

The politics of austerity as politics of law^{*1}

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Introduction

In calling this paper “The politics of austerity as politics of law” my aim is to reflect on the debates and experiences in countries that nowadays live under austerity.

I would like to point out that the arguments I will present are the result of my interpretation of the political role of the sociology of law and my own experiences as a social scientist and citizen.

I realize austerity is not a global phenomenon, although it has become a buzzword, and it seems to me that it challenges the agenda for the political sociology of law.

In my point of view, there are five reasons for this.

Firstly, it is because austerity, despite emerging as an economic model for combating the crisis, is orchestrating a profound legislative reform involving different areas of law associated with the functioning of the economy, in particular social and labour rights. However, in the “babble of public debate” and the narrative based on the inevitability of the neoliberal model, the law is presumed to be politically and sociologically neutral and any discussion of its principles and basis are avoided. Thus austerity emerges as the source of a new positivism and legal formalisms.

Secondly, in returning to the neoliberal rhetoric of the 80s and 90s based on the cost and inflexibility of social and labour rights, austerity relocates the pressing need for

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reform of the social state or welfare state. Therefore, although in another context, we are again encountering the theoretical debates we used to study as part of the recent history of the sociology of law, concerning the level of autonomy that exists between politics, the law and society.

Thirdly, the austerity model corresponds to a questioning of the European social model, both in geopolitical terms as a standard reference for political and economic development, and from an internal European perspective as the downsizing of the aspirations and democratic expectations of many European citizens. This constitutes an interpellation of the theoretical and political developments of *soft law*, European legal pluralism and its models of governance that have fuelled reflections on the sociology of law.

Fourthly, the austerity paradigm is constraining the patterns of social conflict leading to its transformation. Thus austerity establishes itself as a new political and legal source for the structures of social conflict and litigation, interpellating the role of the courts, access to the law and justice, and the individual and collective capacity to exercise rights.

Finally, austerity reveals the existence of many common points in the sociology of law between the normative and substantive aspects of social reality, or, in other words, between normative and cognitive statements.

Bearing this in mind, I have chosen to organise this paper around three topics.

In the first section, my purpose is to suggest that, in addition to the obvious economic and financial aspects of the austerity model, there is also a social model of reality that must be characterised sociologically.

In the second, I will attempt to develop the idea that a certain concept of law is regarded as fundamental to a certain concept of society, meaning that the austerity society corresponds to a certain type of law and politics.

Finally, in the third section I want to share with you what appear to me to be scenarios or possible ways of developing research and action programmes for a sociology of the law of austerity.

1. The austerity society as a model of social reality

Concerning the first question, it is tempting to pursue the path of authors who view the current situation as an extension of a crisis in capitalism, with the added nuance that the financial markets are taking over life in society (Streeck, 2013; Offe, 2013; Crouch, 2013). In this sense, it is assumed that each new crisis contains the sociological sources of a different kind of society, where we can find every post- and neo- society, or even the "spirit of capitalism" we have been studying.

In the current economic context, the concept of austerity defines a set of economic and social policy options which aim to contain or reverse expenditure through restrictions on state budgets, thereby altering the redistributive policy and spending associated with the economy and social reproduction.

This is linked to a deeply economic rhetoric based on the idea that it is necessary to reform the state in order to "trim it down", curb the irresponsible behaviour of citizens and provide the financial markets, considered the means of financing the economy, with confidence they need (Reis, 2012: 33).

As a result, we are witnessing an increasing divide between the economy and the rest of society, through an amplification of the concerns voiced by Karl Polanyi and, at the same time, a reconfiguration of the foundations of redistributive policies and the role of law, which must reflect the economist logic underlying the reform of the welfare state, holding individuals accountable for excessive consumption and promoting confidence in the financial markets.

This economic blindness is well captured by Mark Blyth when he says that economists tend to see the issues of redistribution as the equivalent of Bill Gates walking into a bar: "once he enters, everyone in the bar is a millionaire because the average worth of everyone is pushed way up. This is at once statistically true, but empirically meaningless; in reality there are no millionaires in the bar, just one billionaire and a bunch of other folks who are each worth a few tens of thousands of dollars, or less. Austerity policies suffer from the same statistical and distributional delusion because the effects of austerity are felt differently across the income distribution. Those at the bottom of the income distribution lose more than those at the top for the simple reason that those at the top rely far less on government-produced

services and can afford to lose more because they have more wealth to start with. So, although it is true that *you cannot cure debt with more debt*, if those being asked to pay the debt either cannot afford to do so or perceive their payments as being unfair and disproportionate, then austerity policies simply will not work.” (Blyth, 2013: 7-8).

Aware of the economic debates and different technical solutions proposed by economists and politicians, I believe that sociology and sociologists must question the social, institutional and legal consequences stemming from the way in which the economy dominates society.

In this case, it is imperative to resume the political and legal principles that contribute to a fairer redistribution in favour of work, which has been sacrificed the most intensively to capital, by demanding respect for the dignity of real content (Touraine, 2010: 12-13).

This is why I would contrast a decent society with the austerity society, in order to draw suggestions from this for socio-political guidelines that I will return to in the final part of my presentation. Moreover, on an analytical level it is important to interpret sociologically whether this current period of austerity is, in fact, a new kind of society, and whether it is helping to erode the previous society, prevent the formation of a new type of society, or - and here the question is not only analytical - encourage the intervention and expressions of non-democratic authoritarian social actors who use exception as a form of political-legal social standard.

From a meta-theoretical perspective, the questions emerging out of the social situation and the crisis can be posed in the following terms.

The first refers to the analysis of the processes involved in the production and reproduction of the social and political order. Although a great deal of research is dedicated to predicting and analysing social change, the question that always arises is how, despite all the changes, the social and political order is reproduced (cf. Beck, 2013: 39). The theoretical teleology in question determines that they focus on the normal functioning of political society by "looking at the present and the future [and asking] how order is reproduced" (Beck, 2013: 39-40). The second question, which is linked to the previous one, concerns how the normal and the pathological are defined in a stable, democratic reality. From a Durkheimian perspective this means that it is

possible to assess what is normal in a given society at a particular moment in time and, on this basis, define what is pathological. This in turn implies that these theories admit the existence of a (given or constructed) reality that essentially tends to be stable, and from this normative futures can be projected by identifying the means (processes and rights) by which the distribution of (tangible and intangible) assets must take place.

Consequently, these theoretical approaches freeze reality and tend to find it difficult to consider exceptional cases that disrupt normal routines and are liable to become “the new standard” in contemporary societies.

In my view, the formulation of this problem invites us to reassess the standards for sociability and institutional organisation in society. In this sense, there is common ground in the work of Émile Durkheim and Giorgio Agamben, given that the austerity society is defined by many examples of trade-offs within social situations that were once considered pathological or exceptional and are now seen as normal. As Giorgio Agamben states, “The exception is a kind of exclusion. What is excluded from the general rule is an individual case. But the most proper characteristic of the exception is that what is excluded in it is not, on account of being excluded, absolutely without relation to the rule. On the contrary, what is excluded in the exception maintains itself in relation to the rule in the form of the rule’s suspension. *The rule applies to the exception in no longer applying, in withdrawing from it.* The state of exception is thus not the chaos that precedes order but rather the situation that results from its suspension. In this sense, the exception is truly, according to its etymological root, *taken outside (ex-capere)*, and not simply excluded” (Agamben, 1998: 27). The austerity model adds another element to this social argument concerning exception which should be emphasised, namely that the transitory nature of the social state of exception tends to become naturalised through a process of institutionalisation in the Parsonian sense. Guidelines for action, types of action, interactions and the institutionalisation of social standards end up creating a social system of norms, roles and status.

As I aim to analyse in the next section, the social reality or social argument for exception has a political-legal translation. It is a question to which I will return.

This is the challenge we now face, following the 2008 crisis and the trail of exceptional change that has taken place. According to Ulrich Beck we are facing the “non-fulfilment of expectations and common failures of the usual theoretical tools as

well the failure of politics" (Beck, 2013: 39), resulting in a questioning of the role of the social sciences in the current crisis.

