"Constitucionalismo Dirigente" and Transformative Constitutionalism: Common Elements, Differences, and Methodological Challenges

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Abstract: This paper explores the key ideas behind the theories of Transformative Constitutionalism and the Directive Constitution, in an effort to find the missing link between the two intertwined models, the former being an evolution of the latter, somehow 'lost in translation.' The first section of the paper briefly describes the context within which each theoretical framework was first proposed, highlighting their (common) main characteristics: the view of the constitution as an instrument of change and their strong historical and sociocultural nature, as late examples of the so-called 'social state constitutionalism'. The subsequent sections provide more detailed accounts of the specific proposals by Karl Klare and J.J. Gomes Canotilho, the leading proponents of each model, with particular focus on legal interpretation and constitutional adjudication. The final part advances a reflection on the methodological implications and challenges of the two theories, highlights both their common elements and the aspects about which they diverge and offers some thoughts on their potential usefulness in the present.
Keywords: Directive Constitutionalism, Transformative Constitutionalism

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A. Introduction

In the realm of constitutional law, the concepts of *transformative constitutionalism* and *directive constitutionalism* ('Constitucionalismo Dirigente') have emerged as powerful frameworks to envision legal systems that aim to bring about social change and foster a more egalitarian society. Both theories share similar perspectives on the role of the constitution, the duties of the state, the importance of participation, and the need for a transformative legal culture.

The idea of social transformation and direction *through the constitution* seems difficult to grasp. It is usually met with scepticism and critics as the act of enshrining substantial, and not only procedural, commitments (other than fundamental rights) in constitutions is usually regarded as politically problematic, tendentially illiberal, and quite unreasonable, from a pragmatic point of view. The way in which constitutions become a legally binding

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instrument of political transformation is also not easy to define in abstract terms, in such a manner that allows us to mobilise it to better understand how that may occur in different scenarios (*i.e.* in different countries, historical periods, and/or institutional arrangements).

However, this vision of constitutions as something more than 'a road map of government' has been present in constitutional theory for more than a century, with an emphasis in continental Europe, but also in Latin America. German literature has been especially influential in this regard; it is certainly a less debated issue – although not unknown – in Anglo-Saxon literature, particularly in the context of global law.

In order to fully understand both transformative constitutionalism and the directive constitution, one must therefore acknowledge that they are theoretical proposals that lie far from the current dominant constitutional discourse, mainly concerned about institutions and procedures, in a seemingly ahistorical and apolitical way. These are frameworks developed within a specific context and, as such, historical and cultural products; nevertheless, as we will see later, they encompass a set of principles and legal tools that may be useful for legal reasoning in a more value-neutral way.

This paper explores the key ideas behind both theories in an effort to find the missing link between what I believe are two intertwined models, the former being an evolution of the latter, somehow 'lost in translation.' In part B, I will briefly describe the context within which each theoretical framework was first proposed, highlighting its (common) main characteristics: the view of the constitution as an instrument of change and its strong historical and sociocultural nature, as late examples of the so-called 'social state constitutionalism'. Parts C and D are more detailed accounts of the specific proposals of Klare and Canotilho, with an emphasis on more technical aspects, in particular, in the field of legal interpretation and constitutional adjudication. In part E, I advance a reflexion on the methodological implications of the two theories and seek to highlight both their common elements and the aspects about which they diverge. In addition, I signal the methodological challenges these approaches face and reflect on how they may be useful in the present.

B. Overview

Klare's seminal work on transformative constitutionalism[1] challenges classical liberal notions by emphasising a postliberal constitution that promotes social, redistributive, and caring values. The constitution becomes a vehicle for collective self-determination while also upholding individual self-determination: it is an instrument of deep social transformation, instrument of change, simultaneously enabled and incentivised by constitutional arrangements, from both an institutional and political point of view - with regard to the definition of the fundamental objectives or tasks of the state - and in what concerns fundamental rights.

1 *Karl E. Klare*, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights 14 (1998), p. 146.

The author sums it up in the following way:

> *'By transformative constitutionalism, I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (…) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise that induces large-scale social change through a non-violent political process grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase "reform," but something short of or different from "revolution" in any traditional sense of the word".*

Such a view was neither entirely new nor entirely theoretical. It had been explicitly stated by the South African Constitutional Court in previous years, during the period of the 1993 interim constitution, and also in the context of the 'final' Constitution of 1996. Former Chief Justice Pius Langa[2] has stated it in no uncertain terms:

> *'Both the Constitutional Court and other courts view the Constitution as transformative. The previous Chief Justice has written that a "commitment ... to transform our society ... lies at the heart of the new constitutional order". It is clear that the notion of transformation has played and will play a vital role in interpreting the Constitution.'*

Almost two decades before Klare, J. J. G. Canotilho[3] had developed the concept of *directive constitutionalism,* constructing a quite similar theoretical framework that revolves around the notion of a constitution that commands political powers, in order to establish a specific political, economic, and social project for a society. The author establishes an important distinction between the so-called *programmatic norms*, which essentially determine the goals or main tasks of the State in an abstract way, and *constitutional directives* ("imposições constitucionais"). Whereas the former are usually conceived as political statements, without any binding legal value, the latter are positive rules, aimed at all the powers of the State, but especially at the legislator, imposing concrete and material obligations. This has profound consequences, both methodological and in what regards the relationship between constitutional law and politics, which the author explains in the following way:

> *'The directive constitution establishes a decisive distance in what regards the view of politics as a normatively free and constitutionally detached domain: the legal and constitutional binding of political acts is not just done through the imposition of limits, but is truthfully of substantial nature and demands a constitutional ground.*

2 *Pius Langa*, Transformative Constitutionalism, Stellenbosch Law Review 17 (2006).

