

## SYMPOSIUM

## The *Directive Constitution* in the Varieties of Constitutionalism: An Introduction

By *Michael Riegner\**

**Abstract:** This overview article introduces the special issue on “The *Directive Constitution* in the varieties of constitutionalism”, which revisits debates on the *constituição dirigente* in Portugal and Brazil, analyses the genealogy, substance and evolution of the concept, and compares it to its Anglophone sibling transformative constitutionalism. The article argues that studying directive constitutionalism makes important contributions to comparative constitutional scholarship, especially to debates on constitutional typology and non-liberal varieties of constitutionalism, to the literature on constitutional transfers and the political economy of legal knowledge, and to normative critiques of non-liberal varieties of constitutionalism in the face of democratic decline and authoritarian challenges.

**Keywords:** Varieties of Constitutionalism; Directive Constitution; Comparative Constitutional Law; Brazil; Portugal; Transformative Constitutionalism

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### A. Lost in Translation: The Directive Constitution in Comparative Constitutional Law

In 1982, Portuguese constitutional scholar José Joaquim Gomes Canotilho first published his theory of the *constituição dirigente*<sup>1</sup>, or “directive constitution”, which soon became one of the most influential constitutional theories in the Lusophone world. Well before English-speaking comparative lawyers took an interest in social rights and “transformative constitutionalism”, Canotilho already argued that Portugal’s post-authoritarian constitution embodied a new type of constitutionalism. This new constitutionalism not only limited public authority through civil rights, separation of powers and judicial review, but also *directed* all branches of government towards structural social change. This “directiveness” was most obvious in constitutional provisions imposing positive obligations for state action,

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1 *José Joaquim Gomes Canotilho*, *Constituição Dirigente e Vinculação do Legislador*, Coimbra, 1982. A second, revised edition was published in 2001, and a third edition is forthcoming in 2024.

in enforceable social rights, in institutional guarantees of a national health service or a social security system. But even beyond that, the directive spirit pervaded the entire system of the constitution, guided its implementation and interpretation, furnished the underlying ethos and normative theory for the progressive constitutional project that the 1974 Carnation Revolution against the authoritarian *Estado Novo* had enshrined in the new constitution of 1976.

Canotilho's theory of the directive constitution not only shaped constitutional theory, doctrine and practice in Portugal, but also influenced the drafters of the Brazilian constitution of 1988 and subsequent constitutional debates in Brazil and other Lusophone countries. These debates touched on many of the themes that gained attention in English-speaking comparative constitutional law during the 1990s and became associated with the concept of transformative constitutionalism in the 2000s, popularised by Karl Klare's seminal article on South Africa's post-apartheid constitution.<sup>2</sup> Despite these parallels, however, the insightful Lusophone debate on directive constitutionalism has been lost in translation for global debates in comparative constitutionalism.

Hence, this overview article, and the special issue that it introduces, revisit the debates on the *constituição dirigente* in Portugal and Brazil, analyse the genealogy, substance and evolution of the concept, and compare it to its Anglophone sibling transformative constitutionalism. After this introduction, six authors from Portugal, Brazil and South Africa take on different aspects of the debate: Mariana Canotilho explores key elements of the directive constitution and argues that it can be conceived as a "forefather" of transformative constitutionalism, but remains more focused on the legislator than its court-centred Anglophone relative.<sup>3</sup> In the next contribution, Luís António Malheiro Meneses do Vale digs deeper into the genealogy of directive constitutionalism and unearths European influences and international contexts that have shaped it, placing it at a global crossroads of various strands of contemporary constitutional thought.<sup>4</sup>

Moving to Brazil, Florian Hoffmann and Fabio Carvalho Leite trace the influence of directive constitutionalism on the making of the Brazilian constitution of 1988 and on subsequent constitutional practice, characterised by an often recalcitrant legislator and an increasingly active judiciary, and thus gravitating towards a more court-centred, transfor-

- 2 Karl Klare, Legal Culture and Transformative Constitutionalism, *South African Journal on Human Rights* 14 (1998), pp. 146–88. On social rights as key theme, see only Varun Gauri / Daniel Brinks, *Courting social justice*, Cambridge / New York, 2008; Helena Alviar Garcia / Karl Klare / Lucy Williams, *Social and Economic Rights in Theory and Practice*, Hoboken 2014.
- 3 Mariana Canotilho, "Constitucionalismo dirigente" and Transformative Constitutionalism: Common Elements, Differences and Methodological Challenges, *Verfassung und Recht in Übersee* 56 (2023), in this special issue.
- 4 Luís Malheiro do Vale, Asking for Directions: The Origins of Gomes Canotilho Directive Constitutionalism at the Crossroads of Contemporary Constitutional Thought, *Verfassung und Recht in Übersee* 56 (2023), in this special issue.

