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law in Portugal and Spain;  
A comparative prospect**

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Uma análise comparativa**

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**CONSTITUTIONAL COURTS BEFORE EURO-CRISIS LAW IN PORTUGAL AND SPAIN; A COMPARATIVE PROSPECT**

**TRIBUNAIS CONSTITUCIONAIS PERANTE O DIREITO DA EURO-CRISE EM PORTUGAL E ESPANHA; UMA ANÁLISE COMPARATIVA**

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**Abstract:** Portugal and Spain have been at the center of a major financial and economic crisis since 2009, the management of which has needed major budgetary constraints impinging upon several social rights. This lowering of social rights' enjoyment has been challenged before Constitutional Courts.

In this regard, this article aims to unravel the Spanish and Portuguese Constitutional Courts' role regarding austerity measures by critically analysing their main reasoning on this matter. To achieve such an aim, this article analyses on one hand the role that Euro-crisis Law has played in both Constitutional Courts' reasoning. On the other hand, it discusses how economic crisis has shaped the case law regarding social rights in both countries.

**Summary:** 1. Introduction; 2. The Challenge before Constitutional Courts in Spain and Portugal; a different legal framework; 3. Spanish and Portuguese Constitutional Courts before Euro-crisis Law; 4. Adjudication of Social rights in times of economic crisis; 5. Concluding Remarks.

**Keywords:** Jurisprudence of crisis; constitutional courts; Euro-crisis Law; social rights' adjudication

**Resumo:** Portugal e Espanha têm estado no centro de uma enorme crise financeira e económica desde 2009, cuja gestão impôs importantes restrições orçamentais ao nível de vários direitos sociais. Esta diminuição do gozo dos direitos sociais tem sido desafiada perante os Tribunais Constitucionais.

Neste sentido, o presente artigo pretende desvendar o papel dos Tribunais Constitucionais Espanhol e Português no que se refere às medidas de austeridade, procurando analisar criticamente a sua fundamentação no quadro destas questões. Para atingir este objectivo, este artigo analisa, por um lado, o papel que o Direito da Euro-crise desempenhou na fundamentação dos dois Tribunais Constitucionais. Por outro lado, discute em que medida a crise económica moldou a jurisprudência relativa aos direitos sociais em ambos os países.

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**Sumário:** 1. Introdução; 2. O desafio perante os Tribunais Constitucionais de Espanha e de Portugal; um enquadramento legal distinto; 3. Os Tribunais Constitucionais de Espanha e de Portugal perante o Direito da Euro-crise; 4. Controlo jurisdiccional de direitos sociais em tempos de crise económica; 5. Considerações Finais.

**Palavras-chave:** Jurisprudência da crise; tribunais constitucionais; Direito da Euro-crise; controlo jurisdiccional de direitos sociais.

## 1. Introduction

The Commission initiated an excessive deficit procedure regarding to Spain and Portugal in 2009, which has continued until the present day. Furthermore, both States requested financial assistance from the so-called Troika signing up to a Memorandum of Understanding (MoU) which established further recommendations and guidelines impacting upon public policies and labour market. Nevertheless, the Spanish and the Portuguese memorandums are not the same. The Portuguese MoU aimed at overcoming the structural flaws of the Portuguese economy in the frame of the sovereign crisis, whereas the Spanish one established a loan assistance program applying to its financial sector. Thus, the MoU triggered most of the austerity measures in Portugal but not in Spain<sup>2</sup>.

In any case, both States have adopted several measures regarding mostly public employees' working conditions, welfare and labour rights and tax law, which have been challenged before their Constitutional Courts but also before the ECtHR and the CJEU.

In this regard, this article aims to unravel the Spanish and Portuguese Constitutional Courts' current role regarding austerity measures by critically analysing its main reasoning on this matter during the crisis. To achieve such an aim, firstly it will be enumerated the legal factors than must be taken into account in order before comparing both case laws. Secondly, it will analysed the role that international and European recommendations have played in both Constitutional Courts' reasoning. Finally, it will be discussed how the economic crisis might have impinged upon social rights' case law in both countries.

## 2. The Challenge before Constitutional Courts in Spain and Portugal; a different legal framework

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2. Austerity measures have been defined as “the legislation adopted to cope with the need to reduce the budget deficit that has a direct impact on constitutional rights”. MARIANA CANOTILHO / TERESA VIOLANTE / RUI LANCEIRO, Austerity measures under judicial scrutiny: the Portuguese constitutional case-law, *European Constitutional Law Review*, vol. 11, Issue 01, 2015, p. 158.

As already stated, both Portugal and Spain have been required to adopt several measures on social rights and entitlements, some of such measures being challenged before their respective Constitutional Courts. Thus the comparison of both case laws might allow us to dig into the Constitutional Courts' role in the Euro-crisis. However, it should be stressed that there are substantial differences between both legal frameworks that reduce the plausible scope of such a comparison.

Firstly, it should be considered the different understanding of social rights in each Constitution. The Spanish Constitution enshrines welfare rights such as the right to education, the right to health and the right to enjoy adequate housing, among others. However, according to article 53.3 Spanish Constitution the principles recognised in Chapter Three of the Constitution may only be invoked before ordinary courts in accordance with the legal provisions for implementing them. As a matter of fact, most of the welfare rights are enshrined in Chapter Three.