3 *José J. Gomes Canotilho*, Constituição Dirigente e Vinculação do Legislador - Contributo para a Compreensão das Normas Constitucionais Programáticas, Coimbra 1982 (1st Edition) and 2001 (2nd Edition). I will use the 1st Edition, as it corresponds to the original thesis. A 3rd Edition is forthcoming in 2024.

> *In this sense, the directive constitution does not replace politics, but it becomes a material premise of politics '.*

The focus on policy shaping and social transformation of both theories is a product of their space and time. They cannot be disconnected from the construction of a democratic and plural South Africa after apartheid, or from the sedimentation of the Portuguese democratic regime that emerged from the 1974 revolution, which affirmed itself as a break - with a socialist or social democratic tendency - in relation to the right-wing dictatorship of the previous half century. In this context, it is easy to understand that one of the main characteristics of these theories is precisely their *historicity* - they are theses developed with a specific political project in mind, shaped by a concrete constitutional text. Both assume this with clarity.

In this sense, directive and transformative constitutionalism regard constitutions as an historic, social, and cultural product that define what a society wants and what it does not want to be: its common values, its shared purposes, its institutions, the individual and collective rights it considers to be fundamental. In this view, constitutions are true social contracts, a touchstone for the development of each community, framing the political and legal options which, on the basis of it, become possible as alternative paths in a framework of pluralism. For this reason, each specific constitution cannot be a finished product, but an open and constantly evolving one.

Canotilho describes this well: If constitutions set the process for building democracy, realising fundamental rights, and safeguarding human dignity, what does that really mean? Is it only the process of *forming* a majority's *political will* that is relevant, or must we also enshrine the *processes* that will make it possible *to achieve constitutional goals* (such as ensuring the right to health, social security, education) in constitutional texts?[4] Every process, he explains, does not act in a vacuum of basic ideas or within a socio-institutional empty space:

> *'As J. RAWLS emphasises, procedural justice necessarily postulates a basic structure which includes a just political constitution and a fair design of economic and social institutions. (...) the directive constitution reflects the imbrication of a certain historical consciousness (debatable, it is accepted) and a certain consciousness of action. (...) Constitutional historicisation means however (and only) this - an awareness of action, through which people, in a given concrete situation, try to place themselves in the logic of that situation and shape the future towards which it points.'*

Klare also clearly expresses this idea and perfectly captures its hermeneutical and methodological implications, as well as the differences from liberal constitutionalism that this historicity implies:

4 *Gomes Canotilho*, note 3, pp. 455-456.

> *'South Africans have adopted a postliberal constitution, one that may plausibly be read not only as open to but committed to large-scale, egalitarian social transformation. As a legal matter, I think this is the best interpretation of the Constitution, but other readings are also plausible. As I will argue, determining what a constitution means can never be entirely separated from what one hopes and aspires for it to mean (...) The South African Constitution intends a not fully defined but nonetheless unmistakable departure from liberalism (as contemplated in classic documents such as the US Constitution) toward an 'empowered' model of democracy. As then Deputy President, now Chief Justice Mahomed wrote in Makwanyane, referring to the interim text:*
> *'The South African Constitution is different: it... represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring, and aspirationally egalitarian ethos, expressly articulated in the Constitution '.*

The effective realisation of the social and political aspirations characteristic of the historical moment, both of the Portuguese and of the South African constitutions, thus translated into the imperative of a profound transformation of the respective countries. For this reason, *change* is the second element common to both theories - at its root is a diagnosis concerning the need for structural and structuring change and an attempt to answer the question of what role constitutional law should play in such a process.

The change advocated by both authors is of a similar nature. Transformative constitutionalism and directive constitutionalism are based on identical fundamental principles, offering innovative perspectives on how legal systems can facilitate social change and address social inequalities. Both frameworks call for participatory governance, substantive equality, and historical self-consciousness. As societies move forward, these frameworks continue to evolve, guiding public powers and other policymakers, but also legal scholars and practitioners toward a more just and inclusive constitutional order.

In these terms, transformative constitutionalism and directive constitutionalism are two distinct, albeit similar, proposals that constitute relevant examples, at various levels, of the so-called 'constitutionalism of the welfare state', i.e., the constitutionalism that poured into constitutional texts the sociopolitical consensus born of the 'spirit of 1945'.

