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A comment on Maribel González Pascual's
paper "Constitutional Courts before Euro-Crisis
Law in Portugal and Spain; a comparative prospect"

Um comentário ao artigo "Tribunais
Constitucionais perante o direito da Euro-crise
em Portugal e Espanha; uma perspectiva
comparativa" de Maribel González Pascual

JORGE SILVA SAMPAIO

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**A COMMENT ON MARIBEL GONZÁLEZ PASCUAL'S PAPER
“CONSTITUTIONAL COURTS BEFORE EURO-CRISIS LAW IN
PORTUGAL AND SPAIN; A COMPARATIVE PROSPECT”**

**UM COMENTÁRIO AO ARTIGO “TRIBUNAIS CONSTITUCIONAIS
PERANTE O DIREITO DA EURO-CRISE EM PORTUGAL E ESPANHA;
UMA PERSPECTIVA COMPARATIVA” DE MARIBEL GONZÁLEZ
PASCUAL**

JORGE SILVA SAMPAIO¹

Faculdade de Direito da Universidade de Lisboa
Alameda da Universidade - Cidade Universitária
1649-014 Lisboa - Portugal
jorgesilvasampaio@fd.ul.pt

Abstract: This comment addresses the paper presented by MARIBEL GONZÁLEZ PASCUAL which aims to reveal the Spanish and Portuguese Constitutional Courts' role regarding the so-called "austerity measures", and therefore also focuses on the courts' judicial reasoning. It analyses the role that "Euro-crisis law" has played in both courts' reasoning, and the economic crisis' role in shaping case law regarding social rights in both countries.

Resumo: O presente comentário aborda o artigo apresentado por MARIBEL GONZÁLEZ PASCUAL, que procura desvendar o papel dos Tribunais Constitucionais Espanhol e Português no que se refere às chamadas "medidas de austeridade", pelo que este texto se centra igualmente na argumentação de ambos os tribunais, versando sobre a análise do papel desempenhado pelo "direito da Euro-crise" na argumentação daqueles tribunais, bem como como sobre a influência da crise económica sobre a jurisprudência constitucional ligada a direitos sociais.

Summary: § 1. Preliminary Aspects; § 2. Spanish and Portuguese Constitutional Courts before Euro-crisis Law; 2.1. General aspects; 2.2. The Spanish case; 2.3. The Portuguese case; 2.4. The dilemma's solution; § 3. Adjudication of social rights in times of economic crisis; 3.1. General aspects; 3.2. The Spanish case; 3.3. The Portuguese case; 3.4. Concluding remarks

Sumário: § 1.º Aspectos preliminares; § 2.º Os Tribunais Constitucionais Espanhol e Português perante o direito da Euro-crise; 2.1. Aspectos gerais; 2.2. O caso Espanhol; 2.3. O caso Português; 2.4. A solução para o dilema; § 3.º O controlo judicial de direitos sociais em tempos de crise económica; 3.1. Aspectos gerais; 3.2. O caso Espanhol; 3.3. O caso Português; 3.4. Considerações finais

Keywords: Jurisprudence of crisis; constitutional courts; Euro-crisis law;

1. Master of Laws, University of Lisbon, School of Law. Guest lecturer and PhD candidate, University of Lisbon, School of Law. Associated research fellow, Lisbon Centre for Research in Public Law.

adjudication of social rights

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

1. Preliminary Aspects

1. MARIBEL GONZÁLEZ PASCUAL (“MGP”) submitted a paper called “*Constitutional Courts before Euro-Crisis Law in Portugal and Spain; a comparative prospect*”, following her presentation at the “Conference on the Portuguese Constitutional Court’s Jurisprudence of Crisis”. The paper aims to reveal the Spanish and Portuguese Constitutional Courts’ role regarding “austerity measures” by critically analysing their main reasoning on this matter. For that aim, she (i) provides an analysis of the role that Euro-crisis law has played in both constitutional courts’ reasoning, and (ii) discusses how the economic crisis has shaped case law regarding social rights in both countries.

The context of this discussion is the major financial and economic crisis² that has affected several countries, including Portugal or Spain, since 2009. During the management of this crisis, the governments have imposed major budgetary constraints on several social rights, via so-called austerity measures. This reduction in meeting social rights satisfaction has been challenged at the constitutional courts, whose decisions on these social rights questions have created an enormous discussion in the doctrine³. In fact, some scholars even talk about “austerity and the faded dream of a ‘social Europe’”⁴.

