



UNIVERSIDADE CATÓLICA PORTUGUESA

Social Rights in Post-Crises

A reflexion on the shortcomings of international social rights protection

Beatriz Isabel Monteiro Veloso

Master of Law

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Enjoy [...] the process of making a name for yourself.

Daniel Ricciardo

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Firstly, I would like to dedicate this thesis to my parents, without whom I would not have made this far. I owe them a huge thank you for the consistence presence, love, and support, for always listening to my doubts and appeals, and for continuously dreaming together with me. To my siblings, Laura, Carolina and Vitor for their understanding and empathy.

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Resumo

Os direitos sociais, como sejam o direito à educação, à saúde, à habitação e a um nível de vida adequado, são pilares fundamentais para garantir a dignidade humana e a igualdade nas sociedades modernas. Desempenhando um papel crucial na promoção da justiça social, na redução das desigualdades e proteção dos mais vulneráveis, tornam-se ainda mais relevantes em tempos de crise.

A comunidade internacional tem desempenhado um papel fundamental na promoção e proteção dos direitos sociais. Desde a adoção da Declaração Universal dos Direitos Humanos, em 1948, a criação de tratados como o Pacto Internacional sobre os Direitos Económicos, Sociais e Culturais, em 1966, a Carta Social Europeia e os vários Comités de controlo, são mecanismos indispensáveis para garantir que os Estados cumpram suas obrigações de proteger e promover esses direitos.

No entanto e apesar destes esforços, a proteção dos direitos sociais enfrenta desafios significativos, especialmente em tempos de crise. Atendendo à inerente necessidade de repor a ordem económica e financeira resultante desses períodos e à contra ponente obrigação dos Estado de garantirem a proteção dos direitos sociais, a presente dissertação visa compreender e analisar as razões pelas quais, apesar dos esforços conjuntos da comunidade internacional e dos Estados, é ainda tão difícil garantir uma plena realização destes direitos.

Palavras-Chave: Direitos Fundamentais; Direitos Sociais; Crises; Proteção Internacional; Dignidade Humana; Austeridade; Desigualdades Económicas.

Abstract

Social rights, such as the right to education, health, housing and an adequate standard of living, are fundamental pillars for guaranteeing human dignity and equality in modern societies. Playing a crucial role in promoting social justice, reducing inequalities and protecting the most vulnerable, they become even more relevant in times of crisis.

The international community has played a key role in promoting and protecting social rights. Since the adoption of the Universal Declaration of Human Rights in 1948, the creation of treaties such as the International Covenant on Economic, Social and Cultural Rights in 1966, the European Social Charter and the various monitoring Committees are indispensable mechanisms for ensuring that states fulfill their obligations to protect and promote these rights.

However, despite these efforts, the protection of social rights faces significant challenges, especially in times of crisis. Given the inherent need to restore the economic and financial order resulting from these periods and the countervailing obligation of states to guarantee the protection of social rights, this master thesis aims to understand and analyze the reasons why, despite the joint efforts of the international community and states, it is still so difficult to guarantee the full realization of these rights.

Key Words: Fundamental Rights; Social Rights; Crises; International Protection; Human Dignity; Austerity; Economic Inequalities.

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Abbreviations

CPR – Constitution of the Portuguese Republic

CFREU – Charter of Fundamental Rights of the European Union

ECHR – European Convention on Human Rights

ESC – European Social Charter

HR – Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic Social and Cultural Rights

NGO – Non-Governmental Organizations

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNICEF - United Nations Children's Fund

US – United States

Introduction

Rooted in historical philosophies, human rights have not just evolved but demonstrated remarkable resilience in the face of historical challenges, emerging as a cornerstone of modern democratic societies.

The atrocities of the Second World War sparked a global awakening to the need for protecting individual dignity and freedom. This led to a powerful global commitment in 1948, with the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly. This collective effort articulated a comprehensive spectrum of rights, establishing a universal standard for the dignity of all individuals.

Among these, social rights, including the right to education, health care, housing, and an adequate standard of living, are not just recognized, but increasingly seen as crucial for the realization of human dignity. The importance of social rights is underscored in the face of contemporary global challenges, such as economic inequality, political instability, and public health emergencies.

In a constant attempt to guarantee the protection of social rights against emerging challenges, the international community has made significant steps through various legal instruments and mechanisms. Examples were the adoption of the International Covenant on Economic, Social, and Cultural Rights and the subsequent creation of the respective United Nations Committee. On the European level, both the European Social Charter and the Charter of Fundamental Rights of the European Union.

Furthermore, along with various non-governmental organizations, these mechanisms have contributed to a growing recognition of social rights as essential to human development and societal progress. These organizations are crucial in mobilizing communities and holding governments accountable for their obligations.

However, despite this progress, the protection of social rights is filled with challenges and limitations. These crises disproportionately impact vulnerable populations, increasing marginalization and discrimination and creating environments where fundamental rights are systematically violated, aggravated by austerity measures.

This master thesis looks to understand why, despite all the efforts of cooperation between governments and the international community, it is still challenging to

guarantee effective protection of social rights in times of crisis. Divided into three central parts, it seeks to clarify the evolution and definition of the concept of “social rights” itself, to explore the correlation between crises and social rights and, by critically analyzing the frameworks in place for their protection, it seeks to identify key factors that influence the effectiveness of international and domestic protections.

Part I: Social rights: an International and Constitutional Perspective

1. Historical context

The concept of "human rights" is a product of the culture and human civilization that cross various spheres, comprising all the guarantees, powers, freedoms, institutions, and demands relative to basic needs, including all human beings by the simple fact of their human condition, guaranteeing a life lived with dignity and an integrated relationship between them, as individuals, and the society¹. Human rights were initially understood as "natural rights."² However, this perception has changed since World War II, and respect for human rights has become an international issue.

The definition and scope of social rights continue to be debated in the academic community. Questions about their limits, which rights they encompass, and whether they pose a threat to "first-generation rights" persist³. The modern history of social rights began in the labor movements of the 19th century, but only in the 20th century, after the asymmetrical effects of World War II, did the idea of social rights grow and start expanding and "constitutionalizing."

Nonetheless, this growing importance of social rights in modern constitutions has some regulatory consequences. Namely, it simplifies the complex debate between international and internal law and facilitates their application by national legal experts.

2. Human Dignity

The principle of "human dignity" arose with Kant⁴. In its moral imperative approaches, the author argued that any person treats another in the same way they would like to be treated and not as the circumstances, whether legal, political, or

¹ (Sanchez, 2000, pp. 142-145).

² (Meany, 2018).

³ Social rights, often referred to as "positive rights" or "second generation rights", necessitate active state intervention to ensure individuals can exercise them. This contrasts with "negative rights" or "first generation rights", such as civil and political rights, which require the state to abstain from infringing on individuals' freedoms. The following section will delve into this differentiation.

⁴ (Schwarz, Social rights as fundamental Human Rights: The absolute necessity for them and their guarantees, 2013, pp. 17-18).

economic, would dictate⁵. But it was in the Modern Era that has consolidated⁶. From this period onwards, man was seen as the main figure, and so human dignity derives from the condition of the human person⁷.

An essential point in the recognition of this right at the European level was the cases Holland and Omega, when the European Court of Justice recognized human dignity as a principle of European law and as a general principle of law, respectively.⁸

Even though at a European level, “dignity of the human person” and “human dignity” are referred as the same⁹, it is important to highlight the distinction that Jorge Miranda makes, seeing the first one as an expression of the singularity of the individual, and differently, “human dignity” as referring the person from a global point of view, related to humanity¹⁰. This idea of human dignity does not deny traditions, customs, national languages, and cultural geographies. Instead, it introduces the premise that there is no reason to continue to believe in the separation, distinction, classification, or ranking between human beings based on sex, race, religion, political or ideological convictions, and others¹¹. The ideal is thus intrinsically connected with the Rule of Law.