Therefore, the constitutional articles devoted to welfare rights have been considered by many Spanish scholars, at most, principles that ought to be followed by the political power whenever economic circumstances allow them to do so<sup>3</sup>. Still, according to Article 1 of the Constitution Spain is a Social State and such a provision could support an interpretation of Chapter Three which would strengthen social rights' protection, but the Spanish Constitutional Court has traditionally been quite reluctant to adjudicate on social rights.

The Portuguese Constitution contains a long and detailed list of social rights, which can be judicially enforced. However, Article 18 of the Portuguese Constitution determines that only civil and political rights are directly enforced, which has spurred the debate among scholars regarding whether social rights are binding in any circumstance or whether social rights' scope and actual effectiveness might be shaped by the legislation<sup>4</sup>. Be this as it may, the Portuguese Constitution has a stronger and wider commitment towards social rights than other European Constitutions such as the Spanish one<sup>5</sup>. It is to be expected that the Portuguese case law might enforce social rights in cases in which the Spanish Constitutional Court would not.

A difference response is easily understood whenever the wording of both Constitutions differs greatly. Still, even in cases in which there is not so clear a difference between the constitutional provisions, the Courts' approach might diverge, given that a systematic interpretation of the Constitutions provides a different outcome. Furthermore, it is highly likely that the Portuguese Constitutional Court is more used to dealing with social rights than the Spanish one, the former being more prone to protect them than the latter.

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3. VÍCTOR FERRERES COMELLA, *The Constitution of Spain. A contextual Analysis*, Oxford, 2013, p. 237.

4. ANA GUERRA MARTINS, Constitutional Judge, Social Rights and Public Debt Crisis, *Maasricht Journal*, volume 22, Issue 5, 2015, p. 690.

5. CÉCILE FABRE, Social Rights in European Constitutions, GRAINNE DE BURCA/ BRUNO WITTE (Coord.), *Social Rights in Europe*, Oxford, 2005, p 15.

Secondly, the constraints and possibilities offered by the constitutional justice procedure law in each case must be pointed out. In this regard, the Portuguese Constitutional Court has dealt with the constitutionality of the austerity measures under the *a priori* constitutional review procedure in several cases. Such a procedure compels the Court to decide within 25 working days. The Spanish Constitutional Court instead dealt with the austerity measures mostly in the frame of abstract constitutional challenges, which allowed it to make the decision when the main controversy was actually over. In this regard, the Spanish Constitutional Court did not decide on the public employees' salary cut, approved in 2012, until 2015, but by then a law had been approved reimbursing the public employees for the cuts. Thus, the Constitutional Court declared the challenge inadmissible since the main petition had already been satisfied<sup>6</sup>.

Thirdly, the Spanish Welfare State is intertwined with the Regional State, given that Regions are the ones empowered to rule on social policies. Still, the State rules on general economic matters and also on the minimum equality among citizens throughout the territory. Therefore, many austerity measures have been challenged before the Constitutional Court in the frame of a competence conflict between the central Government and a Regional Government or Parliament.

Competence conflicts can actually conceal a different understanding of a fundamental right, nevertheless in any case the competence controversy shapes the legal debate. Furthermore, since currently economic policy equates to a large extent to austerity measures, the clash between the State's competence on economic matters and the Regions' competence on social policies can involve the State challenging a regional policy that increases public spending. In fact, when Catalonia increased the line item in its budget regarding regional civil servants, the Catalan Budget Act was challenged before the Constitutional Court. The Court simply stated that there was a national law prohibiting any increase on revenues regarding the staff of Public Administrations. Hence, the line item was unconstitutional since it was in contradiction with the State competence over economic policy<sup>7</sup>.

In a similar vein, the State can plead its competence to maintain a general level of equality among citizens throughout the State versus a Regional Law which decreases a social policy. In this regard, Catalonia and Madrid established an extra charge of one euro per prescription, with certain criteria established to exempt disadvantaged groups. However, according to the Constitutional Court the extra charge was unconstitutional. The State sets out the health system's budget and, by doing so, it guarantees a uniform standard in the enjoyment of the right to health throughout the State. Thus, Regions are not allowed to diminish essential public services on their own<sup>8</sup>.

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6. Judgment of the Spanish Constitutional Court n. 81/2015, 8.06.2015 (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

7. Judgment of the Spanish Constitutional Court n. 88/2016, 28.04.2016 (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

8. Judgments of the Spanish Constitutional Court n. 71/2014, 6.05.2014 and n. 85/2014, 24.06.2014 (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

Therefore, the Constitutional Court has dealt with cases in which a social right has been strengthened and vice versa, but the legal debate tends to be framed as a competence controversy. This has determined the reasoning of the Court, which cannot be easily compared with the Portuguese case law on austerity measures, since the competence struggle does not play any role in the Portuguese case.

Thirdly, the MoU regarding Portugal is quite different from the one signed regarding Spain. It is well known that the Spanish Memorandum is related to the financial assistance of the Banking Sector, whereas the Portuguese one refers to the whole public administration. Unsurprisingly the Spanish Memorandum has impinged on the right to housing, whereas the Portuguese one has impacted upon several social rights<sup>9</sup>.