First, concerning the matter of social rights, it is important to stress that the Portuguese and Spanish Constitutions establish a social state essentially through the enshrinement of a set of social rights in the Constitution⁵. Therefore, regardless

2. For the sake of simplicity I will simply call it the “economic crisis”.

3. On this discussion in Portugal, see GONÇALO ALMEIDA RIBEIRO/LUÍS PEREIRA COUTINHO (Coords.), *O Tribunal Constitucional e a Crise - Ensaios Críticos*, Lisboa, 2014; JORGE REIS NOVAIS, *Em defesa do Tribunal Constitucional*, Lisboa, 2014; MARIANA CANOTILHO/TERESA VIO-LANTE/RUI LANCEIRO, Austerity measures under judicial scrutiny: the Portuguese constitutional case-law, *European Constitutional Law Review*, vol. 11, Issue 01, 2015; ANA GUERRA MARTINS, Constitutional Judge, Social Rights and Public Debt Crisis, *Maastricht Journal*, volume 22, Issue 5, 2015; 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; JORGE SILVA SAMPAIO/ FILIPE BRITO BASTOS/AFONSO CHUVA BRÁS, New challenges to democracy: the Portuguese case, *ERPL/REDP*, volume 27, no. 1, 2015. See also, among many others, AOIFE NOLAN (Ed.), *Economic and Social Rights after the Global Financial Crisis*, Cambridge, 2014; XENOPHON CONTIADES (Ed.), *Constitutions in the Global Financial Crisis – A Comparative Analysis*, Surrey, 2013.

4. See COLM O’CINNEIDE, Austerity and the faded dream of a ‘social Europe’, AOIFE NOLAN (Ed.), *Economic and Social Rights after the Global Financial Crisis*, Cambridge, 2014, pp. 169 ff.

5. Regarding the Spanish case, see, among many others, BEATRIZ GONZÁLEZ MORENO, *El Estado Social — Naturaleza Jurídica e Estructura de los Derechos Sociales*, Madrid, 2002; LETICIA MORALES, *Derechos sociales constitucionales y democracia*, Madrid, 2015, pp. 121 ff;

of the rightness social rights' constitutionalisation⁶, this has an obvious normative consequence: they are constitutionally as fundamental as the remaining (civil and liberty) rights and, consequently, according to the hierarchy principle, all the state powers must comply with social rights⁷. In addition, in my view, due to the fact that we have long, normative constitutions, which establish a constitutional court that has several detailed and relevant powers, the *normative context* of a legal system like the Portuguese and Spanish ones not only justifies but also imposes a strong court to protect a strong constitution⁸.

However, on the one hand, if "the protection afforded by economic and social rights are now implemented through adjudication and judicial enforcement, in an increasing number of national and international jurisdictions throughout the world", on the other hand, "the central questions of legitimacy, and of effectiveness, remain"⁹. And this is precisely the main focus of the discussion concerning the so called "jurisprudence of crisis" – can a constitutional court review *austerity measures* approved by governments and parliaments?

2. MGP's paper addresses a comparison between the Spanish and Portuguese jurisprudence of crisis, and her paper is divided essentially into three parts: (i) the existence of a different legal framework in Spanish and Portuguese jurisprudence of crisis cases; (ii) the Spanish Constitutional Court ("SCC") and Portuguese Constitutional Court ("PCC") regarding Euro-crisis law; and (iii) the adjudication of social rights in a situation of economic crisis. Considering this, in my comment I will mostly critically analyse points (ii) and (iii).

In relation to point (i), MGP stresses the existence of substantial differences between both legal frameworks that reduce the plausible scope for such a comparison¹⁰. Due to this, she considers that a comparison between the

on the Portuguese case, see, for example, JORGE REIS NOVAIS, *Direitos Sociais — Teoria Jurídica dos Direitos Sociais enquanto Direitos Fundamentais*, 2^a ed., Lisboa 2017, pp. 23 ff; JORGE SILVA SAMPAIO, *O Controlo Jurisdiccional das Políticas Públicas de Direitos Sociais*, Coimbra, 2015, pp. 146 ss.

6. Listing several good and bad arguments for constitutionalisation, see, for example, JEFF KING, *Judging Social Rights*, Cambridge, 2012, pp. 3 ff; see also LETICIA MORALES, *Derechos*, pp. 179 ff.

7. Of course, this is not what courts and scholars have argued regarding the social rights' constitutionalisation – all over the world, even when social rights are enshrined in constitutions, they are not taken seriously in most cases – but such views mean a (dangerous, in my opinion) attempt to rewrite what the constituent legislator decided. What I mean is that one thing is what a constitution *is* (whether it is good or bad) and another is what a constitution *should be*.

8. Stressing this fact, see JORGE SILVA SAMPAIO, The contextual nature of Proportionality and its relation with the Intensity of Judicial Review, LÚCIA PEREIRA COUTINHO/ MASSIMO LA TORRE/ STEVEN D. SMITH (Eds.), *Judicial Activism – An Interdisciplinary Approach to the American and European Experiences*, Heidelberg, 2015, pp. 137 ss. Note that I am not trying to argue that strong courts are better than weak courts (in TUSHNET's terms), but just trying to describe what normatively follows from the Portuguese and Spanish Constitutions.

9. See KATHARINE YOUNG, *Constituting Economic and Social Rights*, Oxford, 2012, p. 12.

10. MGP points out four main differences: (i) different understanding of social rights in each Constitution; (ii) existence of different constraints due to the constitutional justice procedure law in each case – the PCC dealt with some cases under the *a priori* constitutional review procedure (which compels the court to decide within 25 working days), whereas the SCC dealt

Portuguese and Spanish jurisprudence of crisis must not overlook the differences mentioned because they may explain the divergences in several cases, and this also explains the constraining of the comparison's scope. Even if I agree with MGP, one may not forget that if both legal systems are considered globally, these differences are reduced, which makes comparison possible, albeit with caution.