From the end of the Second World War onwards, and for the second half of the twentieth century, constitutional texts crystallised sociopolitical balances that functioned rather effectively within a cohesive space like the nation-state, especially during times of remarkable economic growth, such as the post-World War II era in Europe. This period of widespread prosperity led to significant upward social mobility, with fundamental rights becoming essential pillars of this progress. Many of these rights were based on the existence or establishment of public collective structures like schools, hospitals, and social services, which functioned relatively uniformly, providing a solid foundation for equal opportunities.

Moreover, meeting the basic needs of many for the first time in history granted an entire generation the freedom to forge their own life paths, irrespective of personal attributes such as social class, gender, or race. This favourable socioeconomic context significantly increased the likelihood of personal and professional success, allowing individuals to develop their capabilities. Furthermore, the prevalence of public services in critical aspects of life promoted social integration and cohesion. People from diverse social backgrounds and with distinct characteristics interacted in public spaces, fostering mutual understanding and playing a crucial role in collective decision-making. In this manner, the constitutions delineated a space for peaceful co-existence between various social sectors for a couple of decades, offering legal remedies for the challenges and political conflict arising from their interactions. The complexities of politics, space, time, and social diversity seemed to have been well managed within this framework.

Constitutional democracies seemed to manage pluralism quite effectively through this approach. On the one hand, a wide array of fundamental rights, applied universally within the nation's borders, ensured (at least apparently) equal treatment for all individuals, thereby reducing the significance of elements that were historically sources of discrimination. Simultaneously, this environment allowed for the acknowledgement and celebration of sociocultural and political distinctions within a realm of freedom. On the other hand, constitutional norms acted as a check on public powers, constraining different political choices resulting from shifting majorities to operate within the boundaries defined by the constitutional pact. As a result, social conflicts and dissent, natural in a diverse society, had to be resolved while respecting the preestablished limits and common objectives defined by the constitution. As F. Balaguer puts it:

> *'Legal rules are essentially mechanisms of social ordering, destined to pacify potential conflicts and to make legal security within the legal order, and peace within the society, possible. At the constitutional level, law is used to solve fundamental conflicts that would render co-existence impossible or extremely difficult, unless they are channelled through the normative Constitution. In the European post-war societies, these conflicts are articulated through a large social pact (the Social State under the rule of law), which was,*
> *simultaneously, a big democratic pact (Constitutional State)'.*[5]

What the Portuguese (in the 1970s) and South African (in the 1990s) constituent processes intended was precisely the resolution of their respective social conflicts through a constitutional pact, in the manner of 1945. The aim was to break with the past and create the political, socioeconomic, and institutional conditions for the accelerated development and democratisation of the respective countries. The constitution is thus seen, both in the

5 *Francisco Balaguer Callejón*, El final de una época dorada. Una reflexión sobre la crisis económica y el declive del Derecho constitucional nacional, in: Fernando Alves Correia/ Jónathas E. M. Machado / João Carlos Loureiro (eds.), Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho, Coimbra 2012, pp. 99-121.

framework of directive constitutionalism and in that of transformative constitutionalism, as the instrument for the defence of the fundamental political choices on which the new democracies are based. These choices clearly and openly depart from classical liberalism and are clearly *postliberal* in nature, to use Klare's expression.

Canotilho emphasises the importance of this constitutional consensus, seen as an agreement on the material foundations of the state, the principles according to which the acts of political power should be governed, and the goals to be pursued collectively:

> *'democratic constitutions, drafted democratically, presuppose a social reality that is plural, antagonistic and in tension, with the result that many of their norms (...) are a true compromise between the ideas, projects, programmes and interests of constitutional groups. (...) The constitution, in aspiring to become a global normative project (of the state and society), accepts, without harmony or reductive universalisms, the contradictions that exist in reality.'*[6]
>
> *Klare, on the other hand, spells out the substantial differences in the type of constitutionalism it supports from classical liberal constitutionalism:*
>
> *In support of a postliberal reading, one would highlight that the South African Constitution, in sharp contrast to the classical liberal documents, is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission. (...)*
>
> *The Constitution envisages equality across the existential space of the social world, not just within the legal process. Implicit is an understanding that foundational law is not and cannot be neutral with respect to the distribution of social and economic power and of opportunities for people to experience self-realization.*[7]

This vision of the function of the constitution, as a project of ordering of the political process, implies an articulation between politics and constitutional legality quite different from the traditional one. The various methodological consequences of both theoretical proposals analysed will be explored later, but it should be noted from the outset that one of the most relevant differences in relation to liberal constitutionalism is in the *hermeneutic* field, this being the third major common feature between directive constitutionalism and transformative constitutionalism. Klare admits this upfront[8], and is well aware of the obvious critics:

> *"The problem is that, within our legal culture, a traditional liberal view carries a presumptive imprimatur of being a 'legal' interpretation, whereas a postliberal reading appears to be a 'political,' that is, non-legal interpretation. From this starting point, the case for the postliberal reading never gets a fair hearing. But this framing of the issues is wrong, as I hope to show. Mainstream, traditionalist interpretations*

6 *Gomes Canotilho*, note 3, p. 141.

7 *Klare*, note 1, p. 153.

8 *Ibid*., p. 152.