Thus, any comparison between the Portuguese and the Spanish case law on austerity measures must consider at least the above-mentioned differences, because they explain the divergence among Courts in several cases. These factors recommend either to constrain the scope of any comparison or to expand it including plenty of information about both constitutional systems. This article follows the first path and constrains itself to explore, firstly, the case law of each Court regarding the margin of maneuver of the domestic players when implementing the law governing the sovereign debt loans and the Economic and Monetary Union (EMU)<sup>10</sup>. Secondly, it will examine the impact of the economic crisis upon case law on social rights.

### **3. Spanish and Portuguese Constitutional Courts before Euro-crisis Law**

Constitutional Courts' understanding of EU Law is an issue deeply debated by scholars. Nevertheless, the domestic case law related to the European Economic Governance and the Financial Assistance to the Member States of the Eurozone poses new challenges to law scholars.

On one hand, there is no denying that this new scheme constrains Member States but mostly through an array of recommendations and guidelines, the actual strength of the soft law being a crucial question. The ultimate strength lying under many financial bodies' recommendations should not be underestimated. In fact, they do have an undeniable impact upon the national legislators since any deviation from the measures recommended might trigger, if not a sanction, at the

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9. On the provisions of the MoU for Portugal regarding social rights see MIGUEL NOGUEIRA DE BRITO, Putting social rights in brackets? The Portuguese experience with welfare rights challenges in times of crisis, *European Journal of Social Law*, Volume 1-2, 2014. On the impact of the MoU regarding the Spanish banking sector upon right to housing see, MARIBEL GONZÁLEZ PASCUAL, Social rights protection and Financial Crisis in Europe. The Right to Housing in Spain: a Cautionary Tale, *Inter-American and European Human Rights Journal*, volume 9, 2016.

10. Both kind of rules have been encapsulated under the term Euro-crisis law. CLAIRE KILPATRICK, Constitutions, social rights and sovereign debt in Europe: a challenging new area of constitutional inquiry, WP EUI 2015/34.

very least economic turmoil. However, the measures recommended to tackle the crisis at international level which might impact upon the rights are not amenable to judicial review.

On the other hand, national Courts tend to be more deferent both in contexts of economic crisis and regarding international settlements. In fact, social rights policentricity as an objection to social rights' adjudication carries more weight when a State has needed international financial assistance. In such cases, the impact of the allocation at the nationwide level of a judicial decision is mostly guesswork. In fact, several factors contribute to the Courts' difficulties in these cases; the unpredictable reaction of international markets, the conditions required for political acceptability of the repayment, the long-term macroeconomic stability and the changing nature of all these factors<sup>11</sup>.

As a matter of fact, both the Spanish and the Portuguese Constitutional Courts are quite aware of the implications that their decisions may have, given the economic crisis. Thus, they have insisted on the need to frame their judgments in the context of an economic crisis and they also have limited their actual effect of their final decisions by suspending the declaration of unconstitutionality when affecting economic measures taken by the government<sup>12</sup>. However, the approach of both Courts has been quite different.

In fact, the Spanish Constitutional Court seems to argue that the State has barely room to decide when implementing the recommendations deriving from international commitments, whereas the Portuguese Constitutional Court considers that such room has decreased but it still exists.

Regarding the Spanish case, the judgment n. 2/2012 is a case in point. On 27th September 2011, Article 135 Spanish Constitution was amended. This new provision was mainly a response to the high cost of Spanish bonds' yields, the international markets being the constitutional amendment's primary addressees. The Spanish Regions were, however, the secondary addressees<sup>13</sup>. Later, the

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11. JEFF KING, *Judging Social Rights*, Cambridge, 2012, p. 6.

12. See, among others, the Judgment of the Portuguese Constitutional Court n. 353/2012 (available at [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt)) and Judgment of the Spanish Constitutional Court n. 140/2016, 21.07.2016 (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

13. Article 135 SC

1. All public administration services shall adapt their actions to the principle of budgetary stability.

2. Neither the State nor the Regional Governments may incur a structural deficit that exceeds the margins established, as the case may be, by the European Union for its Member States. A Constitutional Law shall set the maximum structural deficit permitted for the State and for the Regional Governments in relation to the gross domestic product thereof. Local authorities shall be required to present a balanced budget.

3. The State and the Regional Governments shall require legislative authorisation to issue public debt or secure credit. Loans to meet payment on the interest and capital of the public debt held by the public administration services shall always be deemed to be included in budget expenditure and their payment shall receive absolute priority. Such loans may not be subject to amendment or modification while they are in line with the conditions established by legislation on the issue thereof. The volume of public debt held by the public administration services as a

Budgetary and Financial Stability, approved as foreseen by article 135 Spanish Constitutional Court, was challenged by the Canarias Government and also before the Constitutional Court.

In this regard, the constitutional reform was built on an already existing set of laws approved in 2001 aiming at coordinating the Regions' deficits. Nevertheless, the internal stability pact did not have teeth, given that there was no provision for the Regions not fulfilling the deficit targets. The Budgetary and Financial Stability Act, however, confers extensive inspection and sanction powers to the central government if the Regions fail to achieve the structural and public debt targets<sup>14</sup>.