2. Spanish and Portuguese Constitutional Courts regarding Euro-crisis Law

2.1. General aspects

3. MGP begins mentioning that 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, and highlights two aspects: (i) there is no denying that this new scheme constrains Member States, although mostly through an array of recommendations and guidelines¹¹. However, although these recommendations to tackle the economic crisis have an impact on social rights, it seems that they are not amenable to judicial review; (ii) national courts tend to be more deferent both in contexts of economic crisis and regarding international settlements – this seems like something normal, which is originated by social rights' *polycentricity*¹².

Concerning the first aspect, I would first stress that even if a judicial review of these recommendations and guidelines – which seem to constitute "soft law", whatever that may be – is more difficult, it seems clear to me that they can be reviewed, at least the normative ones. Therefore, if they violate European or national rules, they may be reviewed by the respective competent European and national courts¹³. But this is a contingent aspect: it also depends on what is prescribed by national law. For example, according to the Portuguese Constitution, even if there is "European Union law primacy" over national law, normative superiority does not apply if European Union law conflicts with the fundamental principles of the Portuguese Constitutional State (see Article 8(4) of

with the cases only under the abstract review procedure – this allowed a decision to be made when the main controversy was actually over; (iii) the Spanish welfare state is intertwined with the regional state, given that regions are the ones empowered to rule on social policies; and (iv) the MoU signed by Portugal is quite different from the one signed by Spain – the Spanish Memorandum of Understanding ("MoU") is related to financial assistance for the banking sector, whereas the Portuguese one refers to the whole public administration.

11. While normally these acts are seen as "soft law", it is important not to underestimate them, because of their huge political impact and the fact they even might trigger normative or economic sanctions.

12. During economic crisis, several factors contribute to the courts' difficulties in these cases: the unpredictable reaction of international markets, the conditions required for political acceptability of repayment, long-term macroeconomic stability and the changing nature of all these factors.

13. For example, there are some who consider the Portuguese MoU to be unconstitutional — MELO ALEXANDRINO, O impacto jurídico da jurisprudência da crise (available at https://www.icjp.pt/sites/default/files/papers/o_impacto_juridico_da_jurisprudencia_da_crise.pdf).

the Portuguese Constitution)¹⁴.

Regarding the second aspect, this perception of the *court's deference* in crisis situations – due to so-called “polycentricity” – is related to the contexts in which *epistemic uncertainty* is greater. If this kind of uncertainty is bigger, the legislator’s “margin of appreciation” (as a “freedom to make political choices”) increases, and at the same time the margin of judicial review decreases. In other words, when the legislator wants – or needs – to restrict some fundamental rights in order to satisfy other rights or constitutional values, the weight of the legislator’s reasons is greater due to this epistemic uncertainty and therefore the court must have this in mind when justifying its concrete balancing¹⁵. If this is so, it may not even make much sense to speak about *deference*, since the court is only doing what it is normatively allowed to do.

4. That said, according to MGP, both the SCC and the PCC considered the economic crisis in their decisions, but their approach was quite different – while the SCC seems to argue that the state has little room to decide when implementing recommendations deriving from international commitments, the PCC considers that such margin is smaller but still exists¹⁶.

14. In addition, the Portuguese Constitution also imposes formal constraints on the transposition of international agreements into the Portuguese legal system.

15. There is legislative epistemic discretion when there is “no certain knowledge of what is forbidden or imposed” by constitutional rules. But this does not simply mean that there are “grey areas” of what is constitutionally lawful and that the legislator has discretion to do whatever he wants. This may mean at least one of two things: (i) there is a conflict between a substantive principle (for example, a fundamental right) and a formal principle (such as the democratic legitimacy of the legislator) and the outcome of the balancing process is such that the formal principle has precedence over the substantive principle, in which case there definitely is epistemic discretion. If, on the contrary, the substantive principle takes precedence, then there is no definite discretion; (ii) there is a conflict between two substantive principles (two fundamental rights), and a formal principle such as the democratic one will be an *extra reason* that can influence concrete balancing. On the epistemic uncertainty and the importance of the formal democratic principle in this context, see, for example, ROBERT ALEXY, *Sobre la estructura de los derechos fundamentales de protección*, JAN-R. SIECKMANN (Ed.), *La teoría principalista de los derechos fundamentales — Estudios sobre la teoría de los derechos fundamentales de Robert Alexy*, Madrid, 2011, pp. 133 ff; MARTIN BOROWSKI, *Derechos de defensa como principios de derecho fundamental*, JAN-R. SIECKMANN (Ed.), *La teoría principalista de los derechos fundamentales — Estudios sobre la teoría de los derechos fundamentales de Robert Alexy*, Madrid, 2011, pp. 106 ff; MATTHIAS KLATT/ JOHANNES SCHMIDT, Epistemic discretion in constitutional law, *I-Con*, vol. 10, n.º 1, 2012.