> *are every bit as 'political' as the postliberal interpretation, and the latter is every bit as 'legal' an interpretation as mainstream exegesis."*

Within this framework, the main argumentative and dogmatic endeavour of both directive constitutionalism and transformative constitutionalism is to substantiate their material and hermeneutic choices. As has been said, in the following parts of this paper, I will give a more detailed account of the main premises and specific proposals of each of the theses at issue here, endeavouring to demonstrate the existence of a common thread, or evolution, between the two.

C. Directive Constitutionalism

Directive constitutionalism was first proposed in a book from 1982, written by J. J. Gomes Canotilho, a professor at the University of Coimbra, Portugal. It was the result of his Ph.D. research, partly done in Germany, under the supervision of Konrad Hesse. According to the Portuguese academic tradition, the influence of Germanic authors and theses on the proposal of directive constitutionalism is profound and varied. Impactful authors go back to Heller[9], Hesse[10], Häberle[11], Abendroth[12] or Lerche[13]. Italian influence was also relevant, with a focus on Crisafulli[14], from whom Canotilho first apprehended the idea of compulsory effectiveness of the constraints deriving from constitutional principles, to the legislative bodies.

It should also be remembered, as explained above, that this thesis appears in the aftermath of the Portuguese constituent process, which culminated in the approval of the democratic constitution of 1976 (CRP); the CRP is a dense text, through which fundamental options regarding the organisation and objectives of the State - of a socialist

9 *Hermann Heller*, Der Begriff des Gesetzes in der Reichsverfassung, Das Recht der freien Meinungsäußerung. Der Begriff des Gesetzes in der Reichsverfassung: Verhandlungen der Tagung der Vereinigung der Deutschen Staatsrechtslehrer zu München am 24. und 25. März 1927, Berlin / Boston 1966, pp. 98-110.

10 *Konrad Hesse*, Die normative Kraft der Verfassung, Tübingen 1959; Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, Heidelberg 1978.

11 Among other works by *Peter Häberle*, the main influences are: Allgemeine Staatslehre, demokratische Verfassungslehre oder Staatsrechtslehre?, Archiv des öffentlichen Rechts 98 (1973), pp. 119-134; Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und prozessualen 'Verfassungsinterpretation', Juristen Zeitung 30 (1975), pp. 297-305; Verfassung als öffentlicher Prozeß, Materialien zu einer Verfassungstheorie der offenen Gesellschaft, Schriften zum Öffentlichen Recht (SÖR) 353 (1978); Die Verfassung des Pluralismus. Studien zur Verfassungstheorie der offenen Gesellschaft, Athenäum 1980.

12 *Wolfgang Abendroth*, Antagonistische Gesellschaft und Politische Demokratie, Neuwied / Berlin 1972; Das Grundgesetz. Eine Einführung in seine politischen Probleme, Pfullingen 1978.

13 *Peter Lerche*, Übermaß und Verfassungsrecht: zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit, Cologne 1961.

14 *Vezio Crisafulli*, Efficacia delle norme costituzionali programmatiche, Rivista Trimestrale di Diritto Pubblico, Milan 1951.

or at least social-democratic nature - were constitutionalised, and a very extensive range of fundamental rights, including social rights as subjective and individual rights, were enshrined in the constitution. Canotilho's proposal intends to go beyond conventional constitutionalism, proposing new categories and a new methodological approach. Starting from the concept of constitutional impositions (concrete and permanent mandates towards the state's powers, especially the legislator), the author proposes new premises on the binding nature of the legislator in relation to fundamental rights, especially rights to benefits; a new understanding of the constitutional binding nature of the political direction of the action of the state's powers (a permanent political direction, as opposed to the political direction of the government, which is contingent and varies according to the majority); and a particular understanding of the prospective meaning of the directive constitution, seen as the institutionalisation, at the legal-constitutional level, of the fundamental criteria of the ideas of *common fairness* and *just politics*.

Let us delve deeper into the key principles that define the directive constitution and explore its potential to foster positive social change.

Firstly, Canotilho clearly explains that the guiding constitution must be understood within the framework of *a particular theory of the constitution*, which recognises the importance of the idea of the constitution as the fundamental, material, and open legal order of a community, along the lines of K. Hesse, without its necessary openness, as a condition of political pluralism, leading to the emptying of its material function.

In fact, the problem of the directive constitution is the problem of the extent of the state's tasks and the constitutional norms that shape them, calling for a postpositivist and normatively orientated methodology that leads to a concretisation of the constitutional objectives based on constitutional norms.

In this context, the question of constitutional binding of the democratic legislator and the problem of establishing boundaries for administrative discretion and freedom of conformation at the legislative level are particularly important. As the author puts it: "*Law, in the Democratic-Constitutional State, is not an act free of the constitution, but an activity positively and negatively determined by the fundamental law*"[15].

Secondly, it is worth mentioning that the proposal of directive constitutionalism is inseparable from a *substantive and material conception of equality*, as well as an understanding of economic, social and cultural rights as effective fundamental subjective rights.