In this sense, the relevant formulas through which capitalism and democracy have been combined in what many call "democratic capitalism" are unstable, and have now been replaced by the affirmation of a financial capitalism capable of distancing itself from democratic principles.

In addition, what currently expresses the sociological specificity of the concept of austerity is the blurry nexus between the financial markets and individuals. So I support the idea that austerity is configured as the "pattern that connects" (Bateson, 1987: 17) systemic and mainly financial problems to questions involving individuals, families and organisations in the face of a policy of "civil request".

In that sense the sociological blurring between individuals and markets is supported by a cynical ethics that uses exceptional circumstances as a social response to the crisis, whilst displaying indifference to the harm resulting from increased inequality, impoverishment and social malaise. In the face of extreme power legitimised by the exceptional circumstances, this means that the markets, and in particular the financial system, continue to be fed, since their institutions and interests are considered "too big to fail, whilst people are too insignificant to count" (cf. ILO, 2011: 2-3).

The table transcribed from the work of Schafer and Streeck (2013) in my view it summarises the elements that are part of the process of social un-differentiation in which markets become more important than individuals. Rather than ascribing equal status or importance to markets and people, what the experience of austerity offers us is, in effect, the subordination of people to markets, with the state acting as intermediary.

The austerity society as a model of social reality captures this dynamic characterised by the collective disruption of established institutional and individual standards which yield to the values of resignation, disappointment, guilt, distrust, doubt and fear.

Therefore, the current meaning of austerity encompasses a political-legal model that is punitive to individuals and is guided by the belief that the excesses of the past must be repaired by sacrificing the present and future, whilst at the same time

implementing a bold project for the erosion of social rights and the economic liberalisation of society.

Table 1

The people	The markets
National	International
Citizens	Investors
Voters	Creditors
Rights of citizenship	Claims to assets
Elections (periodic)	Auctions (continual)
Public opinion	Interest rates
Loyalty	Confidence
Public services	Debt service

Source: Schafer and Streeck, 2013: 19-20

If we look at the social facts occurring between September 2008 and the present day it can be seen that deregulation and the lack of control over the financial markets, are identified as the source of the crisis and have highlighted the permanent tension between the political and economic spheres. State interventions to rescue financial institutions and their markets were, initially² accompanied by the possibility of the political affirming itself within democratic capitalism in a disciplinary sense in the sphere of economics. However, this is now viewed as old theory, given that the concern is now directed towards the efficient functioning of the financial markets. Moreover, the question of the regulation of the markets appears to have been replaced by their ontologisation, under the terms of which their feelings, emotions, expectations and states of mind become the main concern in outlining political-legal reform in contemporary societies. This trend may perhaps be termed the “theory of the moral sentiments” of the financial markets.

² See the G20 declarations.

1.2 How is it possible to create social order?

The implementation of the austerity model requires the moral and political force of authority to recognise it, legitimise it and create the reason for “voluntary submission”³. In this sense, the austerity society suggests a reformulation of the traditional Hobbesian question of social order. Dispensing both with formulations directed towards problems of social integration and those which focus on identifying regulatory principles, it opts for establishing an affinity between ways of producing order and chaos, considered inseparable, to the extent to which “without the negativity of chaos, there is no positivity of order; without chaos, no order”, as Bauman so eloquently states (2007: 19). It therefore shares with the notion of the liquid society the ambivalence and indetermination resulting from the permanent tension between the disorder of crisis and the orderliness of reform, understood as the normal pattern of social life, a fact which places an increased focus on those who administer and plan the mediation space for the “third included” that lies between order and chaos: the state. In table 2 I try to capture some of the sociological, political and juridical dynamics between the welfare state momentum and nowadays.

The decoupling or weakening of the reciprocal bonds between the state and citizens is instrumental, and leads to the subversion of the epistemological consensus (cf. Merrien, 2007: 844-854) which is the basis of the Welfare State or to use Supiot’s argument “the Spirit of Philadelphia” inspired by the Declaration of ILO 1944 (Supiot, 2010). That can be observed through the evolution of social actor conceptualization. Thus, the social actor of the welfare state, who needs protection and is the victim of circumstances, is replaced by the rational and responsible *homo sociologicus* who must calculate opportunities. On an institutional and organisational level, the systems for social protection and collective responsibility are now obstacles to competitiveness and economic growth and a cause of unemployment. Mainstream sociological thinking in this area highlights the opposition between the classic concept of society, with its pact between unions and bosses mediated by the state, and the fragmented society composed of individuals, in which the state is replaced or inspired by the market as a mechanism for distributing wealth, since “growth is good for the poor”.

Less emphasis has been placed on the influence of this process of change, widely studied within the social sciences, on systems of rights and obligations established

³ On concepts of authority and legitimacy, see, amongst others, Miguel Morgado (2010: 69).

between citizens and the state, or between individuals and society. Yet it is precisely here that the deep structure of the model for social order in the austerity society can be found. I will now theoretically explore the idea that the system of rights and obligations involved in the process of creating an austerity society requires a subtle combination of state, individual and collective responsibility. Let us look at this a little more closely.

Traditionally, the welfare state follows a Durkheimian logic of collective solidarity, from which emerges a legal reason based politically on the idea that individual liberty and collective sovereignty develop out of the criterion of social justice, understood as the foundation stone of society. This understanding of the state is threatened, as previously mentioned, by the concept of the neoliberal state in which individual freedom acquires supreme value, distancing itself from collective dynamics. Taking individual self-sufficiency and freedom as the guidelines for action leads to an explosion of individual rights in all spheres, making the difficult balance between promoting and protecting individual liberty and developing equality and collective organisation increasingly unstable and fragile. Competition between the two favours the former, emphasising the fundamental principle of not establishing rights without responsibilities via a socio-legal logic of convergence between sociological interpretations of the Third Way and the increasing individualisation of the system of rights (cf. Bec, 2007: 13-14; 19).

The austerity process takes advantage of this political-legal legacy, given the dynamic produced by the actions of a government concerned with spreading the message that «there is no alternative», affirming the idea that the blame for the current situation includes all individuals and making them “pay” and believe that it was their irresponsible actions and careless lifestyle that helped create the current situation (cf. Bauman, 2002: 87). The “responsibilities attributed to worker-consumers who get into debt and, in general, consume unrestrainedly as if the day will never come when they have to “settle the accounts” are specifically targeted. This results in the Nietzschean legitimisation, based on the idea of the debt-blame⁴ that makes the need for force required by austerity viable⁵.

Backed by the force of this new authority, the austerity reforms carried out by the state reveal its dual logic. On the one hand, the state emerges as holding the monopoly

⁴See Frederich Nietzsche’s argument (1976: 49-93) concerning the role of contracts, debt, blame and bad conscience.

⁵ On debt, see Catarina Frade (2008), Boaventura de Sousa Santos (2011) and Elísio Estanque (2012).

on legitimate austerity, the instrument through which it assumes the task of combating the crisis, preventing national bankruptcy and protecting individuals from existential fears and uncertainty. On the other hand, it intensifies the process of dismantling the welfare state through the triple process of privatising public assets, individualising social risks and commodifying social life.

This move towards austerity introduces a nuance into the arguments of Loic Wacquant and Zygmunt Bauman, which are based on the paradigmatic shift from the welfare state to the penal state. According to the authors, the model for law and order and for criminal justice emerges from the crisis in the legitimacy of the welfare state which, as it is no longer able to maintain the standards of protection and social security, deploys a rhetoric based on lowering expectations in social terms and replacing them with a model for security through which it acquires a new legitimacy.