16. For a long study regarding the way constitutions reacted to the financial crisis (until 2012), stressing the existence of four types of constitutional reactions – adjustment, submission, breakdown and stamina – see XENOPHON CONTIADES/ ALKMENE FOTIADOU, How Constitutions Reacted to the Financial Crisis, XENOPHON CONTIADES (Ed.), *Constitutions in the Global Financial Crisis – A Comparative Analysis*, Surrey, 2013, pp. 9 ff. In this study, the Portuguese Constitution appears to be “submissive” (see JÓNATAS E. M. MACHADO, The Sovereign Debt Crisis and the Constitution’s Negative Outlook: A Portuguese Preliminary Assessment, XENOPHON CONTIADES (Ed.), *Constitutions*, pp. 219 ff). However, as I will stress at the end, the PCC’s crisis jurisprudence since 2012 seems to suggest that our Constitution is in the “stamina” category after all.

2.2. The Spanish case

5. According to MGP, in the frame of the economic crisis, the SCC has been so deferent that it even endorsed the strength of EU law and its impact on the Spanish Constitution in a case concerning a non-mandatory EU rule.

5.1. First, following the 2011 amendment to Article 135 of the Spanish Constitution – in which *principle of budgetary stability*¹⁷ is constitutionalised – and the approval of the Budgetary and Financial Stability Act, she addresses the SCC Ruling no. 2/2012, in which the constitutionality of that law was challenged by the Canarias government. Briefly, one of the questions analysed was the constitutionality of the rule contained in Article 11(6) of the mentioned act, according to which the structural deficit allowed to regional administrations would rely on the methodology followed by the EU Commission. The Canarias government argued that this rule empowered the central government to decide unilaterally on which structural deficit each administration could incur, given that there is no mandatory EU rule on the matter¹⁸. The SCC considered the rule not to be unconstitutional based on EU membership, since the EU is entitled to assess the Member States' budget deficits and decide which method to follow¹⁹.

Regarding this ruling, the SCC's reasoning since must be criticised because, despite the existence of a rule setting a maximum permitted structural deficit, there is no rule imposing concrete ways of dealing with it. It must therefore be concluded, as MGP does, that the court was excessively deferent towards the Spanish legislature's reasoning. Moreover, while it is true that the court's margin for judicial review diminishes in situations of epistemic uncertainty – such as in situations of economic crisis – the court is still bound to ensure that constitutional norms are not violated. In other words, the existence of an economic crisis naturally means less room for judicial review, but it certainly does not mean that full permission is granted to the legislator to do whatever he

17. Specifically, Article 135 of the Spanish Constitution enshrines a *principle of structural stability*, even though the norm appears to mean prohibition of any type of structural deficit that exceeds the margins established by the European Union and its Member States. In Portugal, there was also discussion about the possibility of enshrining a rule in the Constitution prohibiting the existence of deficits and, along the same lines, the prohibition of indebtedness. The truth is that the constitutionalisation of such a norm raises several problems (from the *jure constituendo* prism). If we consider the wording used in the Spanish Constitution, it can be interpreted as a rule; as most authors do not conceive the possibility of weighting rules (I am not one of them), does this mean indebtedness by the state is prohibited in any situation, even in cases of serious emergency? On the other hand, if a constitutional norm like this one is created, since the Constitution does not establish any material hierarchy, it conflicts with other constitutional norms and, accordingly, may be restricted like any other. With regard to the Portuguese case, it should also be remembered that it is fine for the Portuguese Constitution to contain both a “scarcity constraint” as a factual limit – “ought implies can” – and maybe even a truly constitutional norm for “scarcity constraint”. In addition, there are also other rules that have a similar content, although with a more general antecedent, such as the *principle of public interest* or the *fundamental right to a good administration*.

18. In fact, the government relied on the document “The cyclically-adjusted budget balance used in the EU fiscal framework: an update” published by European Economy.

19. Ruling of the SCC no. 215/2015. All SCC rulings are available at www.tribunalconstitucional.es.

pleases without any respect for the Constitution, with a kind of prohibition of judicial review²⁰.

5.2. Another case that demonstrates this trend is one regarding the Spanish regional laws which foresaw *temporary suspension of evictions*, in light of the fundamental *right to housing*. Such laws were considered unconstitutional by the SCC and the normative justification was the fifth review of the Financial Assistance Programme. The court considered that, according to Troika's reports²¹, it was clear that regional laws like these ones jeopardised not only the financial assistance programme but also international obligations assumed by Spain²². Along similar lines, the SCC also declared the unconstitutionality of a similar Andalusia government Decree Law, because although it tried to protect the constitutional right to housing, the state had already approved rules to protect vulnerable mortgage debtors without affecting the mortgage scheme and the financial market (the Mortgage Debtors Act, which allowed for the temporary suspension of evictions). As a consequence, regions cannot approve further measures that might change the balance already achieved between social protection and economic policy. The curiosity here, as stressed by MGP, is the similarity of this judicial reasoning with the content of an EU letter sent to the Spanish government in 2013 – it seems that a decision made by a democratically elected body on social rights could easily be disregarded by relying on a non-accountable report.