This substantive conception of equality accompanies the thesis of the directive constitution, advocating for measures that address not only formal equality, but also the underlying structural and societal inequalities. By focussing on substantive equality, the directive constitution aims to bridge the gap between privileged and marginalised communities, ensuring that all citizens have equitable access to opportunities and resources; the directive constitution wants to ensure equality of opportunities through the legislator:

15 *Gomes Canotilho*, note 3, p. 479.

> *'the principle of equality, even when seen from a legal point of view, does not legitimise the function of state laws being understood as exclusively normative (...), limited to the equal treatment of the equal. The principle of equality's impetus function and directive nature implies that laws are a means of perfecting equality by eliminating factual inequalities.'*[16]

As for social rights, or any fundamental right to benefits, they are understood as subjective rights. They are not merely rights to be implemented through legislation, or only effective through the action of the legislator (when and where the latter decides). In fact, constitutional censure directed at the inactive legislator, who does not implement such rights through the law, is imposed in a manner equivalent to unlawful state interference in the spheres of freedom of citizens that are constitutionally protected. In short, at the core of the directive constitution lies the recognition that social rights are not mere abstract principles, but rather *effective* rights, entailing a duty for the state to take positive action. This perspective requires both the government and the legislative bodies to go beyond passively refraining from infringing on citizens' rights and actively engage in promoting the well-being and prosperity of all individuals.

Furthermore, as has already been realised, the *historically compromised nature* of the constitution constitutes a fundamental reading key for the theory of the directive constitution. The constitution is historical because so is human action - it is a manifestation of human theory and praxis and an instrument for guaranteeing fundamental rights that presupposes a concrete historical subject. The directive constitution acknowledges the weight of historical context, appreciating the impact of past injustices on current societal disparities. By embracing historical self-consciousness, the constitution aims to confront these injustices directly, seeking to rectify them through legal means. This forward-looking approach aims to promote healing, reconciliation, and inclusivity, creating a more equitable and cohesive society for future generations.

Along these lines, the theory of the directive constitution does not overlook another fundamental category: that of *consensus*. Constitutional consensus must be properly understood as the result of a process born out of conflict and dissent. Thus, insofar as the directive constitution understands the constitutional text as much more than a guarantee of the economic and social *status quo* or a simple instrument of government, it highlights the need for a genuine material compromise between the various social and political forces in a community. According to this view, the constitution must establish the fundamental principles and objectives of collective life, overcoming the liberal understanding of the functions of constitutional texts. It is impossible to completely prevent the divergences and contradictions present in the political, social, and economic spheres of each society; nevertheless, the directive constitution seeks compromise formulas that do not fail to propose unequivocal solutions for each area of common life that it regulates.

16 *Gomes Canotilho*, note 3, p. 484.

The directive constitution is based, as has been explained, on the premise that the realisation of constitutional requirements is achieved not only through legislation but also through the *political direction* and conformation imposed by the constitutional text on the action of all powers of the state. This political direction requires special attention to several aspects. Firstly, the procedural dimension inherent in realising constitutionally enshrined objectives and in guaranteeing the fundamental rights protected by the basic law. At this level, and given that procedural regulations are generally scarce in constitutional texts, the so-called institutional guarantees - institutions and mechanisms for guaranteeing certain fundamental rights enshrined and regulated in the constitution, such as the national health service or the social security system - are particularly important. Second, the idea of the political direction of the constitution also poses challenges in terms of constitutional interpretation and adjudication, which will be addressed in part E of this work.

Finally, and against this backdrop, it is worth emphasising the place of *democracy* and political pluralism within the framework of the theory of the directive constitution. Thus, the individualisation of a catalogue of relevant state objectives cannot derive autonomously and primarily from the political will of the government or parliamentary majority at any given time. Political pluralism does not necessarily require that the programmatic dimension of the constitution be reduced to a minimum. On the contrary, insistence on this idea often leads to the emptying of the constitution as a horizon of meaning for the life of a political community and to a merely formal rule of law.

The definition, at a constitutional level, of the state's aims and tasks presupposed by the theory of the directive constitution does not imply the elimination of a range of choices for each political majority, nor does it prevent the renewal of political programmes and choices or the confrontation between different party proposals. All of this simply has to take place within a space of constitutional conformity, as these are not pre- or extra-constitutional matters. In addition, the directive constitution also presupposes a space for democratic participation that goes beyond electoral acts. Recognising that significant social transformation cannot take place without the active involvement of all stakeholders, the constitution promotes citizen participation in different decision-making processes at various levels of government.

In conclusion, the theory of the directive constitution, as elaborated by Canotilho, offers a comprehensive framework for understanding the role and function of a constitution within a democratic society. It emphasises the importance of viewing the constitution as a living document that goes beyond mere legal norms and instead shapes the very essence of a community's legal order. Significantly different from traditional liberal constitutionalism, the theory of the directive constitution embodies a diverse theoretical and methodological approach, where the constitution actively shapes and guides the development of a just and equitable society, taking into account historical context, substantive equality, consensus-building, and democratic participation. In order to do so, it requires changes in the very understanding of what a constitution is about and also with regard to the traditional theses on constitutional interpretation and constitutional review. This thesis was influential in

Portugal and Spain, but especially in Brazil, where it was much discussed in the aftermath of the approval of the federal democratic constitution of 1988.