The austerity state does not need to negotiate between the social question and questions of law and order, given that it affirms that there are no alternatives for fighting the crisis except those which involve a clear transfer of its costs to society. It thus puts an end to the ambivalence associated with assessing social protection mechanisms, standardising the repertoire of measures for the new social order under the aegis of austerity: taxes; wage cuts; cuts to pensions and subsidies; reform of the healthcare system; negative flexibility in labour law, etc. Although the formula for legitimising the austerity state may mirror that of the penal state by creating close ties between the politics of fear, security, uncertainty and shared anxiety, the reference has changed. The state of emergency created by growing fears for personal security in the face of human waste – immigrants, criminals, the excluded, etc – now gives way to the state of social emergency, calling for sacrifices in the name of the common good and redirecting the system of duties and obligations (cf. Priban, 2007: 5).

The system of duties and obligations under austerity accentuates the inclusion of social bonds within contractual bonds. The idea of contractualism, in which the contractual bond is the most complete form of social bond, has become established as a component of an economic “ideology” that conceives of society as an agglomeration of individuals motivated by the sole virtue of calculating their interests. Individuals are therefore increasingly defined by improved biographies and self-reflection, unaffected by the constraints of macro- and micro- power structures. Contractualism and individualism are, within the framework of this argument, two sides of the same coin

(cf. Supiot, 2005: 109). The power of the contract-individual dualism recombines different levels of social reality: on a structural level it converts the state, the law, institutions and organizations into axiologically neutral entities, whereas on an individual level it attributes responsibility for changes to individual decisions.

The idea of the contract therefore emerges as a means of soothing individual anxieties in the face of the effects of austerity, by isolating and focussing the consequences of everyday austerity on individuals. In this sense, it may be considered that the system of rights and obligations fosters an obligational accountability that is eminently individual, based on a rational and self-reflective concept of the social actor in which fate is constructed and risk is calculated. Paradoxically, individual contractual freedom parallels the growing impotence of the state powers. Consequently, restricting individual resources and responsibilities to the results of lifestyle choices does not really constitute offering options. The vicious circle of contractual freedom locks us into the assumption that we are all *de jure* individuals, although this does not mean that we are all *de facto* individuals (Bauman, 2002: 89).

The critical rupture with this interpretation of the social benefits from the contribution of Wright Mills, who highlights the importance of the sociological imagination in expressing the “model which links” individual problems to public matters of social structure (Mills, 2000: 8). Contrary to what we may be led to believe, in the context of austerity individual problems are clearly the result of public problems. Unemployment is a case in point. According to Eurostat, the unemployment rate in 2013 was 27.6% in Greece, 26.3% in Spain and 17.4% in Portugal. Given these figures, this cannot be considered a personal problem but a public problem involving the collapse of opportunities structures in the societies in question. The equivocation lies in formulating public problems as if they were personal situations that are individual in scope and nature.

The rhetoric of the balance between individual responsibility and public issues is, from the outset, questionable, since it is the logic of the market that determines individual fate. In addition, as Anthony Giddens, Ulrich Beck and Zygmunt Bauman have noted, it is the actual basis of individualism in relation to the social structure that should be questioned. In Anthony Giddens’ analysis, it is the fatalism identified with resignation and acceptance of events that must take their course that exposes individuals and groups to risks and undesired results. Even though they affect a great number of

people, it is in the “decisive moments” in individual life that people are called upon to make decisions that have major consequences for their future. Moreover, it is the analytical weakening of the dichotomy between the individual and society that highlights the interdependent duality between the individual and the whole, from which the most powerful critique of individualist contractualism can be drawn. In the words of Zygmunt Bauman - and it is worth emphasising his idea – the way in which we live becomes the biographical solution to systemic contradictions (cf. Bauman, 2002: 88)⁶.

The close relationship between the individual and society, choices and consequences, rights and responsibilities form the “decisive moments” in which certainties and security blend with the unpredictability of situations. Specific situations which construct the lives of individuals are viewed from the perspective of uncertainty, since the wide range of possible responses and unpredictable factors replace security with fragility, now also reflected in the inability of institutions themselves to respond. A collective, institutionally moulded fate thus assumes its place in people’s lives in an individualised society (Beck, 1992: 135).

⁶ One of the negative consequences of liquid modernity in the individualisation process is the disintegration of civic culture. In other words, rather than involving democratic decisions and conflict resolution, democratic policies are specific politics and fragmented egoisms united in an atmosphere of fear (Pruban, 2007: 8). Institutionalised individualism and the breakdown of the welfare state within the social context of austerity and the combined extension and reduction the functions of the state end up aligning with the individualism of the times. The re-emergence of a neofeudalism derives from this, based on individuals supporting the strongest, and therefore other demonstrations of the power of the unelected, such as corruption.

Table 2

Dynamics of political-legal change					
PHASES	PHILADELPHIA SPIRIT	WASHINGTON CONSENSUS	POST-WASHINGTON CONSENSUS	FINANCIAL CRISIS	
	WELFARE STATE	CRISIS IN WELFARE STATE	POST-WELFARE STATE	AUSTERITY STATE	
	State as regulator and mediator	Neoliberal state	De-statization	Market state	Reconfiguration of state and separation of powers
	Keynesianism	Deregulation	“Good governance”		
	Expansionist public policies	Managerial public policies	Strategic guidelines	PEC; memorandums	
	Promotional and social law	Deregulatory and flexible law	Soft law	Melting pot law	Law of exception
	Social democracy	Neoliberalism	Third ways		Austerity and sacrifice
	Economy indexed to social	Economy decoupled from social	Social indexed to market logic		Indexation to logic of austerity
	Status nexus / contract - classic citizenship	Contract nexus / status – shrinking citizenship	Recontractualisation of citizenship		Citizenship and “narratives of conversion”
	Concept of weak social actor, existential risks regulated by collective responsibility and social security system	Concept of rational responsible social actor, who calculates opportunities, existential risks regulated by rational choice	Concept of reflexive social actor, responsible for monitoring own path and biography		Concept of social actor: fear, uncertainty and blame

Source: Ferreira, 2012

2. Politics and law in the social reality of austerity

The second topic concerns the new configuration for society, politics and law. The sociology of law, with its different schools and analytical perspectives, has always had to confront the relationship between society, politics and law as founding elements of political-legal modernity. Dispensing with the classic oppositions in which formalism, dogmatism and legalism are offset against an approach to the sociology of law as a social science, the so-called *gap problem* which Alan Hunt and David Nelken explored in the 1980s and 90s remains a historical element or current issue. The use of the past or the present is more than mere temporal opposition, given that the sociology of law remains a social science in which paradigmatic plurality in different ways continues to inspire what is, at the end of the day, most important: the socio-legal interpretation of social reality.

The paradigmatic richness I am referring to includes studies dedicated to the political sociology of law. I therefore welcome the idea of the importance of sociologically analysing the consequences of the changing position of the state, law and justice in the current context of crisis and austerity.

I would argue that the current context of crisis and austerity is profoundly conducive to the development of a sociology of law that is directed towards questioning the political and legal meta-reason that highlights the need to develop an approach to law that “results from the multiple configurations of interdependent relations and the interlinked strategies of actors, networks for public action and systems for action, in accordance with a decision-making scheme that results from the accumulation of negotiated regulations and power relations, in order to instil greater transversality, horizontality or circularity, rather than following a linear and hierarchical concept” (Commaille, 2009: 96).

Nowadays, this socio-legal analysis takes place in a trade-off context (and this is perhaps the most disturbing issue) between democracy as the aspiration for social justice, and democracy as a means of shrinking citizenship and increasing poverty. In a sense, it is as if politics and law are instrumentally matched to separate the rule of law in the social state and I would like to stress this idea, since the advocates of austerity behave politically as if the rule of law and the welfare state were completely separate elements of the state.

For all the different theories and interpretations of the links between the rule of law and the welfare state, this results in a strategic subversion of the principle of the indivisibility of the rule of law and the welfare state, forgetting that the “democratic state of law (or rule of law) is another name for the welfare state” (Miranda, 2011: 3)⁷.

As part of my reflections, I would argue that the forms of politics and law that correspond to the austerity society are based on four key elements, namely:

1) questioning the theory of the separation of powers; 2) the principle of selectivity in the application of exceptional measures; 3) the content of the law of exception; 4) the judicialisation of politics and the jurisprudence of austerity.