mative constitutionalism.<sup>5</sup> Taking his cue from critical comparative law, Deo Campos Dutra then traces the reception of directive constitutionalism in Brazilian scholarship, taking issue with the uncritical transplantation and lack of adaptation of the concept to the Brazilian context.<sup>6</sup> Also using Brazil as a case study, Juliana Cesario Alvim Gomes reflects on how a directive and transformative constitution, initially designed for progressive change, becomes a shield against retrogression in the face of authoritarian challenges and constitutional erosion.<sup>7</sup> Last but not least, Jonathan Klaaren concludes with a comment on the fate of transformative constitutionalism in South Africa in light of the Lusophone debates, arguing that “South African constitutional theory could use a bit less transformative and bit more directive constitutionalism”.<sup>8</sup>

Overall, the articles in this special issue aim to show that studying directive constitutionalism can make important contributions to comparative constitutional scholarship. The remainder of this introduction sketches three possible contributions to contemporary debates concerning constitutional typology and non-liberal varieties of constitutionalism (section 2.), constitutional transfers and the political economy of legal knowledge (3.), as well as normative critiques of non-liberal varieties of constitutionalism in the face of democratic decline and authoritarian challenges (4.). It concludes with some thoughts on future research.

These themes have been the subject of an international research collaboration from which this special issue has emerged, namely the project “Varieties of Constitutionalism: Contestations of Liberal Constitutionalism in Comparative Constitutional Law”, co-funded from 2020-2024 by the German National Research Society DFG and its Brazilian counterpart CAPES. Papers have been presented and discussed at a joint panel at the Law and Society Association Annual Meeting in Lisbon in 2022. Valuable discussions and comments by the members of the research project and by discussants at the conference panel are gratefully acknowledged, with all usual disclaimers.

- 5 Florian Hoffmann / Fabio Carvalho Leite, Transformation by Decree? A (Brief) Reflection on the ‘Directive Constitution’ (Constituição Dirigente) in Brazil, *Verfassung und Recht in Übersee* 56 (2023), in this special issue.
- 6 Deo Campos Dutra, The Theories of Constituição Dirigente and Transformative Constitutionalism and their Reception by Brazilian Constitutional Theory: An Approach Based on Critical Comparative Law, *Verfassung und Recht in Übersee* 56 (2023), in this special issue.
- 7 Juliana Cesario Alvim, Bridging Past and Future: Transformative Constitutionalism and Directive Constitutions Amidst Authoritarian Challenges, *Verfassung und Recht in Übersee* 56 (2023), in this special issue.
- 8 Jonathan Klaaren, A Comment from a South African Perspective on Directive and Transformative Constitutionalism in Comparative Constitutional Law, *Verfassung und Recht in Übersee* 56 (2023), in this special issue.

## B. The Directive Constitution as (Not-so-) New Variety of Constitutionalism

Firstly, recovering and reappraising the debates about directive constitutionalism contributes to typological debates on varieties of constitutionalism in general and transformative constitutionalism in particular. Over the past decade, comparative constitutional scholars have broadened their case selection and epistemic framework beyond liberal constitutional thought and studied non-liberal varieties of constitutionalism.<sup>9</sup> The concept of transformative constitutionalism, in particular, has been generalised beyond its South-African context and has been used to analyse constitutional experiences across Africa, Latin America, India, and even in Europe.<sup>10</sup> This raises the question of how the *constituição dirigente* fits into these varieties of constitutionalism.

In its original formulation, the directive constitution not only described a historically specific constitutional enactment, but also designated a normative constitutional theory, a set of constitutional doctrines, as well as a methodology of constitutional interpretation.<sup>11</sup> In this wider sense, it can also be understood as a constitutional ideal type that facilitates taxonomic comparison of different constitutional projects over time and space.<sup>12</sup>

As a constitutional type, the directive constitution belongs to the broader family of social constitutionalism, inaugurated by the Mexican Constitution of 1917 and the Weimar Constitution of 1919. “Directive principles” already characterised the Irish Constitution of