Article 11(6) of the Budgetary and Financial Stability Act was one of the provisions challenged. This provision establishes the structural deficit allowed to administrations by relying on the methodology followed by the EU Commission. According to the Canarias government, however, this article empowers the central government to decide unilaterally in which structural deficit each administration may incur, given that there is no mandatory EU rule on the matter<sup>15</sup>.

The Constitutional Court, nonetheless, declared this provision constitutional based on EU membership. As state by the Constitutional Court, the EU is entitled to assess the Member States' budget deficit and also to decide which methodology to follow to determine it, the basis being EU law direct effect (Article 288 TFEU). Therefore, "it is not only constitutionally necessary to observe the maximum structural deficit determined by the EU (Article 126 TFEU and Article 135.2 CE) but the EU provisions related to the method to be followed to assess the

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whole in relation to the gross domestic product of the State may not exceed the reference value established in the Treaty on the Functioning of the European Union.

4. The limits on the structural deficit and the volume of public debt may only be exceeded in the event of natural disaster, economic recession or situations of extraordinary emergency beyond the control of the State and which seriously prejudice the financial situation or the economic or social sustainability of the State in the opinion of an absolute majority of the Members of the Lower House of Parliament.

5. A Constitutional Law shall develop the principles provided for in this article, as well as the involvement in the respective procedures by the institutional bodies for coordination between the public administration services in matters of fiscal and financial policy. At any event, it shall govern: a) the distribution of the deficit and debt limits between the various public administration services, the exceptional cases when the same may be exceeded and the method and term to correct deviations that may arise in relation to one or another; b) the methodology and procedure for calculating the structural deficit; c) the responsibility of each public administration service in the event of failure to comply with budgetary stability targets.

6. Pursuant to their respective governing statutes and within the limits referred to in this article, the Regional Governments shall adopt the appropriate provisions to effectively apply the principle of stability in their regulations and budgetary decisions.

14. VIOLETA RUIZ ALMENDRAL, *The Spanish Legal Framework for Curbing the Public Debt and the Deficit*, *European Constitutional Law Review*, Volume 9, 2013, pp. 198-202.

15. In fact, the government relies on the document "The cyclically-adjusted budget balance used in the EU fiscal framework: an update" published by European Economy. (Economic Papers 478 March 2013), which explicitly states the authors' views do not necessarily correspond to those of the European Commission.

deficit.”<sup>16</sup>

Therefore, paradoxically, the Constitutional Court clearly endorsed the strength of EU law and its impact on the Spanish Constitution in a case concerning a non-mandatory EU rule. Such reasoning can only be understood in the frame of the economic crisis, during which the Constitutional Court has been extremely deferent to any economic measure adopted by the central government and to any recommendation stemming from the EU.

This trend has been even clearer when the Constitutional Court dealt with the recommendations addressed to Spain in the frame of the Financial Assistance. In this regard, several regions approved new laws on the right to housing, which foresaw temporary suspension of evictions. Such laws were challenged before the Constitutional Court and their application was suspended. Surprisingly, the legal basis alleged for suspending these regional laws was the fifth review of the Financial Assistance Programme<sup>17</sup>.

According to the Constitutional Court, the Troika is composed of independent and highly specialised institutions. Hence, the President of the Government can rely on their reports to require the suspension of a regional law. In the Court’s view such reports make it plain that regional laws on the right to housing jeopardise not only the financial assistance program but international obligations assumed by Spain<sup>18</sup>.

Later on, the Constitutional Court declared unconstitutional the Decree Law on the housing social function adopted by the Government of Andalusia. The Constitutional Court states that the regional Decree Law tries to protect the right to housing enshrined. Nevertheless, the Court points out that a key element of Spanish economic policy is to stabilize and reorganise the banking sector. In line with this, the state has passed rules to protect vulnerable mortgage debtors but without affecting particularly the mortgage scheme.

In this regard the Constitutional Court brings up the Mortgage Debtors Act passed on 14 May 2013 whose main measures to protect the right to housing are the temporary suspension of evictions. According to the Constitutional Court the Mortgage Debtors Act aims at guaranteeing the right to housing without jeopardising the financial system. Therefore, the Spanish Parliament has already ascertained the scope of vulnerable groups’ protection which does not endanger the mortgage scheme<sup>19</sup>. Furthermore, the mortgage scheme is crucial

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16. Judgment of the Spanish Constitutional Court n. 215/2015, 22.10.2015 (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

17. According to this report the “different legal frameworks on housing across the national and regional levels and legal uncertainty about the rules to be applied could weigh on the value of the mortgage collateral and the stability of financial markets.” In addition, “regional laws aimed at alleviating the social problems related to foreclosures and evictions [...] create additional legal uncertainty [...]. In the worst case, they may even endanger financial stability”.

18. Judgements of the Spanish Constitutional Court n. 69/2014, 10.03.2014 and n. 115/2014, 08.04.2014 (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

19. However, the law had very limited bite in practice. In this regard, it has been estimated

for the financial market. Consequently, regions cannot approve further measures which might change the balance already achieved between social protection and economic policy.