2.1 The theory of the separation of powers and the power of the unelected

Here I would argue that we are witnessing a form of production and application of power and law that is based on a cynical and strategic alliance of government and non-government actors for the purpose of institutionalising the austerity model. This means that we are facing a reconfiguration of the exercise of political power based on a combination of elected and unelected powers or, to give one example of this from the countries that have received bail-outs, the power of the elected government and the power of the unelected troika.

From the classic authors Locke and Montesquieu to the analyses of the sociology of politics and law, there has always been a tension between the normative dimensions of a pure theory of the separation of powers and concrete socio-political dynamics. It emerges, for example, in studies which capture this dynamic: the different alliances forged between political powers and social powers involving political parties; demonstrations of political pluralism (via pressure or interest groups); demonstrations of neo-corporatism; self-government; self-regulation⁸; the judicialisation of politics and the politicisation of justice; the alternative use of law; judicial activism; judicial law; etc.

⁷ Available at <http://www.icjp.pt/sites/default/files/media/1116-2433.pdf>

⁸ Other concepts that should be borne in mind are lobbying, influence, corruption, the power of the media or fourth power and the conspiracy theories and cryptopowers described by Norberto Bobbio (1988: 109-140). Also, as a critique of the theory of the separation of powers, see the discussion by Carl Schmitt on the incompatibility between liberalism and democracy, in Cohen and Arato (1990: 201 onwards).

This means that the perspective for analysing the power of the unelected, since it is not new, is a development of this problematic (Vibert, 2007). For example, we can include in these demonstrations of the power of the unelected a wide range of expressions that include the markets, international financial organisations, central banks, regulatory bodies, ratings agencies, etc⁹ (Vibert, 2007: 1).

None of these demonstrations of power is new from the perspective of political science and political sociology, as seen in analyses that aim to capture evidence of “political and economic influence” (Dahl, 1984: 23-46) or the regulatory powers of various sectors and economic and social areas. However, what is now new about this power of the unelected is that they have become elements of political authority, political power and legitimising and legalising procedures.

It is common knowledge that the memorandums signed by the troika (the IMF, EC and ECB) and the governments of Ireland, Greece and Portugal determine the implementation of procedures for the reform of legislation, public policies and the reform of the state and the economy, without which financial loans will not be granted.

In addition, there is also another dimension linked to these political interventions in the affairs of national states by the unelected, which results from the alliance between the political agendas of the unelected and government political agendas for reform, specifically when these take on neoliberal political contours. The case of Portugal shows the confused way in which it becomes difficult to determine the source of political-legal measures in the public arena. The underlying issue is that, in either case, a process of legitimation and creation of legality is being implemented on the basis of this vague and perverse alliance between the elected and the unelected.

This conspiratorial logic results in reforms guided by the principle of uncertainty and indeterminacy. Since it is close to the origins of this uncertainty and its own conduct is a source of uncertainty for others, the governing power is therefore free to determine the rule of exception for sovereignty and the law.

⁹ The phenomenon of ratings agencies as an expression of the power of the unelected is very significant. They are known to challenge the power of key states such as the United States, or blocs, such as the European Union, and have played a decisive role in the current crisis, although this is not analysed in this study.

Moreover, the uncertainty surrounding the true nature of the reforms, the troika memorandums and the national political agenda of the Portuguese government generates a benchmark for government intervention that is difficult to challenge.

Where do the demands of the troika begin and where does the neoliberal programme of the Government end? This ambiguity allows for a radical reform of the Portuguese state and society in the name of austerity without stating the limits, or even whether limits exist.

The current ongoing experiences therefore reveal the need to shift the analysis of the power of the unelected to the way in which it is aligned with government initiatives, which may also be associated with the establishment of technocratic governments, as in Italy.

An additional factor concerns the extreme situation referred to by Ulrich Beck, in which the parliament of one country, in this case Germany, votes on the fate of another democracy, that of Greece, by approving aid packages associated with the imposition of austerity and restrictions on budgetary sovereignty in Greece. Since the German authorities were not elected by the Greeks, this “removes the self-determination of the Greek people.” (Beck, 2013: 15).

2.2 Political selectivity and the law of exception

Theorisation of the state of exception is associated with an extensive body of literature linked to the work of Carl Schmitt. For my part, I only wish to pick up on the idea presented in the first section of this paper in which I argued that the model for the social reality of austerity is heavily influenced by sociological predicates concerning exception as the standard for social and institutional organisation. However, what I would like to stress now is that social exception has translated into political-legal exception.

The contraposition between the basis of the state of exception as opposed to the democratic rule of law emerges in two ways. One has its origins in intense debates in the public arena involving academics, particularly legal specialists associated with constitutional law, politics, trade unions etc, who invoke the idea of the state of

exception as a crucial element in understanding whether democracy, within the framework of austerity politics, has been suspended or not, or the type of relations to be established with the political and jurisdictional sphere¹⁰. The second emerges from academic reflections and studies whose aim is to reflect on the socio-legal significance of the state of exception in the present-day context of democratic societies marked by austerity¹¹.

On a European level the question is not new, given that situations of exception tend to be framed by the need for formal democratic and jurisdictional control, as Maxime St- Hilaire notes (2011: 78). This observation should, however, be accompanied by demonstrations of concern over the austerity measures and exceptionalism that form the basis of studies developed within the Council of Europe.

What has been studied less – and this is the question I want to emphasise here – is the linking of the principle of exception to the principle of the selectivity of state actions. This theoretical and analytical connection is useful, since the evidence of austerity policies reveals the unequal distribution of restrictions and sacrifices amongst individuals and social groups, thus threatening the principle of the rule of law.

I therefore want to stress the link between the application of emergency measures and the selectivity of state guidelines. This exercise is, at this moment, relevant in terms of revealing the contradictory heuristic relations between different social groups and interests.

In addition to the visible appearance of legal structures, political decision-making processes and political behaviour, there is other evidence that shows the state as interpreting rationalities that reveal the selectivity of its actions.

¹⁰ By way of example, I would recall the debate that took place in the Coimbra regional section of the Portuguese Bar Association in which Vieira de Andrade, Professor of State Law at the University of Coimbra defended the principle of the reserve of the possible and the clear separation of politics and jurisdictional control over measures applied by the Portuguese government, while Jorge Novais, Professor of Constitution Law at the Universidade Nova de Lisboa firmly defended protection of the nucleus of fundamental rights affected by the same measures.

¹¹ Concerning this, I would refer to the research carried out by myself and my colleague José Manuel Pureza and developed at the Observatory for Crises and Alternatives in a partnership involving the Centre for Social Studies and Faculty of Law at the University of Coimbra, and the International Labour Organisation. I would also like to note the recent work developed by António Hespanha, Professor *Jubilado* at the Universidade Nova de Lisboa.

This subject has been carefully analysed by António Hespanha, who identified two types of state intervention in situations involving acquired rights and rights guaranteed by the state: the first corresponds to the assurance that certain rights will be maintained and the second involves the general impoverishment of other rights.

Another important focus of his argument is the selective use of the legal principle of trust, which is applied unevenly according to whether it concerns property rights and rights stemming from contracts between individuals, or rights related to state benefits.

One of the elements which the author criticises is the apparent distinction between the state's obligations according to the type of rights in question. In his words, "within state services, those due under contract have often been treated with deference and are therefore shielded from changes motivated by the public interest, corrections to structural defects in contracts (such as any disparity in benefits i.e. one-sided contracts) or restrictions due to the crisis".

This is what has complicated the renegotiation or termination of public-private partnership contracts generally regarded as harmful (or highly damaging) to the public interest [...] In contrast, other state benefits - notably those arising out of state social policies or even government salaries – lie outside this guarantee and are subject to instability "(Hespanha, 2011: 18-19). I would argue that this can be extended to the way in which pension schemes, unemployment benefit and other social benefits are interpreted.

2.3 Austerity and the law of exception

The third issue refers to the problem of the creation and application of law and how this is challenged by replacing the democratic principle of law by another principle, based on supposedly natural, technical and exceptional standards (cf. Hespanha, 2007: 83) that are considered the most appropriate in a context of crisis.