The conclusion to be drawn from these cases is that for the SCC the impact of “Euro-crisis law” on social rights means one thing: national governments are fully obliged to follow international and/or European recommendations on economic matters without any margin for political appreciation even if those guidelines could collide with fundamental rights. In sum, for the SCC, international and European recommendations and guidelines override fundamental social rights in any situation. And this means that the national measures which aim to satisfy constitutional rights may be challenged if they do not comply with international and European recommendations on fiscal policy.

Within this context, I have to agree with MGP when she asserts that social rights should be an “argumentative burden which could trigger the search for less severe measures” or at least “provide safeguards for the most vulnerable groups”. But I think there is more to say on this subject. Not wishing to address the way in which Europe sought to politically solve the crisis, on the one hand, it is at least strange to see a constitutional court generally giving hierarchical prevalence to recommendations and guidelines over constitutional rights, since their legal force are at least dubious and their nature can also vary. That is to say, naturally, in a rule of law system, European and international normative

20. Regardless of the *prima facie* superiority of European Union law over national law, it has to be asked if it is arguable that a court must accept any justification provided by a unaccountable international body without reviewing it, even if the result is the unconstitutionality of a measure approved by a competent and democratically elected entity.

21. For the court, an entity composed of independent and highly specialised institutions.

22. SCC rulings no. 69/2014 and no. 115/2014.

acts are one thing, and political acts (many of which cannot even be considered “soft law”) are another. On the other hand, in a case in which fundamental rights may conflict with, for example, financial obligations based on the Constitution and even on EU and international law, it is one thing to take both into account and, as a result of the balancing carried out, find that the constitutional financial obligations prevail; it is something quite different to simply not consider social fundamental rights as reasons to oppose measures that restrict them.

Therefore, the immediate criticism that could be made of this jurisprudence regards the absence of social rights in the SCC’s argumentation, even though the Spanish Constitution includes a range of social rights. And here, in my opinion, it is possible to extend this criticism to the PCC, considering that it also tries to avoid using social rights in its reasoning²³; the point is that if social rights are constitutionally enshrined, courts are constitutionally obligated to deal with them. If there is a conflict between a social right and another constitutional interest or right, even if it is a *hard question*, social rights cannot be excluded from the reasoning. It is obvious that social rights norms are extremely indeterminate (among other aspects), which means that they are more likely to be defeated in the balancing process. But this does not mean they do not need to be taken into consideration: on the contrary, normatively, even if they are, all things considered, more likely to be defeated, they must be used in the court’s reasoning.

This means that the problem does not lie in the courts’ conclusions – at least in most cases – but rather in their reasoning. Putting it simply: if dealing with social rights and therefore with collisions between social and other rights, then there is no other way to solve these constitutional norm conflicts than to resort to *balancing* and *proportionality*²⁴.

2.3. The Portuguese case

6. In MGP’s opinion, the PCC had a different attitude on these issues. Even though the court has emphasized that the austerity measures were adopted to comply with the MoU²⁵, it has also stressed, firstly, that the binding nature of those recommendations is not clear; secondly, that the EU recommendations do not include the means chosen by Member States to achieve the imposed goals; thirdly, that the internal legal measures must respect the national constitution; and also that, according to Article 4(2) of the TEU, the Union shall respect Member States’ national identities²⁶.

23. However, more recently the PCC resorted to social rights in a case regarding access to social benefits by foreigners. See PCC Ruling no. 296/2015. All PCC rulings are available at www.tribunalconstitucional.pt.

24. And the reason for using *balancing* is that the usual criteria cannot be applied to solve these normative conflicts, such as *lex superior derogat legi inferiori*, *lex posterior derogat legi priori*, and *lex specialis derogat generali*.

25. As well as the importance of international financial assistance for Portugal. See PCC Rulings no. 396/2011 (point 9) and no. 353/2012 (point 6).

26. PCC Ruling no. 575/2014 (Point 25).

She then contradicts those ideas: firstly, even though the recommendations usually only establish goals, they are often extremely detailed; secondly, even if the recommendations are not normatively obligatory, violating them may have financial and economic effects and originate sanctions; thirdly, Euro-crisis law and national law are fully entangled; and fourthly, despite its importance, the constitutional identity clause has not yet provided any concrete criteria in this context. On the relationship between EU law and national law, please see what I discussed in points 5 and 7.2.

2.4. The solution to the dilemma

7. For MGP, this means that we are facing a dilemma: on the one hand, it is not easy for national states not to comply with European and international recommendations; on the other hand, if one cannot challenge any of these recommendations or the national measures that implement them, the welfare state can be easily dismantled regardless of its constitutional and international protection. So, how can this dilemma be solved?