- 9 *Mark Tushnet*, Editorial: Varieties of constitutionalism, *International Journal of Constitutional Law* 14 (2016), pp. 1–5; *David Law*, Alternatives to Liberal Constitutional Democracy, *Maryland Law Review* 77 (2017), pp. 223–244; *Philipp Dann* / *Michael Riegner* / *Maxim Bönnemann*, *The Global South and Comparative Constitutional Law*, Oxford 2020; *Signe Rehling Larsen*, Varieties of Constitutionalism in the European Union, *Modern Law Review* 84 (2021), pp. 477–502; *Michael Riegner*, Canonizing the corporation: Liberal, social and transformative varieties of corporate constitutionalism, in: *Sujit Choudhry* / *Michaela Hailbronner* / *Mattias Kumm* (eds.), *Global Canons in an Age of Uncertainty*, Oxford 2024, forthcoming.
- 10 From the vast literature, see only *Oscar Vieira* / *Upendra Baxi* / *Frans Viljoen*, *Transformative constitutionalism*, Pretoria 2013; *Michaela Hailbronner*, *Overcoming obstacles to North-South dialogue: Transformative constitutionalism and the fight against poverty and institutional failure, Verfassung und Recht in Übersee* 49 (2016) pp. 253–262; *Armin von Bogdandy* / *Eduardo Ferrer Mac-Gregor* / *Mariela Morales Antoniazzi* / *Flávia Piovesan* / *Ximena Soley*, *Transformative constitutionalism in Latin America*, Oxford 2017; *Kanad Bagchi*, *Transformative Constitutionalism, Constitutional Morality and Equality: The Indian Supreme Court on Section 377, Verfassung und Recht in Übersee* 51 (2018), pp. 367–380; *Diego Werneck Arguelhes*, *Transformative Constitutionalism in Latin America: A view from Brazil*, in: *Philipp Dann* / *Michael Riegner* / *Maxim Bönnemann* (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020, pp. 165–189; *Heinz Klug*, *Transformative constitutionalism as a model for Africa?*, in: *Philipp Dann* / *Michael Riegner* / *Maxim Bönnemann* (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020, pp. 141–164.
- 11 *Canotilho*, note 1. On the “epistemic location” of the directive constitution, see also *do Vale*, note 4, in this special issue.
- 12 On taxonomy as one purpose of comparison, see *Ran Hirschl*, *Comparative matters*, Oxford 2014, pp. 193–194.

1937, from where they migrated into the Indian Constitution of 1949.<sup>13</sup> Later, the South African post-apartheid Constitution of 1996 incorporated many socially transformative elements.<sup>14</sup> Within this broader constitutional family, the directive constitution shares important features with transformative constitutionalism, as several authors in this volume point out: both are characterised by an explicit, historical self-consciousness as products of a revolutionary or transitional process seeking to overcome past injustice and an authoritarian regime; they share a finality aimed at deep, structural change towards a more egalitarian society; and they thus evince a specific, future-oriented temporality rejecting the past and seeking to continuously improve the present. To achieve these aims, they both rely not only on ordinary politics, but on specific constitutional programmes, doctrines and interpretive methods, including enforceable positive obligations, social rights, and judicial review of legislative omissions.<sup>15</sup>

Given these family resemblances, the directive constitution can be considered as a “forefather” of transformative constitutionalism, as Mariana Canotilho puts it in this special issue. Or, considering the age difference (birthdays in 1982 and 1999, respectively) and the possibility of parallel innovations, they might be older and younger siblings of the same family. Yet, while they share the DNA of social constitutionalism, they are not identical twins. A clear conceptual difference between directive and transformative constitutionalism resides in the protagonists of the two conceptions. As Mariana Canotilho points out, in the original theory of the directive constitution, the driver of transformative change was the legislator, whereas transformative constitutionalism centred on courts.<sup>16</sup> This difference would indeed be an argument to distinguish the two types for taxonomic purposes and conceptualise directive constitutionalism as another, distinctive variety of constitutionalism in its own right. Doing so might (re)focus comparative attention on the ways in which different constitutional doctrines seek to compel transformative legislative action without at the same time (over)empowering courts. Are there differences in this respect, for instance, between directive principles, and the “constitutional impositions” in the theory of the directive constitution?<sup>17</sup> And what are the conditions under which a legislature-focused theory of social change can actually become constitutional reality?

13 *Tarunabh Khaitan*, Directive principles and the expressive accommodation of ideological dissenters, *International Journal of Constitutional Law* 16 (2018), pp. 389–420.

14 See only *Pius Langa*, Transformative constitutionalism, *Stellenbosch Law Review* 17 (2006), pp. 351–360.

15 For a detailed analysis of the similarities, see *Canotilho*, note 3, in this special issue.

16 *Ibid.*, in this special issue.