This reasoning was clearly built upon the letter sent by the Commission to the Spanish Government on June 2013. As state in this letter, the regional measure goes “further than a balanced approach that should reconcile the necessary protection of the most vulnerable families with the need to preserve financial stability”. The resemblance with the Constitutional Court reasoning is astonishing. Therefore, a decision made by a democratically elected body on social rights was easily disregarded relying on a non-accountable report drafted by an international body.

Thus, the Spanish Constitutional Court has built its case law regarding the impact of Euro-crisis law on social rights based on a very simple statement: Governments can only follow the international or European recommendations on economic matters to the letter. Therefore, the Constitutional Court has tied its own hands when dealing with economic crisis measures recommended by international players.

Thus, social rights protection is trapped by the international economic legal framework, which renders domestic social rights guarantees futile<sup>20</sup>. Paradoxically, the domestic measures which foster the rights must comply with the international recommendations on fiscal policy, if they do not, they might be challenged. As a consequence, social rights are overruled by the global economic crisis and remain unprotected by Court, which seems not to dare to make any decision at all which affects the banking and financial sector. However, social rights concerns should be, at the very least, an argumentative burden which could trigger the search for less severe measures or, at the very least, provide safeguards for the most vulnerable groups<sup>21</sup>.

The Portuguese Constitutional Court, on the contrary, had a different understanding regarding the implementation of international and European

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that no more than 0.77% of total households in Spain could be eligible. Besides, it has also been estimated that only 7.6% of the households with all members unemployed would be considered a vulnerable group. FERNANDO GÓMEZ POMAR /KAROLINA LYCZKOWSKA, Spanish Courts, the Court of Justice of the European Union and Consumer Law, *InDret, Issue 4*, 2014, p. 30.

20. Euro crisis law seems also to be not accountable before international social rights protection Both the CJEU and the ECtHR have declined jurisdiction regarding the recent austerity measures by relying on their lack of jurisdiction (See, among others, CJEU(Order), *Sindicato dos Bancarios do Norte*, C-128/12, 7 March 2013) and the legislatures “wide margin of appreciation in implementing social and economic policies” (ECtHR (Decision) 7 May 2013, *Koufaki* and *Adedy v. Greece*, App. No 57665/12 and 57657/12) Furthermore, the IMF has explicitly rejected the application of the International Covenant of Economic Social and Cultural Rights (ICESR) to its activities. Economic, Social and Cultural Human Rights and the International Monetary Fund (drafted by F. Gianviti. General Counsel), para 56.<[www.imf.org](http://www.imf.org)>. Still, the CJUE had recently considered, on a case relating right to property and the Cyprus MoU, that the EU Institutions are bound to the Charter also outside the EU legal framework

21. MATTHIAS GOLDMANN, Human Rights and Sovereign Insolvencies, working paper, April 2014. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2330997](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330997).

recommendations. In this regard, it has emphasized that the austerity measures have been adopted to comply with the commitments deriving from the MoU, the access to the international assistance being crucial for Portugal<sup>22</sup>. Nevertheless, the Court is quite aware that the binding nature of the recommendations addressed to Portugal by international and European institutions is not settled. Furthermore, according to the Court the EU recommendations in this field do not include the means chosen by Member States to achieve the goals imposed upon them. Finally, the Portuguese Constitutional Court did not only stress that the internal legal measures must be in accordance with the National Constitution but also that, as stated in article 4 (2) of the TEU, the Union shall respect Member States' national identities<sup>23</sup>.

This perspective is at odds with the one supported by the Spanish Constitutional Court. Still, it is also far from being flawless. Firstly, even though international recommendations aim at establishing goals, as the Court states, it is also true that quite often these recommendations are extremely detailed, particularly in economic matters. Secondly, international recommendations are not mandatory in principle but not following them might cause damage to the national economy, since the country might appear as not reliable, and even they might provoke sanctions in the long run. Domestic players must not always follow every detail of an international recommendation, as the Spanish Constitutional Court seems to suggest. Nevertheless, Euro-crisis law and national law is fully entangled and even though the Portuguese Constitutional Court is normally quite aware of it, some of its statements apparently overlook it.

Secondly, the constitutional identity clause is gaining terrain in the domestic case law regarding the European economic governance scheme, but it has not provided yet any discernible answer since it is being shaped as the last line of resistance, but the line has not been drawn and it is not expected to be drawn in a near future.

The scope and final impact of international recommendations upon constitutional systems is not straightforward. Still, on the one hand, States cannot easily avoid them, given the actual strength that they have in practice. On the other hand, if neither international recommendations nor national measures implementing them are challenged, the welfare state can be easily dismantled regardless of both the constitutional and international provisions on equality and social rights. Which is the best way to handle this dilemma?

In my view, the impact of the Euro-crisis law on social rights should be brought before the CJEU by a Constitutional Court. It is quite doubtful that, if asked by a Constitutional Court, the CJEU would shy away from reviewing either the compatibility of the EU institution's recommendation with the Charter social rights or, at the very least, the actual nature of such a recommendation.

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22. Portuguese Constitutional Court Judgments n. 396/2011 (point 9) and n. 353/2012 (point 6) (available at [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt)).

