supporting itself on the principle of non-reversibility of fundamental social rights or the prohibition to recede, the Constitutional Court viewed the unconstitutionality of the restriction of social benefit as an impairment of this *right to a minimum of befitting life*.

V. CONCLUSIONS

I believe that such a brief presentation may not have reached the target of containing enough elements for the conclusions that I will nevertheless attempt to draw.
Well aware of the not only objective but certainly also subjective limitations I will still endeavour to do so.

1. The Portuguese constitutional system features as its mainstay the principle of human dignity and comprises a vast range of fundamental protection rights and fundamental social rights.

2. The Constitutional Court is primarily responsible for respecting and imposing the respect for the constitutional principles and values within the fundamental rights and is primarily responsible for contributing towards the enforcement of said rights.

3. The Constitutional Court has endeavoured to recognise and enforce the social fundamental right to a minimum for a befitting life drawn from the principle of respect for human dignity and the right to social security and solidarity (sections 1 and 63 of the Constitution).

4. Even though the right to a minimum for a befitting life is consistently recognised by the Portuguese Constitutional Court, there have been some diverging and changing positions as to what shall be considered its essential core.

5. The enforcement of the right to a minimum for a befitting life occurred primarily in case-law pertaining to conflicts between the emerging right to a minimum for a befitting life and:
- the right to property /credit rights.
- family rights (maintenance).

6. Adhering to the recognition of the principle of non-reversibility or the prohibition to recede of social fundamental rights, whilst prohibition of recoiling, at least of the minimum of right which has been recognised, applied here to the minimum to a befitting existence, a binding force similar to that of the rights, freedoms and guarantees is to be recognised through the norm of the Portuguese Constitution that imposes the application of the regime of the latter to the “fundamental rights of analogous nature”.

FINAL NOTE

I recently read a newspaper article whose provocative title read: “The five impairments of the Constitution of April” (which is, as I believe many know the name given to the current Portuguese Constitution). The author, a professor from Lisbon, by using his undoubtable and respectable right to the freedom of expression, makes a rather shattering comment to the Portuguese Constitution that has become ill-struck by the “genetic-political impairments that question both its democratic scope and its feasibility”. According to the author, the third impairment is “the demagogy of the fundamental rights”. He reasons (I quote) that “the Constitution of April comprised – and comprises – the biggest, most penetrating and most extensive

catalogue of fundamental rights ever seen in human societies" and as the Constitution is aware of its own "stillborn nature", it is "an absolute third-world demagogy". Amongst the alleged "demagogic" rights that the author mentions, one can find various fundamental rights and amongst these, the right to social security. I hope I have through this very brief presentation contributed in some way to state the untruth of these affirmations. The judges of the Constitutional Court state on a daily basis and the citizens confirm that it is possible to pursue social justice by taking small steps along a path whose arrival point is still far from being reached. Similarly to the human person who has the right to free development of personality, the social fundamental rights also tend to transform and achieve its internal core.

Fundamental rights pertaining to social security, health, housing and urban planning, to environment and quality of life, to family, to fatherhood and motherhood, to youth, to citizens with disabilities, to senior citizens (using the list included in the Portuguese Constitution) integrate, each one in its own way, the right to a minimum of transposition for everyday life of the right to the protection of human dignity, or to be less philosophical, they render concrete a level of decency that societies should long to attain. Some levels of decency have already been attained but others are still far from such.

I am optimistic. It was once been decent to deny the right to vote to women and now it no longer is. Levels of respect for human dignity shall be attained and their evidence will be equally as clear as the latter are today.