The law that emerges from this follows the current standards of financial capitalism as a powerful model for regulating relations that are not only economic but human. The law of exception now appears inevitable and cannot be challenged by

popular sovereignty or the principle of the democratic creation of law (cf. Hespanha, 2007: 84-86).

In the austerity model the law of exception, in common with the concept of “liquid law” – as can be seen in the socio-legal reflections developed by Zygmunt Bauman¹² - distances itself from the predicates of predictability, security and trust and is transformed into an instrument of domination in the new configuration of power. Exceptionality in this law is part of the austerity process, supported by an instrumental cost-benefit rationality that liquefies and weakens the obstacles put in place by the law that had previously prevailed (cf. Priban, 2007: 1).

We are facing a process of re-standardising social reality which aims to make legal norms more flexible, removing their rigidity by subverting the principle of legal security. As an illustration of this, it can be seen that in the legal system of exception general legal principles such as the non-retroactivity of laws are threatened by the introduction of legislation which affects social legislation in general (pension, wages etc).

I would also like to mention two characteristics of the law of exception and one emerging consequence for the functioning of the law (cf. Arnaut and Farinas: 1996; Faria, 2008: 71-109).

The first refers to the relationship between time and law. When François Ost, in 2000, wrote the introduction to the texts resulting from the seminar *A aceleração do tempo jurídico*, austerity was not yet on the socio-legal research agenda. However, the acceleration of legal time and the accelerated pace with which legislation is adopted, transformed and altered, is a sign of the urgency of the temporality of exception, nowadays imposed as the norm (Ost *et al*, 2000)¹³. If acceleration presupposes the speeding up of political and legislative change, what should we make of a law and a precipitate, opportune, instantaneous normativity which claims urgency as the justification for its rapid emergence? How should we view a law that is devoid of

¹² Concerning this, it is important to consult the book *Liquid Society and its law* (2007) compiled by Jiri Priban which contains contributions from various authors working in the sociology of law.

¹³ Time has featured in the sociological analysis of its theorisation. For an overview of the extensive bibliography, see Bryan Turner and, in Portugal, Renato Miguel do Carmo (2006). Considering the question of time from a socio-legal perspective, it is also relevant to cite the work of António Casimiro Ferreira and João Pedroso *Os Tempos da justiça: ensaios sobre a duração e a morosidade processual* (1997) and *O Trabalho procura Justiça* (2005: 260-270), by António Casimiro Ferreira.

democratic consideration and incapable of ensuring legal security? How can a fair balance be maintained between political-normative stability and social change?

The starting point for outlining the inquiry is austerity as the historical catalyst for the neoliberal project. The opposition between fear and hope, two affective states defined temporally by uncertainty regarding the future, are reference points for the intensification of the experience of the present time, as Hanna Arendt emphasises, breaking with historical time as alterity in relation to the present and converting the past into a homogeneous extension of the present (cf. Genard, 2000: 110). As can be seen, this is not just a matter of responding to the analytical issue of the relationship between the individual and social structures (or, in other words, between subjective and objective, micro and macro, or action and structure), but also, above all, of assessing the political and citizenship implications emerging out of austerity (Ferreira, 2005: 116).

Interpretations of the sociological effects resulting from the intensification of the present under austerity lead me to stress three consequences of the temporality of exception. The first is the relativisation of history and memory. Societies are plural time systems that are not always synchronised. Time, from a social point of view, only exists to the extent that it is composed by groups, institutions and individuals, thus allowing for the idea of social differences within the organisation of time. According to Gurvitch (1973), there is not one time, but social times or a multiplicity of social times (cf. Ferreira, 2005: 115). The asynchrony of these multiple times runs parallel to attempts to regulate against it. The way in which societies organise and systematise institutions, rules, values, relations and social practices temporally (Ost, 2001: 38-39) translates into what may be defined as temporal sovereignty. In this sense, time is power, since it regulates society in political, legal and social terms.

Within the temporality of exception, a conflict emerges between this and the recognition of the right to construct temporality. The need to introduce exception mechanisms that may be reorganised in accordance with the times becomes an area of tension between the temporality of austerity and that of national society. What is at stake is control of the regulatory power to synchronise social rhythms, whether this involves sharing and organising working time, redistributing free time or rethinking intergenerational solidarity, protection mechanisms and social security (cf. Ost, 2001: 41).

The second consequence is the transformation of the principle of legal security into legal and ontological insecurity. Legal time is an important aspect of legal security, understood as the time necessary for the emergence and construction of a legal culture adapted to the society it seeks to regulate in order to consolidate the law itself and its principles (Commaille, 1998: 320). It is in this sense that Jacques Commaile refers to the jurist's view of time as paradoxical (1998: 321). On the one hand, there is a need for legal time to accompany social change, and on the other hand, the "ambition to enshrine the judicial law within long-term historical time rather than the short term of human passions and their blindness to the immediate" (Commaille, 1998: 321).

Legal security therefore involves the long term, a characteristic essential to the affirmation of a legal culture that is not influenced by merely circumstantial factors. However, the discrepancy between the principle of legal security and the temporality of exception creates political and social instability. In this case, short-term needs force changes in legislation which threaten general legal principles.

The resulting legal insecurity is also an ontological security since it deinstitutionalises social relations consolidated over the long term of the law. The accelerated 'dejuridification' or radical alteration to law therefore has a precarious effect and erodes social cohesion. As François Ost states, "the main function of the legal is to contribute towards instituting the social: rather than prohibitions and sanctions, as was previously thought, or calculation and management, as is commonly believed today, the law is a performative discourse, a web of operational fictions that explain the meaning and the value of life in society. Here "institute" means tightening the social bond and offering individuals the necessary reference points for identity and autonomy. It is from the perspective of its contribution towards subtracting nature and its ever-threatening violence from the state, from the perspective of its capacity to institute, that law will therefore be examined" (2001: 14).

The third consequence is the time of consent in relation to democratic theory. Legal time is a "social construct, therefore a question of power, an ethical requirement and a legal object" (Ost, 2001: 12). As I have already stated, the main function of law is to contribute towards instituting the social or, in other words, give meaning and value to life in society. This vision of law breaks with the positivist and self-referential perspectives that exteriorise social times and the politics of law, stressing that only legal time confers the power to institute.

In this sense, Jacques Commaille (1998: 318) considers the relevance of interactions and confrontation between the different temporalities existing in society. The author identifies three groups of temporalities: social time, political time and legal time. The first two, due to their transformations, namely those revealed through the dilution of temporal markers, a multiplicity of social times associated with recompositions of the social world and the ways in which power is exercised, contribute towards transformations of legal temporalities (cf. Commaille, 1998: 319).

Hence it may be argued that the “politics of law” are also the “politics of the time of law”, interdependent on democratic theory to the extent that the various concepts of democracy involve different interpretations of the position of conflict. Radical perspectives on democratic theory reiterate the centrality and relevance to citizens of conflict, in opposition to consensualist concepts and the hegemonies of liberal democracy (Mouffe, 1996: 11-20). For this reason, conflict resolution time is very important to radical concepts of democracy (cf. Ferreira, 2005: 116).

The acceleration of the time of law due to austerity leads to three temporal pathologies. The first results from immediatism and pressure to review constitutional and legislative texts. Contrary to the principles of stability and confidence inherent to the restrictions imposed on constitutional review procedures, it seeks to alter by invoking the political realism of the moment, the availability of conjunctural majorities and the general unanimity of parties within the constitutional sphere. The second emerges from obliteration of the constitutional text, recognised in the form of a parallel semantic constitution¹⁴ of exceptionality in which constitutional rules such as those banning social regression are silenced⁷⁵ and remain in a limbo corresponding to the exceptionality of the state of need. The third stems from the clash of temporalities resulting from the tension between rapid and considered decisions. The time of exception, like that of austerity, tends to obscure conflicts diluted within the immediatism of the solutions. It stands in opposition to the time of the institutionalisation of conflicts which made it possible (Dahrendorf, ...) to create a social architecture in which acquired rights were legitimised. This political and legal standstill mechanism has now been revoked, due to the fact that the old forms of protection and security are considered obstacles. Hence when we no longer fight for a

¹⁴ On the notion of semantic constitution, see Karl Loewenstein (1996: 118). I also refer to the idea of the parallel state developed by Boaventura de Sousa Santos (1993).

better future but only for one that does not get any worse, it is because we have changed society (Ost, 2001: 340).