3. Rule of law vs Welfare state

The counterposition between the Rule of Law and the Social State started in the century XVIII, with the growing mention of fundamental rights in constitutions as a mechanism of defense against the state¹².

Following the Marxist-Leninist conception, “universal access” means liberation from class conflicts, so individual liberty should never go beyond the state. Some

⁵ *Ibidem*.

⁶ Oratio de hominis dignitate, by Giovanni Pico della Mirandola, was the first significant affirmation of the person's dignity. *Apud* (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015).

⁷ (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015)

⁸ (Kingdom of the Netherlands v European Parliament and Council of the European Union, 2001) and (Bundesverwaltungsgericht - Alemanha., 2004).

⁹ Namely on Article 1º ECFR and Article 2º TEU.

¹⁰ (Miranda, 1978) *Apud* (Botelho C. S., Os Direitos Sociais em tempos de crise: ou revisitar as normas programáticas, 2015).

¹¹ Regarding the “universal validity” of the concept of human dignity, see (Benda, 2000) *Apud* (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015).

¹² (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015).

authors further argue that individual rights only increase a society of elites, defending that social rights should entirely replace them.¹³.

Differently, the occidental humanistic approach defends that the basis of fundamental freedoms relies on human dignity, which is above the state. Even though its intervention may be necessary to regulate the guarantee of individual rights, the state should never constrain or interfere with it. Following John Locke and Adam Smith's liberal thesis¹⁴, by seeing liberty, security, and property as fundamental principles.

On the other hand, social rights emerge in the context of trying to reduce social inequalities¹⁵. Over time, and attending to necessities, these "first generation"¹⁶ rights were added the so-called "political participation rights"¹⁷ conceiving all citizens the right to participate in public institutional and political life, democratizing political power, and enhancing citizens' rights¹⁸.

The conversion to a social state started in century XX with the Mexican constitution and the Weimar constitution of 1919, aimed at satisfying economic, social and cultural welfare issues. Rapidly, countries like Greece, Spain and Portugal started to implement this "state intervention" model¹⁹.

The post-industrial revolution period, given the economic and social consequences, was times dominated by severe inequalities and discrimination. These problems raised the question of whether the common good was important to ensure a certain minimum

¹³ Lenin defined the issue in 1920: "As long as classes are not abolished, to speak of freedom and equality in general is [...] to defend the interests of the bourgeoisie. As long as classes are not abolished, any discussion of freedom and equality must raise the question: Freedom for which class? For what purpose? Equality between which classes? Under what concrete relations?". (Machete, 1978, pp. 35-35). *Apud* (Pinto, Sobre os Direitos Fundamentais de Educação: crítica ao monopólio estatal na rede escolar, 2009, pp. 93-94).

¹⁴ (Fontaine Campos, M.; Calvão, F. U.; Botelho, C. S., *Introdução ao Direito Público*, 2015, Coimbra: Almedina). *Apud* (Botelho C. S., *Os Direitos Sociais em Crise: ou revisitar as normas programáticas*, 2015, p. 91).

¹⁵ (Botelho C. , *Os direitos sociais num contexto de austeridade: um elogio fúnebre ao princípio da proibição do retrocesso social?*, 2015, p. 264).

¹⁶ Fundamental rights are considered "first generation" because they refer to the individuality inherent in the human person.

¹⁷ These include the universal right to suffrage, without restrictions; the general right to participate in political life; the right of access to public office, namely, to stand as a candidate for eligible political office; the right of association and free action by political parties; certain civil liberties, such as the freedoms of opinion, demonstration, and association, gain a new dimension through these guarantees of democratic political participation.

¹⁸ (Pinto, Sobre os Direitos Fundamentais de Educação: crítica ao monopólio estatal na rede escolar, 2008, p. 84).

¹⁹ (Botelho C. , *A história faz a Constituição ou a Constituição faz a história? – Reflexões sobre a história constitucional portuguesa (Does History Makes the Constitution or Does the Constitution Makes History? - Reflections on the Portuguese Constitutional History)*, 2013, pp. 229-247).

of well-being²⁰. Based on the premise of legally and formally guaranteeing the exercise of individual freedoms, social rights also promote the guarantee of minimum social conditions by ensuring human dignity is accessible to all without exclusion. So, these social rights, or third-generation rights, aim to provide individuals with conditions for exercising their individual freedoms.

Once recognized the importance of solidarity rights, both for the present and future generations²¹, they must not be seen as a threat to individuality but instead to maximize it²², and so, the importance of acting within personal needs and community possibilities to help the most vulnerable²³. Even though most social issues are resolved by the state nowadays, solidarity does not exist exclusively in the welfare state. These inter-help movements have always existed and followed the development of community and have been taken on by various civil society organizations, such as, in Portugal, the confraternities²⁴.

The argument for recognizing social rights as fundamental relies precisely on their indivisibility and interdependence with individual freedoms. This idea will be discussed in further detail later.

4. The Nature of Social Rights

Regarding the determination of social rights nature, the un-determinability makes its protection more complex at the national and international levels²⁵.

Social rights are not enshrined in many constitutions, so their applicability depends on legislative intervention. Therefore, some argue that they are not valid against the law, but on the contrary, they depend on the law to be valid.

²⁰ (Sánchez, 2008, pp. 43-71) *Apud* (Botelho C. , Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, pp. 94-101).

²¹ For an in-depth analysis referring the recognition of the importance of protecting future generations, (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, pp. 361-416).

²² Article 29(1) of the UDHR states, "Everyone has duties to the community in which alone the free and full development of his personality is possible."

²³ Emphasizes the importance of the link between the (prima face) constitutional obligation of social rights and the (normal) concrete indeterminacy of social benefits for their satisfaction, which is the competence of the ordinary legislator. (Vieira de Andrade, Os Direitos Fundamentais na Constituição Portuguesa de 1976, 2007). *Apud* (Pinto, Sobre os Direitos Fundamentais de Educação: crítica ao monopólio estatal na rede escolar, 2008).

²⁴ (Clemente, 2012). *Apud* (Botelho C. S., 40 Anos de Direitos Sociais: uma reflexão sobre os direitos fundamentais no século XXI, 2016).

²⁵ (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015).

Economic, social, and cultural rights differ from traditional first-generation fundamental rights. The latter tends to guarantee individual freedom, meaning that each person lives, thinks, decides, and acts freely and without state interference²⁶, the so-called negative rights; social rights, although the individual exercises them, impose a duty of action on the public authorities²⁷.

Although, in general, social rights are attributed to the obligation of *facere*, and rights of freedom are associated with *non facere*, the distinction based on this premise does not make sense anymore²⁸. Sometimes rights, freedoms, and guarantees can also require positive actions to guarantee their fulfillment. Social rights also imply negative obligations²⁹, as happens with the right to education and the state's obligation not to invalidate it³⁰. Then, admitting that all fundamental rights are “individual” as they are human rights and also “social” once they regulate the collective life³¹, the differentiation between positive and negative rights has been dissolved³².

Another association with social rights is their onerosity. Moreover, consequently, how its protections vary on states' economic and social realities. Even though some authors argue that social rights have an additional cost³³, it is believed that all fundamental rights involve some expense. To justify a better understanding of the cost of rights and freedoms when compared to social rights onerosity, it claims the primordial nature of the first ones³⁴.

²⁶ The ideal of the Hobesian Principle “*libertas silentium legis*” (freedom is the silence of the law). In this sense, the state's role is to protect the outer boundaries of the sphere of individual freedom, without entering it. To guarantee, through legal regulation and appropriate procedures, personal freedoms against third parties and also against the state's power, but without interfering in their core or their exercise by the holders. (Pinto, *Sobre os Direitos Fundamentais de Educação: crítica ao monopólio estatal na rede escolar*, 2008).

²⁷ (Manwaring, s.d.). *Apud* (Botelho C. S., *Os Direitos Sociais em Tempos de Crise: ou visitar as normas programáticas*, 2015, pp. 116-117)

²⁸ (Botelho C. S., *Os direitos sociais num contexto de austeridade: um elogio fúnebre ao princípio da proibição do retrocesso social?*, 2015).