MGP considers that since the dilemma was originated by the relationship between Euro-crisis law and social rights, the question should be brought before the Court of Justice of European Union (“CJEU”) by a constitutional court. She thinks that, in a case like this, the CJEU would not shy away from reviewing the compatibility of the EU institution’s recommendation with the Charter of Fundamental Rights of European Union (“CFRUE”) or, at the very least, it would clarify the actual nature of such recommendations (even if it has already been argued that national courts must consider EU recommendations). More concretely, the CJEU should (i) clarify what the national state’s margin of appreciation is when dealing with the EU’s soft law, which would also clarify the scope of constitutional courts’ judicial reviews; and (ii) if the MoUs and the rules deriving from in the EMU scheme are compatible with the social rights enshrined in the CFRUE²⁷.

I agree in general with MGP’s consideration, in particular because it would make it possible to settle several nebulous questions in this context, such as the states’ margin of appreciation in implementing the EU’s soft law, as well as the compatibility between this EU law and national constitutions. However, on the one hand, CJEU already had the opportunity to address a similar question and rejected it in a case regarding salary cuts for employees in a nationalized bank which allegedly infringed article 31º paragraph 1 of the Charter of Fundamental Rights²⁸. One the other hand, also another regional court – the European Court

27. According to the recent CJUE Ruling *Ledra Advertising Ltd*, EU Institutions are bound to the CFRUE also when acting outside the EU legal framework (see ECLI:EU:C:2016:701, *Ledra Advertising Ltd* para. 67). Nevertheless, as MGP mentions, we must not forget that the case that originated this ruling referred to the right to property, and economic rights are traditionally considered to be at the core of the EU integration process.

28. See Decision of the European Court of Justice, Case C-128/12 Sindicato dos Bancários do Norte and Others, 7 March 2013.

of Human Rights – has already addressed similar cases, albeit from the point of view of the European Convention on Human Rights, and simply considered that national legislators have an extremely broad margin of appreciation as regards the definition of “public interest”²⁹. Moreover, what is at stake here concerns the judicial review of austerity measures which, despite the strength of European Union law, cannot violate national constitutions, or at least the fundamental principles thereof.

3. Adjudication of social rights in times of economic crisis

3.1. General aspects

8. MGP, stressing that social rights are not immune to economic crisis, since they are dependent on public resources, asks if it is possible for courts to protect social rights in the context of a deep economic crisis, a question which raises another two questions: (i) what is the actual scope of adjudication on social rights? And (ii) what is the balance between social policy and economic policy?

Regarding the question of the courts’ possibilities to adjudicate social rights, she stresses that courts tend to play a lesser role when it comes to social rights, due to some good arguments³⁰, but this does not necessarily lead to the non-justiciability of social rights. Furthermore, the protection of social rights itself considers the economic situation of a country as can be proved by the *principles of progressive realisation and non-retrogression of satisfying social rights, within the available resources*. In other words, an economic crisis may justify a certain retrogression in satisfying social rights, as both the SCC and the PCC have recently recognised³¹. Finally, courts lack democratic legitimacy to challenge

29. On this subject, amongst many others, see RAINER PALMSTORFER, Austerity measures on trial: On the compatibility of austerity measures with the European Convention of Human Rights, *Revista e-Pública*, Vol. 1, n.º 3, Dez. 2014 (available at <https://e-publica.pt/pdf/artigos/austeritymeasuresontrial.pdf>).

30. Such as the courts lack of 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.

31. About this principle in the context of the present economic crisis, see AOIFE NOLAN/ NICHOLAS J. LUSIANI/ CHRISTIAN COURTIS, Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights, AIOFE NOLAN (Ed.), *Economic and Social Rights after the Global Financial Crisis*, Cambridge, 2014, pp. 121 ff. However, the principle of reversibility prohibition is a very problematic one. In fact, if principle norms (as fundamental rights) are *optimisation mandates*, as ALEXY argues, they obviously mean a *prima facie* obligation to fully satisfy what is prescribed by those norms (although within the factual and normative possibilities). Therefore, regarding social rights, saying that retrocession is prohibited is a tautology and unnecessary in legal systems which constitutionally enshrine them (the German case is different as social rights were not enshrined in the constitution). This means that when the legislator approves a social retrocession measure, there is a conflict between the constitutional principle that justifies that measure and a specific social right. Solving this conflict necessarily and logically requires the use of balancing and proportionality as meta-rules (and perhaps other principles such as equality, legitimate expectations, etc.). For a similar but not totally coinciding case, see JORGE REIS NOVAIS, *Direitos*, pp. 254 ff.

austerity measures by the democratically elected powers, a factor which was decisive in SCC case law reasoning (and granted the central government an unlimited margin for decision-making).

Again, I generally agree with the former observations, but let me just reinforce one more time that *economic scarcity* is just a reason – which can be extremely strong in times of crisis – that contributes to the prevalence of public interest or other constitutional norms invoked by the legislator over a possibly restricted social right. And the same can be said regarding the *formal principle of democracy*.

Subsequently, MGP analyses and compares some cases decided by the SCC and the PCC.