17 On the category and doctrine of constitutional impositions, see *Ibid.*, and *do Vale*, note 4, both in this special issue. On directive principles, see *Klaaren*, note 8, in this special issue (on South Africa), and more generally *Khaitan*, note 13; *Lael K. Weis*, Constitutional Directive Principles, *Oxford Journal of Legal Studies* 37 (2017), pp. 916–945; *Tarunabh Khaitan*, Constitutional Directives: Morally-Committed Political Constitutionalism, *Modern Law Review* 82 (2019), pp. 603–632.

The contributions to this special issue indicate that answers to these questions are context dependent. In Brazil, the differences between directive and transformative constitutionalism turned out to be less pronounced in practice than in theory, as Florian Hoffmann and Fabio Carvalho Leite show. While the ideas of directive constitutionalism influenced the making of the 1988 constitution, the legislature tended to remain dominated by entrenched, conservative regional and sectoral special interests. Hoffmann and Leite argue that this was one of the reasons that attention increasingly shifted to courts as potential drivers of transformative change.<sup>18</sup> Yet, even if directive and transformative constitutionalism thus converge in practice, uncovering the long history of the directive constitution adds nuance to global constitutional histories and typologies, and to narratives of constitutional transfer.

### C. Directive Constitutionalism as Constitutional Transplant

In a second contribution to comparative constitutional scholarship, the debates on directive constitutionalism offer a telling case study of constitutional transfer, transplantation, migration and of the global political economy of legal knowledge.<sup>19</sup> The contributions to this special issue demonstrate that directive constitutionalism is at the same time a product of constitutional borrowing and reception, and an object of constitutional transplantation and transfer, situated at a crossroads between the Global North and the Global South.

In his genealogy of Canotilho's theory of directive constitutionalism, Luís do Vale unearths the European intellectual influences and global political contexts that shaped the original theory. In terms of academic inspiration, German and Italian influences loom large. Canotilho was a student of German constitutionalist Konrad Hesse, and was well versed in German debates on programmatic constitutional norms<sup>20</sup>, and especially the interpretation of the constitutional principle of the social state in the German Basic law, as famously debated between scholars Wolfgang Abendroth and his conservative opponent

- 18 Another factor was that the composition of the court also changed in the early 2000s, as *Cesario Alvim* points out in her contribution in this special issue, note 7. On this aspect, see also *Diego Werneck Arguelles*, *Poder não é querer: preferências restritivas e redesenho institucional no Supremo Tribunal Federal pós-democratização*, *Universitas Jus* 25 (2014), pp. 25–45.
- 19 On this debate, see *Sujit Choudhry (ed.)*, *The migration of constitutional ideas*, Cambridge 2010; *Vlad Perju*, *Constitutional transplants, borrowing and migration*, in *András Sajó / Michel Rosenfeld (eds.)*, *The Oxford handbook of comparative constitutional law*, Oxford 2012, pp. 1304–1327; *Günter Frankenberg (ed.)*, *Order from transfer*, Cheltenham 2013.
- 20 On the difference between the *constituição dirigente* theorized by Canotilho and the directive constitution discussed by German constitutionalist Peter Lerche see *Gilberto Bercovici*, *Revolution through Constitution: the Brazilian's directive constitution debate*, *Revista de Investigações Constitucionais* 1 (2017), pp. 7–18. Regarding the interpretation of programmatic norms, Canotilho was influenced by Italian constitutionalist *Vezio Crisafulli*, *La Costituzione e le sue disposizioni di principio*, Milan 1952.

Ernst Forsthoff.<sup>21</sup> But beyond these European inspirations, the directive constitution also reflected global political influences that had shaped the Portuguese constitution of 1976, namely decolonization and the Cold War. According to do Vale, the directive constitution also represented an overdue break with colonialism after a 10-year colonial war, into which the poorest sections of Portuguese society had been drawn, as well as a commitment to a “third way” between Western capitalist democracy and the Eastern socialist block, as epitomized by the Non-Aligned Movement and the declaration of a New International Economic Order.<sup>22</sup> In this reading, the directive constitution is indeed a product of influences from both Global North and South.