23. Portuguese Constitutional Court Judgment n. 575/2014 (Point 25) (available at [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt)).

In fact, the CJUE has considered that national courts must take EU recommendations “into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions”<sup>24</sup>. Hence, EU soft law cannot be easily disregarded by national courts. The CJEU should clarify what is the actual national players’ margin of appreciation when dealing with soft law and, by doing so, it would also contribute to specify Constitutional Courts’ role in this new scenario.

Furthermore, the CJEU should be asked again about the compatibility of the MoUs and of the rules deriving from the EMU scheme with the Charter social rights. The recent judgment *Ledra Advertising Ltd* bears witness that EU Institutions are bound to the Charter also when acting outside the EU legal framework<sup>25</sup>. Still, such a decision was made in a case related to right to property, economic rights being traditionally at the core of the EU integration process. Hence, the question about the compatibility of the austerity measures instigated by the EU with the social rights has still to be decided by the CJEU and, as already explained, a Constitutional Court should ask the CJUE about it.

#### **4. Adjudication of Social rights in times of economic crisis**

Social rights are not immune to an economic crisis, quite on the contrary given their dependency on public resources. It can even be wondered whether Courts can guarantee social rights’ protection in the context of a deep economic crisis. Such a question involves two big controversies regarding social rights: the actual scope of adjudication on social rights and the balance between social policy and economic policy.

It has been heavily discussed whether Courts can (or even should) guarantee social rights. Although many scholars have consistently rebutted the main objections to the adjudication on social rights<sup>26</sup>, Courts tend to play a lesser role when it comes to social rights<sup>27</sup>. As a matter of fact, some objections to the social rights’ adjudications are rooted in good arguments, those being the Courts’ democratic legitimacy, the polycentricity of many cases involving social rights, the need for flexibility and expertise to deal with the allocation of resources, and the existence of better alternatives to the judicial enforcement in many cases<sup>28</sup>.

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24. ECLI:EU:C:1989:646 Grimaldi parr. 18.

25. ECLI:EU:C:2016:701, *Ledra Advertising Ltd* parra. 67.

26. A sound rebuttal of the objections posed by the separation of powers, counter-majoritarian doctrine and legal legitimacy and efficacy of the courts’ enforcement of socio-economic rights is to be found in AOIFE NOLAN, *Children’s socio-economic rights, democracy and the courts*, Oxford, 2011.

27. MALCOLM LANGFORD, *Judicial Review in National Courts*, MALCOLM LANGFORD (Coord.), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, Oxford, 2014, p. 447.

28. JEFF KING, *Judging*, pp. 3-7.

Still, these objections encourage a cautious role for the Courts but they do not necessarily lead to the non-justiciability of social rights.

Furthermore, social rights' protection takes into account the economic situation of a country to the extent that one of the main principles aiming at guaranteeing them is the progressive realization and non-retrogression of social rights' enjoyment, within the available resources. Thus, an economic crisis might allow for a certain retrogression in social rights' enjoyment, as both Spanish and Portuguese Constitutional Courts have recently recognised<sup>29</sup>. Moreover, in the specific case of the sovereign debt crisis, the decrease of budget deficit is essential and it cannot be achieved without lowering the revenues on social policies.

Moreover, Courts are perceived to lack legitimacy to challenge the measures adopted to tackle the crisis by the democratic powers, which limits an effective accountability<sup>30</sup>. This factor, the need to tackle the economic crisis, has become the decisive factor in the Spanish Constitutional Court case law which has granted an unlimited margin of decision-making to the central Government.

A case in point was the judgment 119/2014 related the labour reform adopted by the Spanish Government on 10 February 2012. This reform reduced the severance payment for unjustified dismissals, gave priority to company-level collective agreements, allowed firms to opt out of agreements on a higher level, granted firms greater internal flexibility and provided financial incentives for hiring workers. This Royal Decree Law was in line with the recommendations drafted by the Commission to tackle the macroeconomic imbalances, by increasing the internal flexibility of Spanish firms.

One of the main controversies was the provision which included a trial period of one year. The Constitutional Court upheld the constitutionality of the provision. According to the Court a one-year trial period is a legitimate constraint of the right to work because it derives from the balance between the right to work and the freedom to conduct a business. In this regard, the probation periods aim at enabling the employers to assess the suitability of a worker for the tasks needed.

Furthermore, the probation period must be considered in accordance with the economic situation. In this regard, in the frame of an economic crisis the probation also aims at assessing whether the working-position is profitable. Thus, the one-year probation is legitimate because it is driven to foster employment, given that it promotes the business initiative<sup>31</sup>. Moreover, the diminishing of

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29. Portuguese Constitutional Court Judgment n. 575/2014 (Point 20) (available at [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt)) and Judgment of the Spanish Constitutional Court n. 49/2015, 5.03.2015 (dissenting opinion) (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

30. SALLY-ANNE WAY /NICHOLAS LUSIANI/ IGNATIO SAIZ, Economic and Social Rights in the Great Recession, EIBE RIEDEL / GILLES GIACCA / CHRISTOPHE GOLAY (Eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, Oxford, 2014, pp. 105-114.