3.2. The Spanish case

9. An important case was Ruling no. 119/2014 regarding the Spanish government's 2012 labour reform. The SCC upheld the non-unconstitutionality of a one-year trial period rule, arguing that this trial period was a legitimate constraint on the right to work, because it derives from the balance between this right and the freedom to conduct a business, and it must be considered in accordance with the economic situation³². However, as stressed in the dissenting opinion, it seems the *real* parameter was the economic crisis, which rendered it unnecessary to balance the fundamental rights in collision. For the court, it was the government that had competence to shape economic policy, particularly in times of crisis, and therefore, as almost any measure concerning social rights has budget and economic implications, it follows from this judicial reasoning that there is absolute permission to restrict or not satisfy social rights.

Again, I want to stress that, on the one hand, there is a collision between an economic freedom and a social right, and that the economic crisis³³ is an argument for economic freedom, as well as the legislator's democratic formal credentials, considering the special strength of epistemic uncertainty in these cases. Nevertheless, on the other hand, if social rights are constitutionally enshrined in a certain legal system – as happens in the Spanish and Portuguese cases – the legislator is forbidden from restricting without a constitutional justification and disproportionately, and the court is naturally obligated to consider them in their reasoning. Indeed, it is one thing to balance the rights in collision and consider the referred aspects and perhaps conclude in favour of the economic freedom at stake in that concrete case; it is another thing to give absolute weight to the economic right due to the crisis and therefore *create* an axiological hierarchy in

32. The SCC concluded that the trial period was legitimate because it aimed to foster employment, given that it promoted business initiative. It also concluded that the diminished guarantees were compensated because the worker might be hired permanently at the end of the probation period, which would not have been achieved otherwise.

33. Or as I mentioned above, the “scarcity constraint” is a factual or normative limitation.

the Constitution. – This would mean that it was not necessary to balance rights as one was hierarchically superior.

In addition, it also seems the court does not even check the *justification* presented, for example, to limit or diminish the protection of a fundamental right. And as the court also seems not to apply adequate parameters, such as proportionality, an effective review of the justification was the least that should be done.

The economic crisis argument as used by some courts therefore grants an *unlimited and unreviewable margin of appreciation* to governments, despite the constitutions. The problem of this reasoning is that, in practice, courts do not even balance the colliding norms: they only look at the justification of austerity measures presented by legislators. And this somehow means that, in the name of the crisis, we have a kind of *renunciation of judicial power* (and not simply *deference*).

In short, even if the SCC's conclusion in this case is a correct one, the reasoning used is at least very objectionable, as the decision does not seem to be internally and externally justified³⁴.

3.3. The Portuguese case

10. Regarding the PCC jurisprudence of crisis, MGP considers that a different path has been followed: the economic crisis was taken into account, but the PCC has declared the unconstitutionality of several austerity measures based on some constitutional principles.

10.1. Regarding the *principle of legitimate expectations*, the PCC only relied on the principle in cases in which the measure amounted to a *deep transformation* of the legal situation for those affected, as when the convergence of pensions systems and public workers' requalification measures were deemed unconstitutional. In both cases, the position of those affected by the rule was severely changed, going against a long practice of the Portuguese legal system regarding both the job security of public employees and the maintenance of a two-tier pensions system.

MGP does not comment on the concrete use of this principle, probably due to its unquestionability in the various European legal systems, but I think the constitutional jurisprudence on its normative structure requires some remarks. In effect, in the context of this principle, the PCC stresses that: (1) the principle is only applicable if three conditions are met³⁵; (2) if applicable, as the legislator

34. On internal and external justification, among others, see JERZY WRÓBLEWSKI, Legal Decision and Its Justification, *Logique et Analyse*, n.º 53/54, 1971, pp. 409 ff; NEIL MACCORMICK, *Legal Reasoning and Legal Theory*, USA, 1994.

35. It is forbidden to violate the expectations created by people if (i) the expectations are legitimate; (ii) there are consistent signs that they were stimulated, generated or tolerated by the state's own behaviour; and (iii) private individuals cannot or should not reasonably expect radical changes in the course of normal legislative development.

is also bound to the public interest and other constitutional rights and values, (a) (i) the expectations created by individuals (and their concrete force) and (ii) the public interest pursued by the state must be balanced; (b) if the public interest justifies that the measure that meets the citizens' expectations, it is necessary to check whether the measure complies with the principle of proportionality³⁶.

Concerning this aspect, what I have just described involves different *processes* (interpretation, application, balancing) and obviously goes beyond the *application* of the principle of legitimate expectations. Firstly, one thing is the principle itself: assuming that they are the cumulative conditions of its antecedent, if they are fulfilled, the state is forbidden from violating the citizens' expectations. Secondly, it is a different thing to ascertain that this constitutional principle has a *pro tanto* nature: even if the criteria mentioned are met and the principle is applicable to a certain case, other constitutional principles can also be applied and impose a different normative conclusion. Therefore, if there is a collision between this principle and, for example, the principle of public interest, they must be balanced to choose which one prevails in the concrete case. Thirdly, the proportionality principle would appear to "regulate" this balancing process. In other words, the proportionality principle, which is a naturally independent norm, only applies to the case if and only if (i) there is a conflict between the principle of legitimate expectations and another constitutional principle and (ii) weighting has to be used.