Similar observations applied to the directive constitution as an object of constitutional transfer and transplantation. As several contributions to this special issue demonstrate, Canotilho’s theory influenced the drafting of the 1988 Federal Constitution of Brazil, which included an extensive bill of rights, spelled out binding “fundamental objectives”, established minimum spending thresholds for education and health care, constitutionally anchored the public health system, and provided for constitutional enforcement procedures in cases of legislative inaction and omission.<sup>23</sup> After the enactment of the 1988 Constitution, the expression *constituição dirigente* featured prominently in Brazilian doctrinal debates, as Deo Campos Dutra documents in his contribution.<sup>24</sup> The directive constitution can thus be considered an instance of constitutional transfer, or “transplantation”, although Brazilian scholarship has rarely analysed it in these terms. According to Campos, this transplantation carries risks: As critical comparatists have long pointed out, there is no transplantation without transformation, and understanding the Brazilian constitution in light of a normative theory and doctrines developed in a different context may lead to misunderstandings and inhibit adaptation to different circumstances.<sup>25</sup>

- 21 *do Vale*, note 4, in this special issue. On the Abendroth-Forsthoff debate, see *Christian Joerges*, Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process, *Comparative Sociology* 9 (2010), pp. 65–85; *Kolja Möller*, The Constitution As Social Compromise: Hybrid Constitutionalisation and the Legacy of Wolfgang Abendroth, in: Marco Goldoni / Michael A. Wilkinson (eds.), *The Cambridge Handbook on the Material Constitution*, Cambridge 2023, p. 135; *Jeff King*, Social Rights, constitutionalism, and the German Social State Principle, *e-Pública* 1 (2014), p. 19. For a reflection of that debate in debates of the *constituição dirigente* in Brazil, see *Gilberto Bercovici*, A problemática da constituição dirigente: algumas considerações sobre o caso brasileiro, *Brasília* 36 (1999), p. 35.
- 22 *do Vale*, note 4, in this special issue; *Cristina Nogueira da Silva*, *Constitucionalismo e Império. A Cidadania no Ultramar Português*, Coimbra 2009.
- 23 *Hoffmann / Leite*, note 5, in this special issue.
- 24 *Dutra*, note 6, in this special issue, with further references.
- 25 *Ibid.*, in this special issue. This is not to say that there were no earlier Brazilian debates about programmatic constitutional norms. For an early argument that programmatic constitutional norms are binding and enforceable, see *José Afonso da Silva*, *Aplicabilidade das normas constitucionais*, São Paulo 1967. I thank Virgílio Afonso da Silva for pointing this out.

One of the key factors that required adaptation, and transformed the meaning of the directive constitution, were political differences in the constitution-making processes: While both represented transitions from authoritarian to democratic regimes, the Portuguese constitution was born in the 1974 Carnation Revolution that overthrew the authoritarian *Estado Novo*, and represented the sedimentation of a highly distinctive revolutionary process, initiated by mid-level military personnel, directed against an authoritarian regime with peculiar fascist dimensions, and driven by a deep desire for egalitarian social transformation.<sup>26</sup> In Brazil, the transition was also forced by popular pressure and activism from social movements, but exhibited stronger features of a negotiated, pacted transition. This transition led to a constitutional document that did not embody one particular, revolutionary and ideological project, but rather a set of compromises with a pluralist orientation. Given these differences, critical observers have argued that the “expression *constituição dirigente* cannot convey the same meaning in Portugal and Brazil.”<sup>27</sup>

While the role of popular struggle in both transitions should not be diminished, the differences in constitutional origins did also influence the subsequent balance of power between progressive and conservative social and political forces, and thus the implementation of constitutional promises. As do Vale observes, at least the post-revolutionary legislator in Portugal was fairly plural and democratically responsive, cultivating channels of communication to the parties’ constituencies, powerful social organizations like the Unions, social movements and a highly and widely politicised society.<sup>28</sup> In contrast, the Brazilian transition did not break to the same extent with the power of special regional and sectoral interests that continued to dominate the legislative branch for significant periods of time. Hence, progressive legislative projects often ran up against conservative opposition in Congress. While some of these projects still found majorities, e.g. the *Bolsa Família* social programme, others remained blocked. Hoffmann and Leite argued that this resulted in a situation where the judiciary, rather than the legislature, became the primary interpreter and modulator of the *constituição dirigente*, leading to a shift “from directive constitutionalism to judicial dirigisme”.<sup>29</sup>

The Brazilian experience also fed back into a reconceptualization of directive constitutionalism by its original author. As do Vale points out, in the second edition of Canotilho’s book on the directive constitution, published in 2001, the theory undergoes an expressly admitted change, again controversially debated among scholars in Portugal and Brazil. This feedback loop from Brazil to Portugal closed the circle in the Lusophone migration of constitutional ideas. The *constituição dirigente* thus not only emphasizes the truism that

26 do Vale, note 4; Canotilho, note 3, both in this special issue.