D. Transformative Constitutionalism

The story of transformative constitutionalism is better known in global academia, and therefore I will be brief.[17] K. Klare wrote his famous paper in 1998, exploring the relationship between constitutional content, (more so, between a very specific constitutional project, that of post-apartheid South Africa), and the traditional methodological guidelines regarding interpretation and constitutional adjudication, advocating for changes that would depart from the liberal and formalistic approach to constitutional law and practise.

Klare proposes several key principles, which lay the foundation for a different understanding both of *the Constitution* as the basis of the social contract of each concrete society and of *constitutionalism* as an instrument of progress and social change.

First of all, at the heart of transformative constitutionalism lies the understanding of the South African constitution as *postliberal*, embracing "*a vision of collective self-determination parallel to (not in place of) its strong vision of individual self-determination*"[18] At its centre, social rights shine, having been given constitutional status, and understood as means to achieve a more substantive level of equality. Effectively, transformative constitutionalism should aim for equality across the social world, not just within the legal process. Consequently, social rights are recognised as true *subjective* rights of every person, ensuring that all members of society have access to essential services and opportunities.

This conception of social rights inevitably leads to the consecration of *affirmative state duties* in the Constitution: it imposes legal obligations on the state to take proactive measures to address social inequalities and promote the well-being of its citizens. The state is necessarily a tool for social change, and that goal lies beyond the margin of appreciation of the legislator. Obviously, in a democratic and plural society, each contingent political majority is free to choose what it sees as a better path to achieve the constitutionally imposed results. However, it cannot decide to pursue different aspirations, at least if they are incompatible with the one enshrined in the constitution.

17 There is a considerable amount of literature on transformative constitutionalism in English. For an introduction to the subject, see, for example, *Marius Pieterse*, What do we mean when we talk about Transformative Constitutionalism?, Southern African Public Law 20 (2005), pp. 155-166; *Theunis Roux*, Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?, Stellenbosch Law Review 20 (2009), pp. 258-285; *Upendra Baxi et. al*., Transformative constitutionalism: comparing the apex courts of Brazil, India and South Africa, Pretoria 2013; *Armin von Bogdandy et al*., Transformative Constitutionalism in Latin America - The Emergence of a New Ius Commune, Oxford 2017; *Michaela Hailbronner*, Transformative Constitutionalism: Not Only in the Global South, The American Journal of Comparative Law 65 (2017), pp. 527-565.

18 *Klare*, note 1, p. 153.

Furthermore, the South African Constitution, as a *transformative* text, has a distinct *horizontal dimension*, as the social projects embedded in it have a distinct collective facet. As such, it advocates for horizontal relationships among various social actors, encouraging collaboration, and shared responsibility in addressing social challenges, as well as imposing obligations upon private parties in what regards certain aspects of fundamental rights.

An essential pillar of transformative constitutionalism is also the importance given to the idea of *participation* in all levels of government and forms of governance. Understandably, the common purpose of an inclusive society, through social rights and substantive equality, cannot be achieved without the participation of citizens in decision-making processes. This democratic aspect of transformative constitutionalism is key to its future usefulness, as it ensures democratic legitimacy and responsiveness.

Finally, transformative constitutionalism is not a contextually blind theoretical proposal. On the contrary, it is of utmost importance that each concrete application of the framework takes into account the specific necessities brought by the distinct features of social pluralism and multiculturalism at every time and space. Acknowledging and protecting the diversity of cultures within a society is crucial to creating an inclusive and just constitutional order that demands historical self-consciousness, in order to raise awareness of historical injustices and seek to redress past wrongs through legal mechanisms and policies.

In this context, the main proposals of transformative constitutionalism lie at the methodological level, particularly with regard to constitutional interpretation and adjudication. Klare advocates the reimagining of the judicial role, in a manner that avoids the "*great weakness*" of traditional legal theory of "*insisting too sharply on a separation between law and politics and between professionally constrained legal practises and strategic pursuit of political and moral projects"*[19].

Therefore, this new transformative adjudication suggested by the author demands that judges move beyond conventional legal analysis and take into account the broader political and moral convictions that underpin their decisions. This approach acknowledges that law and politics are interconnected and that legal decisions can have significant social impacts; it also goes beyond the mere application of existing laws and norms and urges judges to advance the principles of justice and progress in their decisions. As Klare puts it:

> *'Judges - and the advocates, academics and parties who influence their thinking - make value-laden choices in the routine course of legal interpretation. They are responsible for the social and distributive consequences that result from these choices, and should be judged accordingly. If this is right, then there is nothing legal practitioners can do but acknowledge their political and moral responsibility in adjudication and share the secret with their publics in the interests of transparency.'*[20]

19 *Klare*, note 1, p. 159.

20 *Ibid*., p. 164.

As such, the need for a new understanding of the role of judges becomes evident. They are expected to interpret the Constitution in light of its transformative goals, even if it requires departing from previous legal interpretations. This approach empowers judges to uphold constitutional principles and values, even if it means redefining legal constraints and considering external moral and social values. By embracing this reimagined role, judges become active participants in shaping societal development and ensuring the advancement of constitutional objectives.