In short, urgency leads to undervaluing the past, since it has already happened, and the future, since it is too uncertain. It also disregards expectations, duration and transitions. A political and legal culture of impatience therefore emerges and a propensity to resolve problems by provisional-definitive means. In a word, the transitory becomes habitual and urgency becomes permanent (cf. Ost, 2001: 359).

The second characteristic is fuelled by the general principle of precaution, applied in this case to the pressing needs of austerity and exception.

I will take as an example the reforms to labour law. The principle of precaution in association with the politics of austerity emerges as mystification (appealing to the principle of “social fear”)¹⁵, by concealing the fact that the causal nexus between flexibility and security is uncertain and the preventive reform measures adopted may create risks of their own (cf. Sunstein, 2005). This issue is particularly important since the relationship between efficiency and equity has indistinct outlines in terms of labour and analysis of the subject has proved inconclusive (Louçã and Caldas, 2009: 327- 353). From scientific uncertainty, scenarios and suppositions are created which justify bypassing the principles of proportionality, non-discrimination and consistency with similar previous measures¹⁶. This draws attention to the fact that a sense of collective insecurity and panic may be aroused by a non-existent relationship, therefore defined as a non-existent risk which is deeply feared¹⁷. By way of example, preventing the “social evil” of rigid labour legislation becomes a socially acceptable risk, despite the likelihood that its influence on lowering unemployment, job creation, increased productivity and economic growth is questionable. In addition, there is a lack of debate on the impact of neoliberal flexibility measures on social cohesion and integration¹⁸.

¹⁵ In the opposite sense, see, Alexandra Aragão (2008a: 14).

¹⁶ See Communication from the Commission of the European Communities on the precautionary principle (2000).

¹⁷ Following the analysis of Alexandra Aragão, who explores the question of the social perception of risk (2008a: 45-50).

¹⁸ See the Green Paper on Labour Relations (2006: 185-198), Employment in Europe (2006: 81-91), Rights at work in times of crisis: Trends at the country level in terms of compliance with international labour standards (2011), Global Employment Trends 2012: preventing a deep job crisis (2012), Recovering from the crisis: A global Jobs Pact (2009a), The financial and economic crisis: a decent work response (2009) and Trade Unions and Global Crisis - Labour's Visions, Strategies and Responses (2011).

This “purchase of regulatory security” (Sunstein cit. in Aragão, 2008a: 45) operates as a technical ideology, justifying the imposition of exceptional labour legislation¹⁹.

This phenomenon is particularly evident in the sphere of labour, where the law of exception has made a paradigmatic break with the assumptions of labour law, eliminating conflict as a dynamic component of labour relations and the protection of workers as a condition of liberty. The functions of labour law are also questioned, specifically (Ferreira, 2012) the economic-instrumental function which is always dependent on the fragile balance between the commodification of labour and the restrictions imposed by the status conferred on workers under labour law. This falters in the face of the changes to working and rest times, whilst the function of organising power relations within the sphere of labour, presented as the dispensability of workers and the narrowing of collective bargaining, makes organising the “voluntary submission” of the worker to the authority of the employer a despotic exercise of power, with no counterpower.

There is one consequence to these two characteristics of the law of exception which appears to me to be highly significant, namely the combination of the time of exception and the activation of the principle of precaution, both competing for greater flexibility and, above all, for the legalisation of social practices that were formerly questionable from a legal point of view. This results in reducing the discrepancy between *law in books* and *law in action*, in the sense that it reduces the ineffectiveness of rights associated with the non-application or selective application of the law on the part of the state.

I would like to single out this aspect, since it is linked to a very substantial research tradition within the sociology of law, specifically through the work of J. Carbonier and E. Blankenburg, concerning the effectiveness and implementation of legal regulations. On the basis of the argument developed here, the question of the effectiveness or ineffectiveness of law has become associated with the processes of producing austerity law, which is directed towards the principles of the temporality of exception and precaution.

¹⁹ The Communication from the Commission on the precautionary principle (2000) states that “Scientific uncertainty results usually from five characteristics of the scientific method: the variable chosen, the measurements made, the samples drawn, the models used and the causal relationship employed. Scientific uncertainty may also arise from a controversy on existing data or lack of some relevant data. Uncertainty may relate to qualitative or quantitative elements of the analysis.” (2000: 15).

From a sociological point of view, this is an issue of great relevance to the sphere of labour.

Legalising the one-sided contract, to the extent that *de facto* power and illegal extracontractual practices become positive law, is one of the objectives of the advocates of austerity, even though it involves denying the anthropological and sociological functions of labour law (Supiot, 2006: 9-10). In the name of austerity realism, there is no hesitation in “killing off the legal person in the man” (Arendt, 1978: 381-383), expelling any considerations of justice from the law. The Schmittian resonances²⁰ of the argument are not inappropriate to the sphere of labour, given the ongoing implementation of measures designed by the troika²¹ and accepted by bailed-out governments. It may be considered that at present legislative reforms aim to enshrine within labour law something that is essentially exterior to it and that is nothing less than the elimination of its political and legal identity, in exchange for external financing. Labour law therefore becomes a product of the market, used as a security for external aid.

2.4 The judicialisation of politics and austerity jurisprudence

Issues relating to the judicialisation of politics and the politicisation of justice have been discussed intensively within the sociology of law. I will not enter into the theoretical debate, preferring instead to explore reflections prompted by the actions of the Portuguese Constitutional Court within the present context.

In pursuing this theme my intention is to add the issue of the judicialisation of politics to the debate on the austerity society, its policies and rights.

The starting point for my reflections is based on the idea that there is an irresolvable tension between the political-legal model of austerity and the Portuguese Constitution.

In general terms, my argument is that in the case of Portugal the combined power of the elected and the unelected, through the troika memorandums and the government’s political actions, is eminently neoliberal and removed from the political pact established

²⁰ See Giorgio Agamben, *Estado de Excepção* (2010).

²¹ Available at <http://www.imf.org/external/np/loi/2011/prt/por/051711p.pdf>

in 1976 with the promulgation of the Constitution, despite the successive constitutional reviews that have since taken place.

In other words, I believe that what is at stake here is the creation of conditions which, using the arguments of austerity and exception, foster or press for the celebration of a new, neoliberal–inspired, political pact that can proceed with a political-ideological "settling of accounts" with the democratic model institutionalised after 1974.

This principle of political opportunity deployed by the Portuguese neoliberal right is clearly illustrated in the JP Morgan report on *"The Euro area adjustment: about halfway there"* which explicitly states that in Portugal, as other countries in crisis, if it were not for "the constitutional constraints" everything would be going well!».

In a recent speech (September 2013), the Portuguese prime minister put pressure on the Constitutional Court, arguing that there was a constitutional risk of some ongoing austerity measures being declared unconstitutional, and that if this were the case, there would be setbacks to combating the crisis and the "sacrifices" already demanded of the Portuguese people.

The question of the constitutionality of the austerity measures has been raised since 2011 with the successive legislative packages resulting from negotiations with the troika, and significantly has always involved issues concerning the policies of the welfare state.

In fact, in the current context, the tensions between the political and the judicial are associated with state social policies and rights, which are presented in the public and political arena as hampering the country's recovery. For this reason, the judicialisation of politics under austerity is synonymous with the judicialisation of the social question.

From the perspective of constitutional law the different positions of the political and judicial actors derive from their interpretations of the principles of trust, equality, proportionality, legal certainty and fairness.