²⁹ (Ucha, 1993). *Apud* (Botelho C. S., *Os Direitos Sociais em Tempos de Crise: ou visitar as normas programáticas*, 2015, p. 153).

³⁰ (Cançado Trindade, 2001, p. 153). *Apud Idem, ibidem*, p.120.

³¹ See note 28.

³² (Botelho C. S., *A proteção multinível dos direitos sociais: verticalidade gótica ou horizontalidade renascentista? – Do não impacto da Carta Social Europeia (Revista) na jurisprudência constitucional portuguesa*, 2017).

³³ In this regard, see the analysis of the position of Rui Medeiros. (Botelho C. S., *Os Direitos Sociais em Tempos de Crise: ou visitar as normas programáticas*, 2015).

³⁴ *Ibidem*, p.124.

Having recognized the onerosity of all rights, it is no less true that the effective protection of social rights, in their dependence on state actions, is directly dependent on state resources, which, in times of crisis, can be an extra challenge³⁵.

5. The Portuguese Constitution

The CPR offers a detailed and exhaustive list of fundamental rights compared to others³⁶, not letting any doubts about delimitations depend on the legislator's interpretation.

Regarding social rights, the CPR is also an example of exhaustiveness. Following Western democracies, the CPR presents distinguish regulations of “rights, freedoms and guarantees” and “economic, social and cultural rights”³⁷.

This differentiation is justified because those rights have different internal structures, objects, and functions³⁸. In Article 2, the final part, the Constitution recognizes social rights as fundamental to guaranteeing the practical conditions for exercising civil and political rights³⁹. Denying the thesis that individual and social rights are contradictory and other extremist approaches and not devaluing social rights, the Constitution recognizes the primacy of fundamental rights⁴⁰.

Disregarding the provisions of Article 17 CPR, some authors argue that social rights are merely programmatic⁴¹, so they are not directly applicable. In a more in-between approach, Catarina Santos Botelho defends that including Article 59 n°1 (a) of the CPR in the economic, social, and cultural rights catalog does not mean that all norms are programmatic. It does not sound reasonable nor juridically acceptable that the nature of one part of the norm implies a programmatic nature to all numbers⁴². Following this, the

³⁵ The issue of available resources is further developed later on.

³⁶ It is divided into three titles: "General principles," "Rights, freedoms and guarantees," and "Economic, social and cultural rights and duties."

³⁷ Throughout the rest of the report, "economic, social, and cultural rights" will be called "social rights."

³⁸ For a detailed explanation of the "unity of meaning of the system of fundamental rights" and "the double dimension of fundamental rights," subjective and objective, resulting from their constitutional enshrinement (Vieira de Andrade, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 2019, pp. 105-144).

³⁹ *Ibidem*, p.351-353.

⁴⁰ In this sense, see the analysis of Böckenförde doctrine (Campos Pinto, 2008, pp. 107-108).

⁴¹ (Thomashausen, 1976, pp. 1-14). *Apud* (Botelho C. S., *Os Direitos Sociais em Tempos de Crise: ou revisitando as normas programáticas*, 2015, p. 148).

⁴² (Botelho C. S., *Os Direitos Sociais em Tempos de Crise*, 2015, p. 148).

article mentioned can be given as a good example of the figure of fundamental rights analogous to rights, freedoms, and guarantees, to which the direct applicability regime of Article 17 is extended.

Others go even further and argue that as social rights norms enshrine genuine fundamental rights to individuals, they should be immediately enforceable as subjective rights⁴³, not distinguishing between them and rights and freedoms.

The Constitutional Court determined, on Decision n°39/84, that social rights "a) they are true and proper "constitutional impositions" and not mere "programmatic norms"; b) they prescribe concrete and defined constitutional tasks to the state and not vague and abstract lines of action; c) they constitute means of realizing fundamental rights", recognizing the constitutional duty to the legislator act to protect and promote social rights⁴⁴.

In the CPR, social rights are usually considered "provision rights", giving the legislator some liberty of action.

Part II: The Impact of Crises on Social Rights and International Protection

1. Introduction

Crises, whether economic, political, or social, have inevitable impacts on humans and the enjoyment of social rights⁴⁵.

The "cost of living crises"⁴⁶ are felt across the world, but with particular emphasis on vulnerable groups like minorities, migrants, women, or children⁴⁷. These groups,

⁴³ (Prata, 1982, p. 117). *Apud Idem, Ibidem*, p. 151.

⁴⁴ (Case 39/84, 1984).

⁴⁵ (Mammadova, 2020).

who already experienced lower levels of social rights enjoyment than other social classes, continue to be the most affected by the job losses, poverty, and economic and political inequalities that follow the global collapses⁴⁸. As the UN Special Rapporteur on Extreme Poverty and Human Rights stated, in 2009, "social-economic indicators show that the current global financial crises is having unparalleled negative consequences on the enjoyment of human rights for many people around the world, in particular for those living in situations of extreme poverty"⁴⁹.

2. Financial and economic crises

Within the context of the 2007 and 2008 crises, and according to the International Labour Organization⁵⁰, in the 51 countries analyzed, at least 20 million jobs were lost between October 2008 and the end of the following year⁵¹ and almost 43 million workers were at risk of exclusion from the labor market⁵². Moreover, even though the highest exponent of food prices was reached in June 2008, its effects were still being felt in the following months, with a total of 963 million people pushed into hungry⁵³. At the end of that year, and the next year, that number raised to 1.02 billion. On the housing market, the rising house rents⁵⁴, linked to the increasing unemployment, has led to a sharp increase in evictions because of non-payment of mortgages, foreclosures, and house seizures in many countries⁵⁵.

In October 2014, UNICEF showed a report that stated that in 23 of 41 of the world's most affluent countries, child poverty has increased by over 50%⁵⁶.

⁴⁶ Understood as the stark rise in prices of everyday goods and services during crises.

⁴⁷ On this, interview with Daniel Seymour, Director of Humanitarian Action and Crisis Response Office at UN Women, and Professor Radhika Balakrishnan, Professor of Economics and International Studies at Marymount Manhattan College, US. "The Global Economic Crisis through a Human Rights Lens". From <https://www.youtube.com/watch?v=d6vH9OexOIA>

⁴⁸ (Heltberg, Hossain, & Reva, 2012).

⁴⁹ (Carmona, 2010).

⁵⁰ (Verick & Islam, 2012).

⁵¹ *Ibidem*.

⁵² *Ibidem*.

⁵³ (World of work report 2009. The global jobs crisis, 2010).

⁵⁴ (Commissioner for Human Rights, 2013). Retrieved from <https://rm.coe.int/safeguarding-human-rights-in-times-of-economic-crisis-issue-paper-publ/1680908dfa>.

⁵⁵ *Ibidem*.

⁵⁶ (Europe: 2.6 million more children plunged into poverty in rich countries during Great Recession, 2014)

The way governments respond to the crises, namely through austerity measures⁵⁷ or excessive economic contraction can intensify the damage to social rights protection. As the Office of the UN High Commissioner for Human Rights emphasized, "austerity is now being applied for "pre-emptive reasons", meaning fiscal deficits are being reduced to avert negative reactions from financial markets⁵⁸. The example of Greece and how the cut of 20% between 2010 and 2011 on mental healthcare funding resulted in a "2.5 times increased prevalence of major depression, from 3.3% in 2008 to 8.2% in 2011" and "a 36% increase between 2009 and 2011 in the number of people attempting suicide"⁵⁹. Such scenarios threaten the right to life.

2.1. Inflation

Inflation is an economic term referring to the level at which the general price of goods and services is increasing and subsequently destroying purchasing power, measured by the Consumer Price Index and the Producer Price Index. When those Index are high, the value of money falls and people can buy less with the same amount of money. The causes of rising inflation depend on various factors, including rising production costs, higher energy prices and monetary policies. Consequently, a moderate inflation is usually a sign of a growing economy, but when it is too high or too low, it can be a sign of economic problems and can impact everything from personal savings to business investments and government policies.