This methodological reconfiguration culminates in the imperative of a transformative legal culture. In fact, for transformative constitutionalism to take root and flourish, a transformative legal culture must be nurtured within the legal profession and judiciary. This entails a fundamental change in legal thinking and practise, highlighting the importance of constitutional principles, values, and directives. Legal professionals need to adopt a holistic approach to the law, recognising the normative value of all constitutional rules and principles, rather than viewing the Constitution as a mere technical document. The development of a transformative legal culture also emphasises the role of constitutional courts in interpreting and applying constitutional norms. These courts are seen as guardians of the transformative vision, responsible for upholding the Constitution's transformative goals and promoting societal progress.

In summary, transformative constitutionalism, as exemplified in the South African context, represents a profound shift in the understanding and proposed practise of constitutional law. At its core, it envisions a constitution that goes beyond protecting individual rights to actively promoting substantive equality and collective self-determination, where social rights take centre stage, imposing affirmative duties on the state to address social inequalities and enhance the well-being of all citizens. Ultimately, though, the success of transformative constitutionalism hinges on the development of a transformative legal culture within the legal profession and judiciary, and a less formalistic and substantially committed methodological approach. In the author's own words, "*the burden of my argument is that law and legal practises can be a foundation of democratic and responsive social transformation, but that this requires us to evolve an updated, politicized account of the rule of law*"[21].

This theory also had a significant impact, and transformative constitutionalism came to assert itself as a new paradigm of constitutionalism. From the specific South African context, the proposal spread to the Global South, serving as a conceptual framework for analysing constitutional practise - especially the practise of constitutional adjudication, therefore focussing on the judiciary - from India to Latin America, with an emphasis on countries such as Colombia and Brazil.

21 *Klare*, note 1, p. 188.

E. Methodological Challenges and the 'Hidden Link' Between the Directive Constitution and Transformative Constitutionalism

Having reached this point, it is now easier to understand what elements are common to the two theses analysed and identify the moment where their paths differ. Directive constitutionalism seems to be a precursor or forefather of transformative constitutionalism: Both theories share an understanding of the constitution as much more than an instrument of government or the guarantee of the economic and social *status quo*. The constitution is, therefore, the container of a shared political, economic, and social project that is, in its origin, primarily counter-factual, but aims at being progressively accomplished and institutionalised. The purpose of a directive constitution is to achieve deep social change through law, engaging all the state's organs in this task. The deeply political nature of these goals is not denied in any of the approaches, and the methodological consequences both Canotilho and Klare derive from them are simultaneously one of their most important common elements but also their point of divergence. Both authors recognise the need for *methodological changes* in *constitutional interpretation* and *judicial review of constitutionality*. Both also advocate a greater awareness of the political dimension of these tasks and their subordination to the concrete political project enshrined in the constitution. Furthermore, both theories presuppose the legal effectiveness of constitutional norms that enshrine social and economic rights or other forms of combating inequality and promoting a specific constitutional consensus around an idea of justice.

Naturally, as has already been explained, the practical realisation of the transformative dimension of a constitutional text requires respect for the framework of possibilities and political choices outlined by the constitution. This entails a reduction in the space for discretion and free action by state bodies, starting with the legislature. Also, it further implies an expansion of the possibilities for review of such acts by the judiciary, which must assess whether or not and in what way each legislative measure contributes to the realisation of constitutional objectives.

However, insofar as these objectives are intensely political, directive constitutionalism elects *the legislator* as its main recipient, its primary actor. It explores the consequences of the premises it sets forth in what regards legislative acts, their limits and possibilities, their interpretation, and their intricate relationship with the constitution. Of course, this cannot be completely disconnected from the problem of constitutional review of constitutionality, where several questions on the competences of the judiciary certainly arise. Still, the focus of this thesis lies in legislation and the legislator.

Transformative constitutionalism, on the other hand, clearly focusses on courts and the role of *judges*. Klare advocates for a postliberal method of constitutional interpretation that is transparent but politically engaged, according to which all lawyers, but primarily judges, should face the reading of the constitution in the light of their duty to promote the goals it enshrines. This focus on courts became prevalent in the last decades, not only in the

common law world, where this could easily be expected, but also in countries of continental law tradition, who were well familiar with the other approach, such as Brazil.

However, both theories face fierce political resistance. On the one hand, implementing a model of constitutionalism that advocates social transformation through law often faces political resistance from those who may perceive it as embodying a political project they do not agree with or a threat to existing power structures. Therefore, it requires a change in societal attitudes and a willingness to challenge established inequalities. Overcoming this resistance requires advocacy, public awareness, and building a broad-based consensus on shared concepts of social justice and equality. On the other hand, resistance also comes from those who do not necessarily object to a 'transformative constitutional agenda', but to the methodological changes it entails, as they are seen as rigorous and scientific, less predictable and uniform than traditional methods of interpretation and adjudication. In this sense, I believe that a deeper reflexion is needed on the distinction between a *transformative constitution* and *transformative constitutionalism* or between a *directive constitution* and *directive constitutionalism*. The objections to the transformative nature of a constitutional text can only be predominantly political. However, resistance to a constitutional practise that promotes social transformation through the law can have purely methodological foundations, given the perception of its effectiveness and the risks it entails. The question is, therefore, whether transformative or directive *constitutionalisms*, understood as the set of conceptual instruments, mechanisms, and practises of constitutional interpretation and adjudication described above, are preferable to a more traditional method, or at least have some qualitative advantage that can be incorporated into it.