It should be noted that in a brief report the Constitutional Court approved the first "austerity state budget" in 2011, which contained strong restrictive measures including wage cuts of 3.5% to 10% (depending on the amount earned) for a wide range of

people, generally applicable to all those earning monthly salaries paid by public funds of over 1500 euros, considering these measures to be temporary.

In fact, the limited temporality of the measures associated with the state budget seems to have been one of the decisive factors in ensuring the measures were not declared unconstitutional.

Similarly, the Constitutional Court was sensitive to the commitments agreed with international and European bodies to impose sacrifices, which were not, however, universal, since it even considered that "those paid by public funds are not in the same position as other citizens, therefore the additional sacrifice that is required for this category of people – bound, it should be remembered, to the pursuit of the public interest - does not constitute unjustified unequal treatment.”.

The meaning of the first decision of the Constitutional Court on the austerity budget was later reversed, since several measures in subsequent state budgets (in 2012 and 2013) approved by a right-wing parliamentary majority, as well as other ordinances promulgated by the government, were declared unconstitutional.

In these circumstances and considering the two latter cases, the measures imposed are now seen by the Constitutional Court as exceeding the "limits of sacrifice" and equity, both because of the deeper monetary and salary cuts and the fact that the measures applied not only to workers but included retired people and pensioners, and also - a significant point in these discussions on austerity and exception – since they are being applied definitively with no provision for temporality.

The Constitutional Court invoked the violation of the principles of trust, equality, proportionality, the democratic rule of law and the right to social security. After initially acknowledging the need for politics and the law to comply with the external conditions imposed by the troika, the Constitutional Court's assessment of austerity and exception policies now seems to be evolving towards preserving constitutional principles.

The tension between the parliamentary majority, the right-wing government and the Constitutional Court is not limited to the decisions made by the latter. Assuming the obligation to respect the decisions of the Constitutional Court, the government is using

them as a pretext for speeding up a broad reform of the welfare state. This is why, after the third state budget (2013) was rejected using this same argument, the government is launching a concerted set of activities in the public arena involving academics and experts in constitutional law in order to confirm the need for the reform of the state.

After "commissioning" a study from the IMF, the government and its supporters began stating that this document would provide the terms of reference for the inevitable reform of the state, without which the targets negotiated with the troika could not be met. In my view, this reaction establishes a form of politicisation and strategic use of Constitutional Court decisions, which are now presented to the public as failing to respect the commitments made with the troika.

However, it is important to remember that we are in the process of a sociological interpretation and a political intervention in which austerity measures are characterised by ambiguity and indeterminacy, as I sought to illustrate when discussing the previous topic.

The situation of the judiciary in this context acquires renewed focus, involving a consideration of how it is linked to political decisions on austerity. In maintaining the argument of the "exception normativity" associated with austerity, the borderline between constitutional and unconstitutional will inevitably become a political battleground, particularly if the court decisions value the singularity of the current moment.

Similarly, changes in the circumstances that determine invoking exception to legitimise austerity bring pressure to bear on the interpretations of legislation made by the courts. It is within this tension that discussions on the new constitutionalism can commence, particularly if emphasising the idea that judicial activism emerges out of situations in which the state intervenes selectively in the pursuit of public policies.

As part of its functions (Santos et al, 1996: 51-56), the work of the courts in the context of crisis reveals the existence of an "austerity jurisprudence" whose purpose is the law of exception. It is known that the courts play a strong role in the rationalisation of legislation, which is even greater when this becomes politically controversial. From a political point of view, their capacity to assess the work of the executive and legislative

powers makes them active participants in the current phase of transforming Portuguese society.

3. Towards a political sociology of the law of austerity

In this third and final section, I intend to explore what appear to me to be scenarios or possible paths for constructing research and action programmes for a sociology of the law of austerity or a political sociology of austerity law. Following the work of Jacques Commailles, I intend to bear in mind that the law reveals metamorphoses of the political and that law and politics combine in different ways. Together, they constitute the entry point for the debate on the austerity society (Commaille, 2013: 9). I also want to state that I will take the background paper prepared by Pierre Guibentif for this plenary session into consideration. I would therefore ask you to consider the scenarios or paths that I will propose by observing the following presuppositions.

Firstly, they emerge from reflections based on a critical sociology of law that is disposed to confront the problems emerging from the link between the normative and cognitive dimensions of social reality. For this reason I should inform you that my identity as a sociologist of law is based on a defence of normative presuppositions (aprioristic or taken from social reality!) concerning what a dignified and democratic society should be. I have sought to explore this issue in my latest book and in other published work.

Secondly, the sociology of law, as it is widely known, uses the investigative tools and instruments required to carry out scientific research. In this particular case, the theorisation and research strategy I will be using reflects the guidelines on middle range theory established by Roberto Merton.

The relation between the two presuppositions is summed up well in the work of Boaventura de Sousa Santos, which has always affirmed that the desired scientific aim should not be confused with axiological neutrality. In addition, there is the possible link with proposals for legal reflections involving different social actors: jurists, sociologists of law, social actors involved in mobilising rights etc, thereby creating favourable conditions for debates that may help develop democracy and dignity.

(1) Politics, law and the limits of social justice

If you are reading these words, at some time in your life you will have used a ruler to draw more or less precise lines and measure, more or less accurately. It may seem strange to invoke this image, yet the lines I have in mind are those which separate the various functions of the state, its policies and the role of law. They are the lines that divide ideologies, theoretical paradigms and concepts, but also political projects and concrete policies. It is for this reason that the tensions underlying the theoretical debates and the correlation between political forces and current interests in society show that what is at stake is defining where to draw the line between what should and should not constitute political-legal intervention under the austerity model. In the light of what has been previously stated, the defining lines for the political-legal model of austerity are captured in two traditional debates originating in philosophy and political theory. The first emerges from the opposition between forms of state welfarism and formulas for the minimal state. Given that in realpolitik theory the existence of the state was never totally questioned (except in anarchist thinking), this debate pitted libertarians and neoliberals, for whom the state should limit itself to responding to matters of law and order, against others such as liberal egalitarians, social-democrats and various advocates of the Third Way, who accepted the need for state intervention in social matters. This paradigmatic tension held sway until 2008, when states intervened to secure the financial system at the cost of weakening their social functions. This constitutes the current debate on “the state of the state” in which, to ensure peace and meet the expectations of the financial markets, measures are adopted to transfer the income of citizens to the accumulated wealth of financial capitalism. The second debate is closely related to the first and refers to the subject of social justice. Here as well, the austerity model affects the terms of reference of the problematic. Briefly, taking *A Theory of Justice* by John Rawls as a reference point, the question has been one of knowing how, within unequal societies, a distributive criterion can be established through which the least privileged members of society can enjoy more equal access to primary social benefits: liberty, opportunities, income and wealth and the basis for self-respect. Austerity, however, draws a double “veil of illusion” over questions of social justice and equity. The first is based on its social experimentalism, the continuing decline in living conditions and the quality of democracy created by the policies and law of austerity, revealing the existence of a theory of social inequality which tests the limits of

an unequal distribution of assets that is prejudicial to the least privileged. The second is related to a false egalitarianism supported by a supposed consensus created on the basis of the collective responsibility of all members of society, regardless of their position in the social structure. It is presented as a collective identity/'we', to use the words of George Gurvitch, in which all are equally responsible²². The "we", as a collective interest and in the shape of a combined force, raises the dilemma of how to combine individual sacrifice and social justice, leading to the revival of a classic problem in political theory: in the face of a crisis that affects all, it becomes necessary to resort to measures that violate the fundamental rights of some.

The concerns I have listed form part of a research path for a political sociology of austerity law. Given this context, law increasingly becomes a system for distributing scarce resources and therefore the legal guardian of a model of social (in)justice. Establishing limits for state intervention associated with distributive mechanisms confers enormous centrality on law and the way in which it combines with austerity politics. Naturally, the divide between the political and the legal is set aside, replaced by the previously defined outlines for a political sociology of law.