The Committee on Economic Social and Cultural Rights has, on various occasions, commented on the dangers of worldwide inflation and the needs for the states to act to counter its impacts, namely by adjusting the minimum wage or increasing benefits⁶⁰, but most of the times, governments do not take sufficient measures to protect social rights and end up opting for austerity measures. The crises of 2007-2008 were a clarifying example. The housing market crash began with problems in the US housing market, but quickly grew into something much bigger and affected other countries

⁵⁷Generally, austerity measures fall into four types, each with its unique consequences for the enjoyment of human rights: a) public budget contractions affecting social spending, b) regressive taxation measures, c) labor market reforms, and d) structural reforms to pension plans. See note 54.

⁵⁸ (Report on austerity measures and economic and social rights, 2013).

⁵⁹ (Yannakourou, 2014).

⁶⁰ (Concluding observations on the fourth periodic report of Argentina, 2018).

around the globe. The period following this market crash was globally shaped by austerity, and its effects on social inequality were remarkable.

2.2. Austerity

By austerity is understood the economic policy implemented by governments, often adopted in periods of economic crises, aimed to reducing public budget deficits through spending cuts, tax increases, or a combination of to reestablish the fiscal imbalances.

The impact of austerity on social rights is multifaced and can be perceived times after the period of crise. Through cuts in essential social services, can diminish the quality and accessibility of these services, disproportionately affecting vulnerable populations who rely more heavily on public assistance, leading to social exclusion. It can also lead to changes in labor laws that favor flexibility over security, often at the expense of workers' rights. This can include easier conditions for dismissal, reduced bargaining power for trade unions and wage cuts, particularly in the public sector. For varied reasons, during crises, healthcare systems tend to be under stress. By reducing spending, the governments can aggravate the services available, which results in a higher mortality rate and a lower overall public health. Regarding the educational sector, the reduction of spending compromises the quality and access to education itself which will have long term consequences. Austerity measures, lead, most of the times, to widespread dissatisfaction, protests, and political instability, as affected populations respond to the perceived unfairness and impact of the cuts.

The debate and challenge around austerity rely between the necessity of fiscal measures to reassurance the economic stability and avoid worse economic outcomes and how it can be made without undermining social rights, equality and discrimination⁶¹.

As already referred, the impacts of the economic crises of 2007-2008 were felt worldwide, affecting eurozone countries, particularly those more vulnerable, as was the case of Portugal.

⁶¹ (Caetano, 2017).

To revive the economy, and like other European countries, the Portuguese government, has adopted economic stimulus⁶² which increased the public debt. This growing dependence on foreign credit and the, at the time, European crisis⁶³, increased the economic vulnerability of the country.

Unable to support the taxes of international markets, in 2011, the Portuguese government felt forced to ask for external intervention. On this context, signed the Troika Memorandum, constituted by the International Monetary Fund, the European Central Bank and the European Commission. The agreement stipulated the application of a financial assistance program in exchange for the implementation of severe austerity measures. To accomplish this sustainability and stabilization of the public finances, the government implemented drastic cuts in public spending, affecting areas such as civil servants' salaries, pensions and social benefits; promoted the relaxation of labour laws, an increase in working hours, a freeze on the minimum wage and measures that facilitated redundancies, and other reforms that included the privatization of state-owned companies and the liberalization of sectors such as energy and transport; structurally reorganized both the health and education systems, closing several institutions and reducing the number of workers⁶⁴.

These measures are controversial for both the economy and society. In the short term⁶⁵, austerity policies aggravated the economic recession, resulting in a contraction of PIB and an exponential increase in unemployment reaching around 17% in 2013; the higher taxes and lower disposable incomes had a negative impact on domestic consumption; the reduction in wages has largely impoverished the middle and lower classes; emigration rates, especially among young people, have risen dramatically. The poverty rate has increased, and social inequality has worsened⁶⁶.

On the other side, the budget deficit was gradually reduced, and labor market reforms increased the economy's flexibility. Troika argued that, despite those immediate

⁶²For an analysis of the various phases of the post-crisis economy in Portugal, (Caldas, 2013).

⁶³As a result of the impacts of the crisis period in Greece. (Nolan, 2015).

⁶⁴Analysis through <https://acervo.publico.pt/economia/memorando-da-troika-anotado>.

⁶⁵In this sense, the economist Carlos Farinha Rodrigues criticizes the inability to act effectively in the short term and how it compromised the community. (Santos, 2015).

⁶⁶*Ibidem*.

social challenges, those austerity measures were necessary for a more sustainable recovery in the long term⁶⁷.

The Troika's intervention in Portugal was a period of profound economic adjustment, marked by harsh austerity measures that had a significant impact on people's lives⁶⁸ which will be felt for generations.

2.3. Economic Inequalities

As already said and as the Committee on Economic, Social and Cultural Rights recognized multiple times, neither the inflation nor other austerity measures are felt equally, both in individuals and states⁶⁹. Often influenced by factors such as race, gender, ethnicity, educational background, or income values, it leads to inequalities.

This disparity can manifest in various forms, including differences in earnings, access to education, health care, and opportunities for social mobility. It has multiple consequences, affecting the overall economic health of a society by limiting growth potential and fostering social discontent.

3. Health crises

The Rohingya crisis escalated significantly in 2017 due to systematic violations against the Rohingya ethnic group in Myanmar, resulting in a large-scale exodus to Indonesia⁷⁰. Given its strategic location, the country became one of the main destinations for Rohingya refugees, and this, consequently, brings challenges as the legal and policy dilemmas in providing adequate protection for the ethnic group.

Despite not having a specific legal framework for the regulation of the statutes and rights of refugees once it did not ratify the 1951 Refugee Convention and the 1967

⁶⁷ See note 64.

⁶⁸ (Rodrigues & Adão e Silva, 2015).

⁶⁹ (Aaltonen, Legitimately Left Behind? The Power of ICESCR Obligations to Challenge State Responses in Economic Crises which Deepen Economic Inequality, 2023).

⁷⁰ (Salsabila & Riyadi, 2024).

Protocol, the Indonesian government has shown commitment⁷¹ to humanitarian principles, including the recognition of the non-refoulement⁷².

Notwithstanding those efforts, there are ongoing challenges in protecting Rohingya refugees from discrimination, xenophobia, and exploitation and guaranteeing them access to basic needs such as education or health services.

The biggest problems in this humanitarian crises are the legal and policy gaps and the need for a specific legal framework for refugees when comparing their national laws and international standards. As an effect of this lack, security considerations are a big issue in protecting these refugees. Most of the time, Indonesian policies prioritize security concerns over humanitarian needs, leading to prolonged detention and restricted movement for refugees, impeding their integration into society.⁷³

Some authors have pointed out the need for legal and policy reforms, such as the ratification of the 1951 Refugee Convention and the 1967 Protocol and a reform of its policies⁷⁴, emphasizing an international humanitarian approach by prioritizing the protection of refugee rights. In addition, enhance the coordination between the government and civil society organizations and encourage resource sharing and support from both governmental and non-governmental entities to enhance the delivery of essential services and reduce the impact of discrimination and xenophobia⁷⁵.

4. Environmental crises

Along with economic hardship and political instability, Afghanistan has a history of frequent natural disasters, including strong earthquakes, flash floods, and drought.

In June 2022, a powerful earthquake struck southeastern Afghanistan, resulting in over 1,000 deaths and 1,500 serious injuries⁷⁶. More recently, on October 7, 2023, a 6.3

⁷¹ Through various measures, such as providing humanitarian assistance and temporary shelter, facilitating resettlement to third countries, and enacting various laws and regulations. *Ibidem*.

⁷² *Ibidem*.

⁷³ Rohingya refugee children have difficulty accessing formal education, while adults have difficulty finding decent work. Access to health services is also limited, especially for refugees outside refugee camps. *Ibidem*.

⁷⁴ *Ibidem*.

⁷⁵ *Ibidem*.