31. Judgment of the Spanish Constitutional Court n. 119/2014, 16.07.2014. (point 3) (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

guarantees regarding redundancy are compensated because the worker might be hired permanently at the end of the probation period, which would not be achieved otherwise.

As the dissenting opinion pointed out, the real parameter in this case was the economic crisis. The economic crisis justified the transformation of the essence of the probation periods and rendered it unnecessary to strike a balance between the employers and the employees' rights. In fact, the proportionality of the measure was grounded on the Government's claims regarding the efficiency of the Royal Decree Law.

The Constitutional Court considers that it is up to the Government to shape the economic policy particularly in times of crisis. Furthermore, nowadays the budget cuts and the stabilization of the financial market are the priorities of the economic policy. However, almost any measure concerning social rights has budget and economic implications, therefore the Constitutional Court's reasoning is a dead-end for social rights' protection.

The Portuguese Constitutional Court has followed a completely different path. It has also recognised that social rights' protection is no alien to the economic crisis, the non-retrogression principle being a relative one. Nevertheless, it has declared the unconstitutionality of several austerity measures based on the legitimate expectations

and of the proportional equality. Furthermore, it has considered the solidarity principle as an intrinsic principle of a Social State<sup>32</sup>.

The legitimate expectations principle is a basic tenet of the rule of law, according to which "people ought to be able to plan their lives, secure in the knowledge of the legal consequences of their actions"<sup>33</sup>. However, it must also be compatible with the need for the administrations for pursuing new policies. Still, the legitimate expectations principle is requested to play a main role regarding social entitlements given that the legal changes in this field can affect the ones whose livelihood depend on them in an extremely severe way<sup>34</sup>.

In the Portuguese case, the principle of legitimate expectations has been pleaded in several cases by the claimants<sup>35</sup> but the Court relied on it only in cases in which the measure amounted to a deep transformation of the legal situation of

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32. On the Portuguese constitutional case law regarding Euro-crisis law see JORGE SILVA SAMPAIO / FILIPE BRITO BASTOS / AFONSO CHUVA BRAS, *New challenges to democracy: the Portuguese case*, *ERPL/REDP*, volume 27, n. 1, 2015; ANA GUERRA MARTINS, *Constitutional*; MIGUEL NOGUEIRA DE BRITO, *Putting*; and MARIANA CANOTILHO / TERESA VIOLANTE / RUI LANCEIRO, *Austerity*.

33. PAUL CRAIG, *Substantive Legitimate Expectations in Domestic and Community Law*, *The Cambridge Law Journal*, Vol. 55, Issue 2, p. 1996.

34. Judgment of the German Constitutional Federal Court, 1BvL 11/98, 20.02.2002 (Point 39) (available at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de)).

35. See, among others, Judgment n. 396/2011 (Point 8) and n. 187/2013 (Point 32) (available at [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt)).

the ones affected. In this regard, the Portuguese Constitutional Court declared the unconstitutionality of both the pensions systems convergence and public workers' requalification on the basis of the legitimate expectations principle. In both cases, the position of the addressees of the rule was severely changed in contradiction with a long practice of the Portuguese legal system regarding both the job security of public employees and the maintenance of a two-tier system of pensions. Thus, the principle seems to be applicable when the substance of the legal status is modified but not if additional elements, such as the final amount to be paid, are changed.

The second parameter deployed by the Portuguese Constitutional Court has been proportional equality. According to this principle, there are clear differences between public employees and the ones working in the private sector which can justify different treatment. Thus, public employees can have bigger sacrifices required of them than the rest to tackle an economic crisis but such a sacrifice cannot be disproportionate.

In my view, this parameter is a problematic one. The Court ponders the pay cuts suffered particularly by public employees throughout the years, the cumulative sacrifice being the main reason to eventually declare them unconstitutional<sup>36</sup>. Nevertheless, if the equality between public employees and the ones working in the private sector must be proportional, the Court should have also acknowledge the situation of the latter and, only afterwards, a comparison could be made. However, the Court only considers the public employees' economic situation, breaking thereby the logic of its own reasoning.

However, the Court did not need to elaborate on a new principle to ponder the constitutionality of the pay cuts. As a matter of fact, the Court has upheld the constitutionality of the budget cuts relying on both the need to fulfill short-term international commitments and on the transitory nature of austerity measures. In fact, austerity measures were considered legitimate and necessary as long as they were temporary. Since they were yearly repeated, they became permanent and, with it, unconstitutional<sup>37</sup>.

Then, the Government had the time to adopt a different strategy in the long run to reduce the budget deficit. At the very least, it should have provided a robust justification of the need to maintain measures introduced to be temporary. This lack of further justification of measures, impinging upon social and labour entitlements, in clear opposition to the Constitutional Court's case, could have been the source of a more coherent and plausible reasoning to declare them unconstitutional than the proportional equality.

In fact, one of the main flaws of the Spanish Constitutional Court is that its case law seems to be transitory, given its reliance on the economic crisis as the main

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36. Judgment of the Portuguese Constitutional Court n. 187/2013 (Points 40-41) (available at [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt)).