(2) Blame as an element of legal awareness

The second scenario or path refers to the responsibility of citizens as consumers and as democratic citizens who, through their "consumer greed", to use the words so dear to Jacques Rancière, have helped create the situation we are now facing. High levels of debt and easy access to credit allowed citizens to undertake commitments which, in the event of any default, became one more fuse that ignited the crisis.

In this "regime of truth" concerning shared situations in the present day it is even possible to trace a principle of "responsibilities attributed to worker-consumers" which legitimises the demands for them to contribute in order to find ways out of the crisis. As

²² Following George Gurvitch, the use of the plural "we" describes a whole that cannot be reduced to the plurality of its members, a union that cannot be decomposed. The "we", according to Gurvitch, does not attribute specific characteristics to the identity of its members and therefore constitutes a social framework as a concrete whole. It thus assumes the existence of reciprocal participation through unity in plurality and plurality in unity (cf. Gurvitch, 1977: 245).

Bob Jessop stated in 2009²³, one of the explanations is that consumers who took out mortgages without the slightest intention of paying for them, overused their credit cards and engaged in rampant consumerism as if there would be no need to “settle accounts” one day, helped cause the financial crisis. They therefore have to shoulder part of the blame for the impact of the crisis and incorporate this into their own personal condition²⁴.

It is from this perspective that a socio-legal approach to blame associated with the austerity society can be tested. The question can be formulated in the following terms: under economic and social conditions considered normal, conflicts and litigation associated with consumerism and loans are resolved through the legal framework of civil law and consumer law. The question is that now, in a context of exception and austerity, the pressure on worker-consumers is based on a diffuse collective awareness marked by blame. Moreover, and again taking up the analogy with Durkheimian thought, a kind of symbolic-legal trade-off can be seen, under the terms of which private civil liability is transformed into a rhetoric of “criminalisation” of the freedom of individuals expressed through their subjective rights, with their irresponsible behaviour now sanctioned and condemned. The symbolic-legal dynamic of the “collective awareness of guilt” creates an ambiguous socio-legal space in which individuals, in addition to renegotiating mortgages and loans and making increased efforts to meet their commitments, are also constrained by wage cuts, fiscal reforms of dubious equity and a regression in labour and social rights. In fact²⁵, the *homo juridicus* of austerity is the “indebted man”, gradually stripped of the social rights with which he might aspire to a minimum level of socio-economic security.

²³ <http://blog.theasa.org/?p=228>

²⁴ Featuring frequently in speeches by politicians, in public debates and commentaries by opinion makers, references to the problem of family and individual debt, associated with the blame mechanisms that justify the sacrifices, include political changes and changes in law enshrined in the austerity reform agenda. The subject is not new to philosophical and political thought, and the works of Friedrich Nietzsche and Walter Benjamin must inevitably be cited, as well as the more recent work of Zygmunt Bauman in which the issue of debt and blame emerge as a form of discipline for social control, thus challenging the position formerly occupied by employment bonds.

²⁵ From a neoliberal perspective, the concept of individual freedom is inseparable from the emergence of “indebted man” and the social relations established between creditors and debtors (cf. Lazzarato, 2012).

(3) Fear and legitimacy

The third research path is related to the legitimisation procedures adopted in the austerity society. As I aimed to emphasise in the two opening sections of this text, a clear affinity can be identified between Zygmunt Bauman's notion of liquid modernity and the notion of the austerity society. However, the specific features of the latter contain a theme dear to Bauman, namely social fear. Zygmunt Bauman establishes an argument for legitimacy that is defined by the establishment of boundaries raised in the transition from the solidity of solid modernity and the fluidity of liquid modernity. One of the themes developed by the author is the question of the fears of modern life, which he frequently associates with the dissolution of the solidarity of solid modernity and processes of exclusion and distancing from difference in the other and the unknown, illustrated by a fear of the return of the "dangerous classes"²⁶, the unemployed, immigrants, delinquents, the working poor and the poor, demonised by everyone who believes they can define themselves as decent and who feel that others may not be like them.

The political-legal consequences of this analytical thread on the theme of fear are projected in the politics of fear as one of the most important characteristics of the liquid society which lies at the roots of a new form of legitimation responsible for the erosion of civil liberties and human rights (Priban, 2007: 9). As Jiri Priban aptly notes, the creation of the state of emergency is facilitated by an increase in fears concerning personal security and the need to contain urban decay.

It is precisely in relation to this latter point that I would argue that there are nuances to the relationship between fear, exception and legitimation in the context of the austerity society. The first of these rejects the legitimation of exception based on fear and difference in the other in favour of a legitimacy based on the collective fate of a people dependent on the "emotions of the financial markets". This is the combined "collective we" which I referred to in the previous point, which organises the attitudes and expectations that form the basis of a legitimacy created out of predictions of catastrophic scenarios associated with the risks emerging from the financial markets that can only be reduced by imposing austerity measures and reducing the welfare state. Fear, in the context of austerity, is an integral part of a political contractualism which

²⁶ Castel, Robert (2003).

forms the basis of a paradoxical regime of causality. This is the point I wish to emphasise, given that fear in the austerity society is affirmed as a mechanism for translating structural problems, public debt and financial bailouts into individual designs. It therefore constitutes a mechanism for legitimation, converting the narrative of austerity into the dominant political-social model and ensuring total priority is given to the moral values of austerity neoliberalism. The needs of families and individuals makes them willing to accept certain living and working conditions, however precarious they may be, provided that they can subsist on them. A critical sociology of law directed towards the themes of austerity, fear and legitimacy cannot avoid revisiting the subject of the “rule of law” and the “universal nature of law”, confronting this with the different aspects of the law of austerity for different social groups. Fear is only apparently democratic, as the repository of communal, inter-class expectations. The social reality that permeates the politics and law of austerity ultimately reveals the intensive processes of social differentiation between groups and individuals associated with the application of this form of normativity.

(4) Austerity and non-recognition of rights

The concept of recognition is linked to the work of Axel Honneth, already the subject of analysis by the sociology of law in a recent edition of the journal *Droit et Société*. Its critical theory has led to a normative approach to social reality which acknowledges in itself the potential for progress (Guibentif, 2011: 295). This is shared by the emancipatory approach of much socio-legal research, namely in *Critical Legal Studies*, *Movement Critique du droit* and the work developed by other colleagues (cf. Guibentif, 2003: 178). It is an important issue, since it links sociological models of social reality with sociological studies of the law which challenge the limits of official legal systems (*idem*) connected with the alternative use of law, emancipatory legal pluralism, approaches sometimes connected with subjects such as the mobilisation of rights, the effectiveness of rights, access to the law and to justice and legal awareness. However, how can we reformulate the previous argument in the light of the austerity society, when this is defined by stagnation and a regression in social issues and rights? Recognise what and how, when the social actors are no longer motivated by social and economic interests or extending their rights and only defend existing rights as a form of

resistance to the regressive movement that seeks to suppress them in the name of neoliberal-inspired market objectives?

Moreover, if we agree with Alain Touraine (2012: 127) on the “end of the social”, where do we place politics and the law, given that the divide between the economic system which no one is able to effectively control and life in society threatens the principles of liberty and justice more than any relations based in force?

Two lines of investigation may be pursued in a political sociology of law. One is the analysis of the mobilisation and recognition of existing rights, namely social and labour rights, identifying the forms of struggle that aim to prevent “non-recognition” and the abolition of these rights. The *indignados* movement, the use of the courts by trade unions, public actions and recourse to the courts by professional organisations representing magistrates and public prosecutors, the work of European legal specialist networks, demonstrations in defence of the welfare state and labour law and even proceedings lodged against the ratings agencies are all evidence of the existence of a network constructed from the “bottom up”, configuring a pattern for the mobilisation and use of the law against the politics of austerity.

The other revives the Durkheimian tradition of taking the law as a sociological indicator of social solidarity, investigating the way in which the law of exception under austerity has been established as a standard for social life that contributes towards decoupling and abolishing basic principles of social law, leading to the emergence of a society in which the income of citizens is transferred to the financial markets.