⁷⁶ (Essar & al., 2024) from <https://journals.plos.org/globalpublichealth/article?id=10.1371/journal.pgph.000275>.

magnitude earthquake hit the western province of Herat, causing, according to reports, 1,482 fatalities and more than 2,000 injuries, including many women and children⁷⁷.

Over the last few years, Afghanistan has grappled with an endless cycle of crises and disasters, and there is little support and solidarity from the global community. With the withdrawal of the US, many NGOs halted their activities in Afghanistan due to political reasons and due to the Taliban's restrictions on women's movement and employment, which will have several negative impacts on the future economy of the country⁷⁸.

Afghanistan is one of the most at-risk countries of worsening humanitarian crises, with approximately 28.3 million people (70% of the population) currently in need of assistance⁷⁹ and 91% below the poverty line⁸⁰ and the ongoing natural disasters have been aggravating this scenario. As per the latest UN's Integrated Food Security Phase Classification (IPC) 2023 analysis, 17.2 million Afghans face high levels of food insecurity and were classified in Crisis or Emergency (IPC Phase 3 or 4) in April 2023⁸¹.

5. Political crises

The Syrian war, which began in 2011, is already considered one of the most devastating conflicts of the 21st century and has led to catastrophic humanitarian consequences. Over the past decade, the war has resulted in more than 500,000, and in 2024, approximately 6.7 million Syrians remain internally displaced within the country, while over 5.6 million have fled to neighboring countries and beyond, seeking refuge in Europe and other regions which represents one of the most significant refugee crises in modern history.

Based on the consequences that have been described so far, this crisis has various impacts on social rights. It has devastated the economy, leading to widespread

⁷⁷ *Ibidem.*

⁷⁸ *Ibidem.*

⁷⁹ *Ibidem.*

⁸⁰ *Ibidem.*

⁸¹ *Ibidem.*

unemployment and poverty. Because of that, many families have lost their sources of income and are struggling to access necessities such as food, water, and sanitation.

Starting with the right to health, although the conflict has led to a significant increase in preventable diseases, malnutrition, and maternal and child mortality, several hospitals and clinics have been targeted, and medical facilities have been destroyed or severely impaired, resulting in a severe shortage of medical supplies and healthcare professionals. Regarding education, schools have been damaged, and so many children have been forced to abandon their studies. These constant interruptions have long-term implications, such as limiting students' opportunities for personal development and contributing to a generation that may lack the skills and education needed to rebuild the country.

To sum up, the constant threat of violence, including bombings, chemical attacks, and ground assaults, has disrupted daily life and left countless civilians in precarious situations, spreading the use of indiscriminate violence has resulted in numerous human rights abuses, including extrajudicial killings, torture, and arbitrary detention.

6. International protection of Social Rights

As previously analyzed, human rights law significantly improved with the demystification of the hierarchy between rights and the subsequent development of the understanding of social rights and their connection with human dignity. The international community has been developing some mechanisms to guarantee the protection of these rights to an increasing level.

6.1. International law

6.1.1. UDHR and UN Charter

The Universal Declaration on Human Rights, approved by the UN General Assembly in 1948, was one of the first international diplomas to simultaneously verse

on rights and freedoms and social rights⁸². Also, the UN Charter, in the preamble, demands the promotion of "social progress" and, in its chapter IX, the responsibility of states in the "economic, social, cultural, educational, health and related fields."⁸³ marking the beginning of the international positivisation of social rights⁸⁴.

The idea of interdependence and indivisibility of human rights was recognized in 1968, on the Tehran Convention, that "the full realization of civil and political rights is impossible without the enjoyment of economic, social and cultural rights"⁸⁵. This understanding was reaffirmed in 1993 at the World Conference on Human Rights⁸⁶.

Nonetheless, these concepts are the subject of some doctrinal debate. Authors such as Friedrich A. Hayek argue they are "merely an exercise of rhetoric" from the UN.⁸⁷

6.1.2. ICESCR

Despite being mentioned, the distinction between social rights and others was only established in 1966 with the ICESCR, which divided economic, social, and cultural rights from civil and political ones. It is worth highlighting the main differences between International Covenant of Civil and Political Rights and ICESCR: while the first one is aimed at individuals, the ICESCR is addressed to states; the ICESCR recognizes that the fulfillment of obligations is limited by the available resources of the respective states, connecting to this obligation the progression clause⁸⁸. Both concepts have yet to be mentioned in ICCPR.

The ICESCR came into force in 1976 enshrining legally binding rights and recognizing three main principles: state responsibility, they are committed to adopt

⁸² (Leão, 2006, p. 45)

⁸³ Article 57 UN Charter.

⁸⁴ (Sub-Comission takes up economic, social and cultural rights, 2006).

⁸⁵ (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, p. 222)

⁸⁶ On I.5, the Vienna Declaration and Programme of Action states that "all human rights are universal, indivisible, interdependent, and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

⁸⁷ In this sense, José Melo Alexandrino argues that this idea is not "legally worked out" and that if social rights are not properly protected at the international level, governments cannot be expected to do so. (Alexandrino, 2011, p. 180). *Apud* see note 85.

⁸⁸ Refer to Article 2 (1) "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

measures listed in the diploma; prohibition of retrogression, in the sense of the reserve of possible, which obliges states to protect social rights attending the maximum available resources; and progressivity⁸⁹. Based on this, the national legislator assumes a relevant role on the matter in enforcing international regulations⁹⁰.

The doctrine is not uniform regarding the nature of the rights mentioned in the Covenant. Some authors refer to them as "legally insignificant."⁹¹ while others highlight their positive obligations to the state parties⁹².

6.2. European law

6.2.1. ECHR

Although the European Convention on Human Rights does not catalog social rights in its text, despite the mention of the prohibition of forced labor in Article 4 and the freedom of association in Article 11, which are classified by some doctrines as social rights, there seems to be a "communicability" with the Convention of Social Rights.⁹³ Emphasized by the mention of Strasburg jurisprudence and its interpretation in line with the principle of indivisibility⁹⁴.

While some doctrine refers to Strasburg as "fiction jurisprudence"⁹⁵, is important to highlight the social dimension which has progressively recognized the civil rights of the ECHR⁹⁶. In that sense, Strasburg has recognized multiple times the positive obligations that states are responsible for in situations where there is a "direct and immediate connection" between social rights and their effects on private lives and well-being⁹⁷.

⁸⁹Conclusions from (Carbonell, 2001, p. 221). *Apud* (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, p. 224).

⁹⁰(Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015).

⁹¹(W., 1978, p. 105). *Apud Idem, Ibidem*.

⁹²(van Hoof, 1984, p. 101). *Apud Idem. Ibidem*.

⁹³ See note 90. p.228.

⁹⁴*Ibidem*.

⁹⁵(Koch, 2006, pp. 408-409). Mentions how the Court is not entirely consistent in its approach by giving examples of cases in which the Court has abstained from giving an extensive interpretation that would bring economic and social rights within the scope of the Convention. *Apud Idem, Ibidem*. p.229.

⁹⁶(Daugareilh, 2001, p. 126). *Apud Idem, Ibidem*.

⁹⁷(Marckx v. Belgium , 1979). In this case, the Court ruled that the obligations of the state authorities were not merely negative but sometimes required action. The right to family life was specifically at stake despite having a primarily negative orientation, which not only imposes a duty of abstention on the state but also includes positive actions to guarantee this right.

Considering this, despite its jurisdiction limits, Strasbourg has shown that social rights are not "second-rate rights with the presumption of non-justiciability."⁹⁸

6.2.2. European Social Charter

The ESC, signed in 1961, is a European instrument that complements the ECHR on the protection of social rights, seen as a political move to guarantee some resilience in terms of fundamental rights⁹⁹.

The multiple constitutional models for the protection of social rights have shown that the ideological differences between states can sometimes be a barrier, given that while some parties recognize social protection, some are more reticent¹⁰⁰. The ESC, thus, establishes a "social development mandate"¹⁰¹, ensuring some social objectives directly applicable to nationals¹⁰².