In this regard, T. Khaitan has made an interesting proposal, advancing the concept of 'directive principles', which he defines as '*expressive constitutional directives primarily addressed to political organs of the state to programmatically secure certain social, political or economic goals of 'transformative' character'*.[22] He also highlights some key features of these principles – they are *constitutional, directive, addressed to the political organs of the state, programmatic and transformative* – in order to describe how they work, as tools in the service of change – taken in a *literal and value neutral sense* – envisioned by a constitutional text. Khaitan's contribution not only seems to me to achieve a successful synthesis of some of the fundamental elements of directive constitutionalism and transformative constitutionalism, but also constitutes an interesting answer to the question of whether there is added value in such methodological proposals. By rehearsing a dogmatic proposal with greater value and political neutrality, the author shows what can be added to the traditional method based on the idea of constitutional transformation.

The distinction between the transformative dimension of constitutional texts and that of the instruments and mechanisms of constitutionalism that serve them is also important

22 *Tarunabh Khaitan*, Directive principles and the expressive accommodation of ideological dissenters, I•CON 16 (2018). Also, by the same author, Constitutional Directives: Morally-Committed Political Constitutionalism, Modern Law Review 82 (2019).

to clarify another aspect: a constitution that is socially committed and desires to promote political, social, and economic change is of little use without a constitutionalism and a constitutional practise to accompany it. However, the impression of dogmatic rigour and an ideologically neutral dimension to such mechanisms and practises has several advantages. Firstly, it makes it possible to understand such methodological instruments without overdependence on their specific historical and political contexts, which lends them greater rigour on an academic level and extends the boundaries of the debate about them into the global arena. Second, and of particular importance in what concerns the judiciary, it allows for the replication of reasoning processes that promote formal equality and legal certainty, dimensions that should not be totally postponed in the name of a transformative possibility. However, more thought must be given to the risks of mobilising the instruments of directive and transformative constitutionalism when it comes to promoting social changes that involve a reversal of the progress made thus far. This is indeed a challenge that the two theses presented need to respond to: how to react to the possibility of using their theoretical, conceptual, and practical framework to promote a transformation that is conservative and unequal.

Another implication of both theses is the need for institutional changes. The successful implementation of transformative constitutionalism requires strong institutional capacity within the judiciary, the legislature, and other state organs. All of them need to embrace a clear understanding of the specific constitutional consensus (and the dissent from which it was generated), as well as of their role in guaranteeing such a project. Basically, both directive and transformative constitutionalism presuppose a *will of constitution* (Hesse) by public office holders, without which the defence of their respective political-constitutional project becomes very difficult. Building such institutional capacity involves different actions and dimensions, such as training judges and legal professionals, promoting constitutional literacy among citizens, and establishing mechanisms for meaningful citizen participation in decision-making processes.

Finally, the greatest political and methodological challenge common to directive and transformative constitutionalism comes from supranational integration spheres. In an era of increasing supranational integration and globalised governance, reconciling transformative political projects at the nation-state level with liberalising agendas and global economic and political forces is a daunting task. Navigating the delicate balance between striving for profound social transformation and equal opportunities and accommodating the demands of neoliberal constitutionalism demands a cautious approach, involving strategic articulation of both domestic and global objectives. In fact, the greatest difficulty of such proposals in the near future will lie, on the one hand, in demonstrating the profound substantial contradictions between competing political-constitutional projects in the same space and time. On the other hand, it will be necessary to find methodological solutions to support the prevalence of transformative constitutional agendas, without which change in an egalitarian and empowering sense resulting from national consensus risks being postponed in favour of international political agreements.

F. Conclusions

Transformative and directive constitutionalism, as articulated by Karl E. Klare and J. J. G. Canotilho, offer powerful frameworks for reimagining constitutional law and promoting social change. The two theories seem to have a common link, although they differ in terms of the main state actor they are addressing (the judiciary or the legislator). Both underscore the constitution as a vessel for a consensus around political, economic, and social aspirations, aimed at progressive realisation. The shared recognition of the need for methodological evolution in constitutional interpretation and judicial review is therefore a crucial common ground.

Despite their potential to drive profound social change, both theses face shared methodological challenges; the implementation of transformative and directive constitutionalism requires overcoming political resistance, defining more precisely the set of mechanisms and interpretative elements that they articulate, building institutional capacity to implement it, and navigating complex supranational challenges. However, by emphasising substantive equality, participatory governance, and historical self-consciousness, these frameworks provide a roadmap for building more inclusive and just societies. Despite the difficulties and shortcomings that may be faced, both theses, and above all their common elements, are a good starting point to think about the essential evolution of the constitutional practise in the near future.