27 Luís Roberto Barroso, *Curso de Direito Constitucional Contemporâneo*, São Paulo 2015, p. 250. Translation by Deo Campos, in this special issue. See also Lênio Streck / José Luiz Bolzan de Morais, Artigo 3º, in: Gilmar Ferreira Mendes / José Gomes Canotilho / Ingo Wolfgang Sarlet / Lenio Luiz Streck (eds.), *Comentários à Constituição do Brasil*, São Paulo 2018, pp. 330-332.

28 do Vale, note 4, in this special issue.

29 Hoffmann / Leite, note 5, in this special issue.

in comparative constitutional law, “there are no origins”. It also suggests that besides the uni-directional metaphors of transfer, transplantation, and migration, there are multi-directional and circular processes that might be better captured by the idea of *circulation* of constitutional ideas.

The fact that this circulation has thus far been lost in translation for English-speaking comparative constitutional scholarship also points to the complex political economy of legal knowledge. Critical comparatists have long pointed out the hierarchies in the production of legal knowledge, which often match postcolonial hierarchies and asymmetries of the capitalist global political economy between Euro-America and former colonies in Asia, Africa and Latin America.<sup>30</sup> Given the colonial history of Portugal and Brazil, the story of the directive constitution partly confirms these patterns. But it also points to the multi-layered, complex interplay and relational nature of different types of hierarchies, with Portugal being both at the centre of a former empire and at the periphery of a European integration project, with an imperial language spoken across former colonies yet functioning as a barrier in the global comparative constitutional discourse dominated by English and Anglophone authors. From the perspective of the global political economy of legal knowledge in comparative constitutional law, the directive constitution thus raises not only questions about transfer and transplantation but also about translation and linguistic pluralism.<sup>31</sup>

#### **D. Critiques and Challenges: Directive and Transformative Constitutionalism in the Face of Democratic Backsliding**

In a third contribution to extant scholarship, this special issue also sheds light on normative critiques of directive and transformative constitutionalism and on their evolution in the face of illiberal challenges and democratic backsliding. As Mariana Canotilho reminds us, the idea of social transformation through law and the constitution has meet with scepticism throughout history. Critics have long regarded the constitutional entrenchment of substantive, not only procedural, commitments other than fundamental rights as politically problematic, tendentially illiberal, and at best impractical and ineffective.<sup>32</sup>

30 *Daniel Bonilla Maldonado*, The political economy of legal knowledge, in Colin Crawford / Daniel Bonilla Maldonado (eds.), *Constitutionalism in the Americas*, Cheltenham / Northampton 2018, pp. 29–78; *Christine Schwöbel-Patel*, (Global) Constitutionalism and the Geopolitics of Knowledge, in Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020; *Jorge Esquirol*, *Ruling the law*, Cambridge / New York 2020; *Daniel Bonilla Maldonado*, *The Legal Barbarians*, Oxford 2021.

31 For a problematisation of language in international law scholarship, see *Gabriel M. Lentner*, *Law, Language, and Power: English and the Production of Ignorance in International Law*, *International Journal of Language & Law* 8 (2019), pp. 50–66; *Odile Ammann*, *Language Bias in International Legal Scholarship: Symptoms, Explanations, Implications and Remedies*, *European Journal of International Law* (2022), pp. 1–30.

32 *Canotilho*, note 3, in this special issue.

These critiques have been levelled against directive and transformative constitutionalism alike. Transformative constitutionalism has been criticised for its overreliance on courts and its limited impact in social reality, and it has been doubted whether differences to liberal constitutionalism are that pronounced and do actually warrant more politicised interpretive methods.<sup>33</sup> Even before these critiques had emerged, the directive constitution had already been subject to conjunctures, critiques, and disenchantments, to the point that Hoffmann and Leite argue that the concept has fallen out of fashion in Brazil.<sup>34</sup> As do Vale observes, the critical debates about the older concept of the directive constitution display some important parallels with the growing critiques of, and disappointments with, its younger relative transformative constitutionalism.<sup>35</sup>

Broadly speaking, critiques of directive and transformative constitutionalism can concern either the effectiveness or the legitimacy of either variety. Effectiveness critiques maintain that the transformative promise has not been realised sufficiently, for reasons inherent to the constitutional model. For directive constitutionalism, one such reason may be overreliance and dependence on a progressive legislator. For transformative constitutionalism, it may be overreliance on progressive courts. As historical experience shows, neither legislators nor courts can be expected to be consistently progressive.<sup>36</sup> In other words, the implementation of transformative promises in both directive and transformative constitutions requires a specific political alignment of courts, other branches of government, and social forces in civil society. As Juliana Cesario Alvim points out in her contribution to this special issue, the implementation of the right to health in Brazil made significant progress when a progressive executive and a newly composed judiciary mounted a concerted effort in promoting progressive realization of this right.<sup>37</sup> In other areas, however, as Hoffmann and Leite argue, responses to directive and transformative constitutional mandates have