To ensure the non-discrimination principle, in 1999¹⁰³, came into force the Revised European Social Charter, resulting from a combination of the original Social Charter and the Additional Protocol of 1995¹⁰⁴.

6.2.3. CFREU

As mentioned, some states do not recognize adequate protections for social rights. It was this lack of legislation that justified the cataloging in the Fundamental Charter¹⁰⁵. Divided into six chapters about the values of dignity, freedom, equality, solidarity,

⁹⁸ (Sudre, 2003, p. 760). *Apud* (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, p. 231).

⁹⁹ (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, pp. 231-232)

¹⁰⁰ *Ibidem*. p.232.

¹⁰¹ (Schambeck, 1969, p. 79). *Apud Idem, Ibidem*.

¹⁰² (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, p. 232).

¹⁰³ The ESC dates back to 1996 but only came into force after the necessary rectifications.

¹⁰⁴ The RESC was important to establish a system of collective complaints. The purpose of this mechanism was precisely to allow organizations to submit complaints and initiate a supervisory procedure. For a further analysis (Cullen, 2000, pp. 18-30). *Apud* (Botelho C. S., A Proteção Multinível dos Direitos Sociais: verticalidade gótica ou horizontalidade renascentista?- do não impacto da Carta Social Europeia (Revista) na Jurisprudência Constitucional Portuguesa, 2017, pp. 98-100).

¹⁰⁵ See note 102. p.239.

citizenship, and justice, its main goal was not the emergence of new rights but to ensure the already existing catalog of fundamental rights¹⁰⁶.

The adoption of the Charter of Fundamental Rights of the European Union brings notable differences to the Social Charter, referring to the wording of the rights and the possibility of limitation. On this view, some doctrine, such as Olivier Le Bot, recognizes that "this transition from the unity to the duality of catalogs is a source of legal uncertainty"¹⁰⁷ and it may result in some interference, namely in judicial decisions¹⁰⁸.

As already said, the CFREU did not take significant steps to recognize new social rights. However, it was essential to recognize the principle of indivisibility of fundamental rights, evidenced by the absence of differentiated cataloging of civil and political rights from economic, social, and cultural rights¹⁰⁹.

Regarding the issue of positive social rights, the Charter only mentions that their full effectiveness depends on legislative intervention. According to Article 51, the CFREU distinguished between rights and principles, determining that the first ones should be "respected," implying the duty of abstention, and the others "observed"¹¹⁰, requiring a positive action to make them operative and directly invocable¹¹¹.

Although the Charter intends to harmonize both rights and freedoms and social rights regimes, the fact that the last ones are dependent on the national legislator implementation, depending, in a certain way, on the political factor, calls into question their binding nature¹¹². In this regard, various authors called for the need to introduce mechanisms, like a European Social model¹¹³, to limit national disparities.

¹⁰⁶ (Botelho C. S., A Recepção Da Carta Dos Direitos Fundamentais Da União Europeia Na Ordem Jurídico-Constitucional Portuguesa: Uma Dinâmica Pro Unione Ou Pro Constitutione?, 2013) via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911109.

¹⁰⁷ (Le Bot, 2003, p. 787).

¹⁰⁸ *Ibidem*.

¹⁰⁹ (Pereira da Silva, 2001, pp. 148-149). *Apud* See note 106. p.325.

¹¹⁰ (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou visitar as normas programáticas, 2015, p. 248).

¹¹¹ See note 106. p.325.

¹¹² *Ibidem*, p.326.

¹¹³ (Smismans, 2005, pp. 217-240). *Apud* See note 110. p.250.

Part III: Limitations on the Protection of Social Rights

As the research explains, social rights and their protection have gained growing importance over time.

Various international conventions have been adopted to corroborate this continuous commitment. Reflecting the common effort between states and the international community, these texts highlight the need to guarantee a minimum level of social welfare for all.

However, particularly during crises, when the political, economic, and social spheres struggle with extra challenges, the integral protection of social rights faces certain limitations.

1. Social Rights as Programmatic Norms

Unlike first-generation rights, the definition of social rights in most constitutions is very imprecise, and so they are not directly applicable¹¹⁴. This un-determinability makes its protection more difficult both at the national and international levels¹¹⁵. Moreover, it leads some doctrines to argue that they are not self-executing against the law but depend on the law to be self-executing.

Consequently, its applicability depends on legislative intervention, obligating the state to take proactive measures such as creating policies, allocating resources, and actively providing services to ensure their fulfillment, which can become problematic in times of crisis.

This dependence on the moment's conjecture raises two main issues. On the one hand, governments see their available resources in times of crisis¹¹⁶. Decrease, and consequently, they are forced to make budget cuts or redirect funds, leading to the erosion of social services.

Another challenge of programmatic rights is the gap due to the implementation procedure. Since recognizing a right and its practical realization take time, all the planning, infrastructure development, and policy coordination take time. These long-

¹¹⁴ (Botelho C. S., *Os Direitos Sociais em Tempos de Crise*, 2015, p. 116)

¹¹⁵ *Ibidem.*, p.117.

¹¹⁶ The issue of the available resources will be considered below.

term plans compromise states' capacity to respond to social needs immediately¹¹⁷. Which has a bigger impact in times of crisis when vulnerable populations are disproportionately affected.

Lastly, not directly applicability, raises the issue of the justiciability of social rights. Justiciability means the ability of individuals to go to court to demand compliance or reparation for the state's violations of these rights. Well, by depending on the legislator's intervention, they also depend on state resources, administrative capacity, and political will, which could lead to a conflict about the principle of separation of powers¹¹⁸.

So, this programmatic nature simultaneously strengthens social rights in the sense that it acknowledges the need for state intervention to ensure that everyone enjoys basic standards of living and social welfare. But, at the same time, it heightens their vulnerability by being depended on such subjective matters as the available resources or the political ruling.

2. State Discretion

The integration of social rights into the constitutional and internal legal system of each country imposes obligations, both positive and negative, not only for the public authorities but to the individuals as well¹¹⁹.

As already known, international law plays an important role in ensuring the protection of social rights, in this sense, international conventions impose some general obligations to the states to ensure a "progressive realization" of social rights¹²⁰ and access to basic needs for all¹²¹. Acknowledges that the full realization of socio-

¹¹⁷ (Langford, 2008). *Apud* (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, p. 148).

¹¹⁸ For detailed reflection (Queiroz, 2010, pp. 44-47). *Apud Idem, Ibidem.*, p.125.

¹¹⁹ (Luño, 1999) on studying the German doctrine and jurisprudence on *Drittwirkung der Grundrechte* (exercise of fundamental rights towards third parties), holds: "In summary, what is involved is the application of fundamental rights, not only in relations between the state and its citizens, but also in the relations between private persons. *Apud* (Schwarz, Social Rights as Fundamental Human Rights: the absolute necessity for them and their guarantees, 2013).

¹²⁰ Article 2 ICESCR.

¹²¹ The states must either make a national action plan for the realization of the right or if it already has a comprehensive social security system in place, regularly review its consistency with the right to social security. Para.68, (UN. Committee on Economic, CESC General Comment N°19: The Right to Social Security, 2008).

economic rights requires time, particularly when resources are limited¹²², the ICESCR expects states to make progress "as expeditiously and effectively as possible"¹²³. Meaning that simply having a system is insufficient and states must show tangible improvements, by using the maximum resources available.

The concept "reverse of the possible" emerged in the German doctrine, to determine what individuals could reasonably require the state in its obligation to act¹²⁴. Nevertheless, the evolution of the concept was in the sense of pointing out the importance of the financial and, consequently, resources availability for this capacity of action¹²⁵.

Often, expenditures are evaluated about a country's gross domestic product¹²⁶. But this method has limitations, especially in crises, when the available resources are impacted, so its measuring becomes more difficult.