37. Judgments of the Portuguese Constitutional Court n. 396/2011 (Point 9) and n. 413/2014 (Point 47). (available at [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt)).

interpretative tool. However, not only the crisis has proven to be persistent but it is doubtful that all the measures challenged are transitory since many of them aim at fulfilling the EMU requirements. Hence, many changes are not supposed to be reversed. Governments can no longer rely on the temporary need of austerity measures and Courts cannot uphold their constitutionality by merely insisting on the urgency to tackle a temporary economic crisis. In this regard, the Portuguese Constitutional Court seems to be much more aware of the challenges ahead, even though it should enrich its reasoning with regard the so-called proportional equality.

The crucial role that the solidarity principle has played in the Portuguese Constitutional Court's reasoning must be also be borne in mind. The Court has upheld the constitutionality of measures which gave weight to the solidarity principle by adjusting its impact to the economic capacity of the addressees<sup>38</sup>. However, in the Spanish case, this principle has played no role<sup>39</sup>, being disregarded even in measures affecting impoverished groups<sup>40</sup>. As a matter of fact, the Spanish Constitutional Court has only considered unconstitutional the introduction of court costs since it could impair the access to a fair trial for the ones with less economic resources<sup>41</sup>. This judgment bears witness that the Spanish Constitutional Court is willing to guarantee the social dimension of civil and political rights, but not the social rights themselves.

Thus, the Portuguese Constitutional Court embeds the solidarity in the design of economic policies, which must assess the actual needs of the members of the society to determine the share in rights and duties of everyone. Thereby, the Portuguese Court emphasizes the community, whereas the Spanish Constitutional Court focuses on autonomy. Still, the wording of the constitutions should not be irrelevant. The economic crisis diminishes social rights' actual scope but it should not suppress them.

## 5. Concluding Remarks

The Euro-crisis law has brought new challenges before Courts. The entanglement between the European and international recommendations with the domestic decisions and the actual strength of the former, diminishes the protection that Constitutional Courts can in practice provide. Furthermore, the sovereign debt crisis asks for a reduction of the budget deficit under a very tight agenda, which inevitably impinges upon social rights.

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38. Judgments of the Portuguese Constitutional Court n. 413/2014 (Point 39) and n. 187/2013 (Point 75) (available at [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt)).

39. Judgment of the Spanish Constitutional Court n. 49/2015, 5.03.2015 (dissenting opinion) (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

40. See Judgment of the Spanish Constitutional Court n. 139/2016, 21.07.2016. (Irregular migrants' right to health) (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

41. Judgment of the Spanish Constitutional Court n. 140/2016, 21.07.2016 (available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)).

In this framework, Courts are being quite cautious when deciding on austerity measures. In fact, both the Spanish and the Portuguese Constitutional Courts have suspended the effects of judgments declaring the unconstitutionality of austerity measures and have preferred to rely on general principles or civil rights rather than on social rights. The fact that most of the judgments quoted in this article were not unanimous bears witness to the unease of Courts with these new challenges<sup>42</sup>

However, there are great differences between the austerity case law of the Portuguese Constitutional Court and the Spanish one, in key aspects such as the actual impact of Euro-crisis law on the domestic legal system and the constraints imposed by the economic crisis to the Courts' role.

The Portuguese Constitutional Court has maintained that international and European recommendations must be taken into account by the domestic power, whose margin of maneuver has clearly diminished. However, in its view, domestic powers still have room to shape the economic policy since Euro-crisis law determines the goals but not the means to achieve them. Besides, European recommendations and decisions cannot completely define the social and economic policies in contradiction with the general principles enshrined in the Portuguese Constitution.

Nevertheless, it has not been considered necessary to raise a preliminary ruling to the CJEU to ascertain the actual scope and strength of European soft law, and which limits the Charter social rights would impose on Euro-crisis law. However, the Portuguese Constitutional Court, which has built an intricate and challenging case law regarding austerity measures, should be the one to bring these questions before the CJEU, enriching thereby the European discussion and even enhancing social rights protection in Europe.

Regarding the constraints imposed by the economic crisis, the Portuguese Constitutional Court has been more generous towards the urgent and transitory measures, whereas it has declared unconstitutional the ones becoming permanent. The Court seems to be weary of the indolence of the government which insists on measures that have been considered not compatible with the Constitution if they endure. However, instead of building a robust reasoning based in its own early requirements, the Portuguese Constitutional Court has shaped a new principle, the proportional equality which, in my view, should be refined.

The Spanish Constitutional Court, on the contrary, has built its case law regarding the Euro crisis on the basis of two main ideas; Governments can only follow the international or European recommendations on economic matters to the letter; and if those recommendations leave room, only the central Government is entitled to fill it up given the economic crisis. The Constitutional Court has followed this reasoning, even suspending or declaring null rules approved by

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42. It seems also plausible that the dissent within the Courts have fostered the reliance on general principles rather than on specific constitutional provisions, MARIANA CANOTILHO /TERESA VIOLANTE /RUI LANCEIRO, *Austerity*, p. 183.

democratic powers enhancing social rights protection, when challenged by the Government. Thus, the Spanish Constitutional Court seems to be the enforcer of the Governments' economic policy, regardless of any other consideration. The Constitutional Court has neither reflected on the scope of strength of the international and European recommendations nor on the actual meaning of the constitutional provisions enshrining the Social State.

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