- 33 *Theunis Roux*, Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?, *Stellenbosch Law Review* 20 (2009), p. 258; *Arguelhes Werneck*, note 10; *Alejandro Rodiles*, The great promise of comparative public law for Latin America: Towards *ius commune americanum*?, in *Anthea Roberts / Paul B. Stephan / Pierre-Hugues Verdier / Mila Versteeg* (eds.), *Comparative International Law*, Oxford 2018, pp. 501-525.
- 34 *Hoffmann / Leite*, note 5, in this special issue. For some of these critiques, see *Gilberto Bercovici*, Die dirigierende Verfassung und die Krise der Verfassungslehre am Beispiel Brasiliens, *Verfassung und Recht in Übersee* 37 (2004); *Luciano Scheer / Alfredo Neto*, Constitucionalismo contemporâneo e a constituição brasileira de 1988: uma análise dos impasses à constituição dirigente, *Cadernos do Programa de Pós-Graduação em Direito PPGDir./UFRGS* 12 (2017), pp. 156-171; *Nelson Moreira*, Constitucionalismo Dirigente no Brasil: em busca das promessas descumpridas, *Revista de Direitos e Garantias Fundamentais* 3 (2008), pp. 87-128.
- 35 *do Vale*, note 4, in this special issue.
- 36 On the legislator, *Hoffmann / Leite*, note 5, in this special issue, with further references. On the Brazilian judiciary, see *Cesario Alvim*, note 7, in this special issue, with further references.
- 37 *Cesario Alvim*, note 7, in this special issue.

been “too diverse and their effectiveness too indeterminate to keep the promise of an explicit *constituição dirigente* alive.”<sup>38</sup>

In the absence of the necessary alignment of the political branches, courts may take on a more proactive role. This (perceived or actual) “judicial activism” not only pushes the functional boundaries of courts, which may not be better placed to design and implement effective social policies and to make distributive choices than expert bureaucracies or more representative political bodies. It also intensifies the legitimacy critiques levelled against judicial review by unelected courts, already present in more preservative liberal constitutional systems and heightened when courts enforce positive obligations resulting from directive or transformative mandates. In this vein, Hoffmann and Leite observe that directive and transformative elements in the Brazilian constitution served as “a springboard for judicial activism rather than as a consistently applied and substantive design principle and controlling device for public policy – as it may have been intended in the original conception of the ‘directive constitution’”.<sup>39</sup> To critics, this court-centrism lacks democratic legitimacy, as it assumes that there is one correct direction in which the constitution should drive politics, and that the courts already know that one direction.<sup>40</sup> It also risks falling for the “mission accomplished syndrome”, whereby courts use transformative rhetoric and issue purportedly transformative rulings, without however insisting on implementation and real world change.<sup>41</sup>

At least in this respect, the theory of the directive constitution may offer some counterarguments by insisting on a stronger role of the legislature – a feature that prompts Jonathan Klaaren in his comment to argue that “South African constitutional theory could use a bit less transformative and bit more directive constitutionalism”.<sup>42</sup> Ultimately, the insistence on legislative protagonism in directive constitutional theory, and in democratic critiques of transformative constitutionalism, raises questions regarding the importance of democratic politics, and democratic theory, in these varieties of constitutionalism – questions that deserve further exploration and also require engagement with the legal structuring

38 Hoffmann / Leite, note 5, in this special issue.

39 *Ibid.*, in this special issue.

40 Diego Werneck Arguelhes / Evandro Sússekind, *Constitucionalismo transformador: Entre casas de máquinas e “engenharia social judicial”*, *Revista Direito E Práxis* 12 (2022), pp. 2557–2594. On democracy, see also Cláudia Carvalho, *Desafios democráticos para a constituição dirigente: entre vinculação e abertura constitucional*, *Revista Jurídica da Presidência* 14 (2022), pp. 357–381.

41 Werneck Arguelhes, note 10.

42 Klaaren, note 8, in this special issue.

of democratic processes, or the law of democracy, under directive and transformative constitutionalism.<sup>43</sup>

In the current global climate, the undeniable importance of political context, and progressive politics, for both directive and transformative constitutionalism raises a further question: What if politics goes awry, becomes illiberal or authoritarian, and thus poses a fundamental challenge for democratic constitutionalism as such? Extant literature on right-wing populism, democratic backsliding and constitutional erosion has tended to frame these developments as challenges of “liberal constitutionalism”.<sup>44</sup> While directive and transformative constitutionalism share this fundamental predicament, regressive politics poses another, specific constitutional problem for these socially-oriented varieties of constitutionalism: how to preserve progressive achievements and social progress against political backlash? To the extent that social achievements and progress are protected by directive and transformative constitutional mandates, this question also becomes a constitutional question, more so than under (purely) liberal conceptions of constitutionalism that do not constitutionalize social rights and welfare guarantees in similar ways.