Inflation hinders the spending of most individuals, and this, together with reduced income due to stagnating wages or lost jobs, means that the state collects fewer taxes. However, to guarantee that states do not "hide" in this justification, the Committee ESCR highlighted how the protection of social rights and vulnerable groups gain rising importance during periods of economic and social conditionalities¹²⁷, as are the crises, and so, the simple "resource scarcity" is not reasoning for the disrespect of rights¹²⁸. Following this line, the Committee established the concept of "maximum available resources," including those currently under the state's control and those that can reasonably be obtained. As an example of these, Danilo Türk, a former UN Special Rapporteur, suggested progressive taxation policies¹²⁹.

However, attending, among others, to the principles of proportionality and rust protection¹³⁰, both ICESCR and the Committee are very neutral regarding such

¹²² (Aaltonen, Legitimately Left Behind? The Power of ICESCR Obligations to Challenge State Responses in Economic Crises which Deepen Economic Inequality, 2023).

¹²³ (UN. Committee on Economic, Draft general comment no. 9, The domestic application of the Covenant, 1998), Para.9.

¹²⁴ (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, p. 432).

¹²⁵ *Ibidem*.

¹²⁶ See note 122. p.16.

¹²⁷ See note 124. p.433-434.

¹²⁸ (King, 2007). *Apud Idem, Ibidem*.

¹²⁹ (Türk, 1992).

¹³⁰ The principle of proportionality allows states, particularly in crises, to adhere to resource restrictions and protect one right over another. However, it also works as a beacon once it requires that this lack of

decisions, considering that the last word on this distribution of available resources always belongs to the states.

By not specifying the measures states should take to implement the general obligation to protect social rights, the international community gives them some discretion in adjusting their actions. The different conjectures open the door to the subjectivity of approaches and justifications, making it more difficult to ensure states' compliance.

3. The Minimum

The minimum core content is an imperative obligation designed by the international community to ensure the minimum essential levels of each of the rights, particularly in times of crises, imposing to states a minimum core obligation, never in the sense of retrogression¹³¹.

This matter raises discussion on the doctrine. In Portugal, while Jose Carlos Vieira de Andrade has been receptive to this minimum core of social rights in specific situations¹³², others criticize the concept¹³³.

The question that arises is: What if the states cannot guarantee this minimum core? In these cases, the Committee responds that there will be a presumption of guilt, and the state will have to fully demonstrate that "it has made every effort to use the resources at its disposal to fulfill these minimum obligations as a matter of priority"¹³⁴. What makes the doctrine unfulfilled and reluctant about the effectiveness of this principle is the fact that the Committee does not establish objective criteria for a clear determination of noncompliance¹³⁵.

protection be necessary and appropriate and respects inviolable minimums. For further developments, consult (Botelho C. S., *Os Direitos Sociais em Tempos de Crise*, 2015, pp. 462-468)

¹³¹ (Economic and Social Council, 1990), Para.10.

¹³² The author recognizes the validity of this principle in situations of extreme injustice or necessity. (Vieira de Andrade, *Os Direitos Fundamentais da Constituição portuguesa de 1976*, 2007, p. 369). *Apud* (Botelho C. S., *Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas*, 2015, p. 324).

¹³³ For further analysis of positions against (Botelho C. S., *Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas*, 2015, pp. 324-326).

¹³⁴ See note 131.

¹³⁵ (Craven, 1998). *Apud* (Botelho C. S., *Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas*, 2015, p. 327).

Another issue regarding the minimum core relies on its determination. The international community has recognized the concept of a minimum decent existence at various times, namely, under article 25 UDHR, article 11 ICESCR, and article 34 (3) CFREU. In addition, some national systems deduced this concept as related to human dignity¹³⁶. In Portugal, a right to a minimum decent existence can be inferred from Article 1 of the Portuguese Constitution (principle of human dignity). Also, in Germany, from the combination of article 1(1) and article 20(1), the "essentiality theory" deduces the fundamental right to the guarantee of a minimum dignified existence¹³⁷.

Notwithstanding this association between the minimum decent existence and human dignity, some argue that the minimum core is not limited to this physiological condition and should also encompass the "sociocultural" reality¹³⁸. The concepts of "good" and "rights" do not always fill the exact needs. As Catarina Santos Botelho explains, a sense of incompleteness always exists regarding protecting fundamental rights¹³⁹.

As already shown, the resources are negatively affected in times of crisis. Consequently, states are obligated to stipulate priorities at the risk of not being able to protect all rights effectively. This abstention of specificity on the part of international agencies regarding the definition of "minimum obligations" and the doctrinal discussion regarding concretization of "minimum core" leaves its determination highly dependent on the legislator and consequently on each country's specific social and political context.¹⁴⁰

4. Progressive retrogression¹⁴¹?

The ICESCR recognizes non-retrogression as the prohibition of regressing from previously achieved human rights standards and social protections. This principle ensures that once social rights are recognized and protected, they cannot be diminished or removed without adequate justification. It becomes particularly important in times of

¹³⁶ (Rabre, 2001, pp. 22-23) *Apud Idem, Ibidem.*, p.333.

¹³⁷ The right to a minimum standard of living was first recognized by the administrative courts, in the footsteps of Otto Bachof, and then by the constitutional courts. *Ibidem.*, p.334.

¹³⁸ (Reis Novais, 2010, p. 195). *Apud Idem, Ibidem.*, p.336.

¹³⁹ *Ibidem.*, p.337.

¹⁴⁰ (Nolte, 2013). *Apud Idem, Ibidem.*

¹⁴¹ Christian Courtis distinguishes between retrogression of results, when the results of a public policy were worse when compared to the previous ones. And normative retrogression, when there is a reduction in aptitude of the rights granted by a norm. (Courtis, 2006, pp. 3-4). *Apud Idem, Ibidem.*, p.434.

crises because, during those periods, states tend to adopt measures to keep their budgets in line, which have negative implications on social rights¹⁴².

However, the discussion regarding the acceptance and understanding of this principle is not new¹⁴³. Moreover, Portugal is an example of this doctrinal division. It is often associated with other constitutional principles in Portugal, such as protection of legitimate expectations, non-discrimination or proportionality. The truth is that the prohibition of retrogression has never been properly presented from a dogmatic perspective. Even though there are authors against and in favor of this principle, a substantial part defends an intermediary adoption, accepting its invocation as a political principle and not as a constitutional principle¹⁴⁴.

The Portuguese constitutional jurisprudence, while having initially enforced the non-retrogression principle, has been limiting its application. In the Ruling 39/84¹⁴⁵, the Constitutional Court determined that "the state, obliged to act to satisfy the social right, once realized, is then obliged to refrain from taking action against that social right." In a posterior ruling, the Constitutional Court highlighted that "the legislator is not, as a rule, obliged to maintain the legal solutions it has adopted in the past"¹⁴⁶. Therefore, we can conclude that the Portuguese Constitutional Court does not recognize the prohibition of retrogression as an autonomous principle¹⁴⁷.

Taking into account these decisions and in agreement with Catarina Santos Botelho, in certain specific situations, when sufficiently substantiated, adequate, and proportional, it is possible to regress on social and political based measures- as it is the obligation of states to act in order to guarantee the protection of social rights- as long as it never threatens the human dignity¹⁴⁸. As the Author argues, the exacerbation of this principle could become a threat to a functioning democracy¹⁴⁹. In this sense, if it is not guaranteed space for adequate social rights to new generations, economic or social

¹⁴² (Aaltonen, Legitimately Left Behind? The Power of ICESCR Obligations to Challenge State Responses in Economic Crises which Deepen Economic Inequality, 2023, pp. 31-54).

¹⁴³ (Schutter, 2006, p. 406). *Apud* (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, p. 435).

¹⁴⁴ For a detailed analysis of the various doctrines (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, pp. 436-442)

¹⁴⁵ (Case 39/84, 1984).

¹⁴⁶ (Diário da República n.º 217/1991, 1991), Para.13.

¹⁴⁷ Associating it with violating the principle of the protection of trust or the minimum living standard. (Diário da República n.º 125/1992, 1992).