In doctrinal terms, this shifts attention to constitutional doctrines limiting regressive politics, especially the principle of non-regression, as Cesario Alvim discusses with respect to the right to health in Brazil under right-wing president Jair Bolsonaro during the Covid-19 pandemic.<sup>45</sup> Beyond these specific doctrinal shifts, directive and transformative constitutions also change their broader meaning in the context of regressive politics: initially conceived “as the spearhead of a progressive transformation project”, they now function as “a shield against retrogressive changes”, assuming a “preservationist force, striving to conserve a jeopardized future vision, now at risk of becoming a relic of the past”.<sup>46</sup> Under these specific political circumstances, directive and transformative varieties

43 For arguments concerning democratic politics and democratic theory, see *Klaaren*, note 8, and *Canotilho*, note 3, both in this special issue; *Werneck Arguelhes / Süsskind*, note 40. On transformative constitutionalism and democracy, see only *Brian Ray*, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa’s Second Wave*, Cambridge 2016; *James Fowkes*, *Transformative Constitutionalism and the Global South: The View from South Africa*, in: Armin von Bogdandy et al. (eds.), *Transformative Constitutionalism in Latin America: The Emergence of a New Jus Commune*, Oxford 2017, pp. 97–122. On the law of democracy, see only *Samuel Issacharoff*, *Comparative Constitutional Law as a Window on Democratic Institutions*, in: Erin F. Delaney / Rosalind Dixon (eds.), *Comparative judicial review*, Cheltenham / Northampton, pp. 60–82.

44 See only *Mark Graber / Sanford Levinson / Mark Tushnet* (eds.), *Constitutional democracy in crisis?*, New York 2018; *Rosalind Dixon / David Landau*, *Abusive Constitutional Borrowing*, Oxford 2021. But see in Brazil also *Emilio Meyer*, *Constitutional erosion in Brazil*, Oxford / London / New York / New Delhi / Sydney 2021.

45 *Cesario Alvim*, note 7.

46 *Ibid.*

of constitutionalism thus share a preservative dimension with the liberal type<sup>47</sup>, indicating that constitutional typologies are to some extent dynamic and context dependent. Including directive and transformative varieties into constitutional typologies thus adds further nuance and variation to the analytical frameworks and provides differentiated insights into how different types of democratic constitutional systems respond to and evolve in the face of illiberal and authoritarian challenges.

## E. Conclusions

In 2024, a third edition José Joaquim Gomes Canotilho's book on the *constituição dirigente* is forthcoming. The update could be an occasion for comparative constitutional lawyers to consider further research avenues. The comparative study of the *constituição dirigente* offers a window into understudied constitutional experiences lost in translation, yet with many parallels and insights for Anglophone debates on varieties of constitutionalism. It adds directive constitutionalism as new variety to extant typologies and has many family resemblances with its younger sibling transformative constitutionalism. Conceiving of directive constitutionalism as product and object of constitutional borrowing and transfers opens up avenues for future research on determinants and patterns of migration of constitutional ideas and the often circular nature of these processes. It also raises questions for normative constitutional theory concerning justifications and critiques of non-liberal constitutional types and the extent to which both directive and transformative constitutionalism depend on political context and acquire a more preservative function in the face of regressive politics and democratic backsliding. For the same reason, future research might also explore how a change in political context, such as the one in Brazil from right-wing populist Jair Bolsonaro to left-progressive president Lula da Silva, may renew the impetus for directive and transformative constitutionalism. In any event, the debates on directive constitutionalism may also inform future research in comparative constitutional law on programmatic norms, directive principles, constitutional impositions, or the principle of non-regression in new areas of constitutional law such as environmental constitutionalism and climate change.<sup>48</sup>



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47 On this point, see also *James Fowkes*, *Transformative Constitutionalism and the Global South: The View from South Africa*, in: Armin von Bogdandy et al. (eds.), *Transformative constitutionalism in Latin America*, Oxford 2017, pp. 97–122.

48 See e.g. *Lael K. Weis*, *Environmental Constitutionalism: Aspiration or Transformation?*, *International Journal of Constitutional Law* 16 (2018), pp. 836–870.