¹⁴⁸ (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, p. 444).

¹⁴⁹ *Ibidem.*, p.445.

panorama, limitations of resources, or other issues that may arise, the legislative power "is degraded to a mere function of executing the Constitution"¹⁵⁰. The Author, therefore, stands against the constitutionalization of this principle¹⁵¹. However, it is worth pointing out that this constitutional flexibility should not be misunderstood as "undefinition"¹⁵².

As mentioned above, the ICESCR obliges states to take positive measures to protect social rights even during crises. However, acknowledges that the full realization of socio-economic rights requires time, particularly when resources are limited, the ICESCR expects states to make progress "as expeditiously and effectively as possible"¹⁵³, adopting an "expanding"¹⁵⁴ approach even if immediate full realization is not possible¹⁵⁵.

Based on this premise, and despite excluding some situations, as is the case of the minimum core of rights¹⁵⁶ and when they are discriminatory or target vulnerable people¹⁵⁷, this ideal of progression enjoys some flexibility, meaning certain limitations on rights are allowed to promote the general welfare in a democratic society as long as they are well-justified¹⁵⁸. On this sense the Committee's General Comment N.3 on states obligations determines that "...any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."¹⁵⁹ From here, the Chairperson Letter of 2012¹⁶⁰ establish several criteria for the permission of retrogressive measures, namely their temporary measure, necessity, and proportionality, which cannot affect the minimum core of rights and nondiscrimination.

However, this balance, between flexibility on the one hand and the continuous protection of other principles and social rights, has faced criticism. Attending the fact

¹⁵⁰ (Häußling, 1997, p. 110). *Apud Idem, Ibidem.*, p.448.

¹⁵¹ See note 148.

¹⁵² (Vaz, 2013, p. 167). *Apud Idem, Ibidem.*, p.445.

¹⁵³ (Economic and Social Council, 1990), Para.9.

¹⁵⁴ See note 148. p.448.

¹⁵⁵ (Netherlands, 1987), Para.21.

¹⁵⁶ (UN Committee on Economic S. a., 2000), Para.48.

¹⁵⁷ (Human Rights Committee, 1989), Para.34.

¹⁵⁸ Article 2 (1) in articulation with Article 4 ICESCR. Allows limitations as long as they are "determined by law, compatible with the nature of the right in question, and for the purpose of promoting general welfare in a democratic society."

¹⁵⁹ See note 153.

¹⁶⁰ (Commission on the Limits of the Continental Shelf. Chair, 2012), Para.2.

that the Committee did not yet determine any inaction as a non-retrogression, given its reluctance to criticize structural policy decisions¹⁶¹, letting the “last word” to the states.

5. The Committees

To ensure the respect of the principles established by the ICESCR, the UN Committee on Economic, Social, and Cultural Rights, a non-judicial body, was created in 1985¹⁶². As the ICESCR, and differently from the HR Committee, the Committee on ESCR is not addressed to individuals¹⁶³. Instead, it plays a relevant role in controlling states' actions¹⁶⁴.

The Committee considers that "states must modify their domestic legal systems to the extent necessary to give effect to the obligations arising from the treaties to which they are parties."¹⁶⁵ From this is understood that insufficiency of recourses is not *per se* a justification and so the state must justify why has failed to promote social rights. This is because the Committee defends indivisibility and interdependence, and so, the protection of these rights is fundamental regarding guarantying the protection of the "most vulnerable and disadvantaged groups in society"¹⁶⁶.

The Committee also played an essential role in defining the distinction between "justiciability" and "immediate applicability" of social rights. The first refers to the possibility of enforcing the rights in court, and the other one to the option of courts basing their decisions directly and unconditionally on violating or fulfilling these rights¹⁶⁷.

¹⁶¹ (Aaltonen, Legitimately Left Behind? The Power of ICESCR Obligations to Challenge State Responses in Economic Crises which Deepen Economic Inequality, 2023).

¹⁶²The Committee is composed of eighteen members, who are presented by the States Parties and elected by the United Nations Economic and Social Council.

¹⁶³ Some authors pointed this as a clear sign that the protection of social rights was not taken as seriously as it is for individuals rights. (Costa, s.d., p. 148). *Apud* (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, p. 225).

¹⁶⁴ The first decision of the Committee, in 1999, was against Portugal. Result of a complaint lodged by the International Commission of Jurists, which argued that Portugal was not applying Article 7(1) of the CSE in a satisfactory manner. (International Commission of Jurists v. Portugal, 1999).

¹⁶⁵ (UN Committee on Economic S. a., 1998).

¹⁶⁶(Economic and Social Council, 1990), Para.12.

¹⁶⁷ (Botelho C. S., Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas, 2015, p. 248)

At the European level, also to reinforce the European Social Charter directrices, the Council of Europe created the Committee on Social Rights¹⁶⁸. However, its monitoring procedure¹⁶⁹ emphasizes its political nature rather than the legal¹⁷⁰. The Committee is based on a reporting system to control state progress. As stated in article 31 ESC, the parties must submit a new report every two years, which is subsequently analyzed by a sub-committee composed of a representative of these parties. Lastly, the minister's committee, considering the opinion of the Consultative Assembly, determines if there is a need for recommendations or not¹⁷¹.

Thus, many consider this control model ineffective¹⁷², doctrine continues to divide civil and political rights from social rights, characterizing the last ones as progressive.

Not dismissing the continuous efforts of these organisms to guarantee that states intend social rights protection, the truth is that its effectiveness is limited. Once its non-binding power, the Committees cannot impose sanctions, and this leaves up to the goodwill of states attend their recommendations.

Conclusion

Along this master thesis, the impact of crises on social rights and the limitations in ensuring their protection, highlighting the multifaceted challenges that arise in economic, political, and social crises, were examined.

Social rights, including the rights to education, health, housing, and an adequate standard of living, are essential components of human dignity. However, these rights are often the first to be compromised in times of crisis. As explored, the global financial crises of 2007-2008, the challenges of austerity measures, and the recent public health crises of COVID-19, among others, are examples of the fragility of social rights frameworks.

¹⁶⁸The Committee is composed of fifteen independent and impartial members who decide on the compliance of the actions of the states with the Charter.

¹⁶⁹States' obligations are supervised by a system of reports. For further details on this system (Botelho C. S., *Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas*, 2015).

¹⁷⁰(Churchill & Khaliq, 2007). *Apud Idem, Ibidem.*, p.233.

¹⁷¹Article 29 ESC.

¹⁷²(Maarzo, 2010, pp. 98-99). *Apud* (Botelho C. S., *Os Direitos Sociais em Tempos de Crise: ou revisitar as normas programáticas*, 2015, p. 234).

Throughout this text, it has always been emphasized the fundamental role of international and regional mechanisms in monitoring and enforcing social rights protections.

Bodies such as the UN Committee on Economic, Social and Cultural Rights and the European Social Charter's monitoring committees are crucial in holding states accountable. However, their non-binding nature and reliance on state cooperation often limit their effectiveness. This lack of enforceable sanctions and the dependence on voluntary state action remain significant obstacles to fully realizing social rights.

In addition, while the international legal framework recognizes the need for states to protect social rights even in difficult times, the flexibility in determining how to act often leads to delays. This tension between state discretion and the protection of social rights is a recurring theme, highlighting the difficulties in maintaining social protections during periods of instability.

In conclusion, protecting social rights is not just a legal obligation. It is also a moral imperative at the center of human dignity and social justice. As the world faces complex and unpredictable crises, social rights must be upheld and prioritized.

What is highlighted here is the urgent need for a more resilient and adaptable framework for protecting social rights, particularly in times of crisis. This includes the development of stronger legal frameworks that limit state discretion in reducing social protections during economic downturns and ensuring that social rights are treated as equal to civil and political rights in terms of their enforceability. Additionally, governments must be held accountable for their obligations to protect the most vulnerable populations.

This dissertation has sought to contribute to this ongoing dialogue, advocating for a more resilient and equitable approach to social rights protection in the face of global challenges.

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