10.2. Concerning the *principle of proportional equality*³⁷ – which is a mixture of equality and proportionality – the PCC considered there to be clear differences between public employees and those working in the private sector, and this justified different treatment. Thus, bigger sacrifices could be imposed on public employees to tackle an economic crisis, but such a sacrifice could not be disproportionate.

MGP distrusts this parameter because it seems the PCC only regarded the public employees' perspective – particularly the cumulative effect of their pay cuts – to consider the measure's unconstitutionality³⁸, while forgetting the private sector employees' situation. However, I think this bilateral analysis was considered, even if the main perspective was the situation of public sector employees whose

36. See, among many others, PCC Rulings no. 473/92, no. 449/02. On this subject, see also JORGE REIS NOVAIS, *Os Princípios Constitucionais Estruturantes da República Portuguesa*, 2^a ed., Coimbra 2011, pp. 261 ff; PAULO MOTA PINTO, "A Protecção da Confiança na «Jurisprudência da Crise»", GONÇALO ALMEIDA RIBEIRO/ LUIS PEREIRA COUTINHO (Eds.), *O Tribunal*, pp. 133 ff.

37. Among others, see MIGUEL NOGUEIRA DE BRITO, Medida e Intensidade do Controlo da Igualdade na Jurisprudência da Crise do Tribunal Constitucional, GONÇALO ALMEIDA RIBEIRO/ LUIS PEREIRA COUTINHO (Eds.), *O Tribunal*, pp. 105 ff; VITALINO CANAS, Constituição *prima facie*: igualdade, proporcionalidade, confiança, *Revista e-Pública*, Vol 1, no. 1, Jan. 2014 (available at <http://e-publica.pt/pdf/artigos/Vol.1-N%C2%BA1-Art.01.pdf>); RAVI AFONSO PEREIRA, Igualdade e Proporcionalidade: um comentário às decisões do Tribunal Constitucional sobre cortes salariais no sector público, *Revista Española de Derecho Constitucional*, no. 98, 2013, 317 ff.

38. PCC Ruling no. 187/2013 (Points 40-41).

salaries were being reduced. More important is MGP's consideration that the *creation* of this (almost) new principle to review the constitutionality of pay cuts seems unnecessary. She believes that since the PCC had considered that the budget cuts' constitutionality was dependent on both (i) the need to fulfil short-term international commitments and (ii) the transitory nature of austerity measures, they were repeated every year becoming permanent and, therefore, unconstitutional³⁹. In addition, as time passed, the government had more time to choose different policies to reduce the budget deficit, and this means the legislator should have provided a robust justification for the need to maintain the allegedly temporary measures – for MGP, this lack of further justification could have been the source of a more coherent and plausible reasoning to declare them unconstitutional than proportional equality.

Although I think the PCC also used the argument of the temporary cuts and the respective lack of justification to maintain those measures⁴⁰, I am not sure of the need to use the proportional equality principle to address these problems: firstly, what it is supposed to add is already provided by the legal system, and secondly, the unnecessary creation of a new concept would never pass Occam's razor and only helps bringing confusion to an extremely delicate subject and context. For most authors, the problem with this principle seems to be linked to the fact that it permits more intense judicial scrutiny than would be allowed by the principle of equality⁴¹. Even though it is not possible to discuss this aspect in detail, it seems to me that the court is once again confusing norms that are independent and, in fact, applied in different situations. Specifically, looking briefly at the plan under analysis, the equality rule implies that (i) in any situations within the scope of the legislative function, (ii) if there are comparable terms, the legislator (iii) is obligated to establish (iv1) identical effects for identical situations and (iv2) different effects for different cases⁴². On the one hand, the equality principle always requires the existence of comparable terms; on the other hand, regarding its consequences, the assessment of the difference imposes the application of another rule: proportionality. In fact, since the assessment of a differentiating measure has a certain objective, there is a mid-term relationship here and therefore proportionality is triggered for the judicial review of any excess in the measure adopted.

In other words: not only is the creation of a norm of proportional equality doubtful, because different rules with different scope are at stake, but the alleged new parameter was already provided by proportionality and so this new principle

39. PCC Ruling no. 396/2011 (Point 9) and no. 413/2014 (Point 47).

40. For example in PCC Rulings no. 474/2013 and no. 862/2013, the PCC considered that there was a conflict between the principle of legitimate expectations and the public interest in financial stability. Here, the court asked for an explicit justification for the legislator's measures and the demonstration that the interests it sought to protect outweighed the legitimate expectations of Portuguese citizens. Should parliament fail to do so, the PCC would review the balance of the principles itself.

41. In particular, due to its more specific prohibition of total discretion (*proibição do arbítrio*), which only prohibits discriminations without any rational justification.

42. See DAVID DUARTE, *A norma de legalidade procedural administrativa*, Coimbra, 2006, pp. 639 ff.

is tautological. In addition, a review using the principle of proportionality autonomously as set out above is much clearer – and does not confuse different operations – and allows for greater scrutiny of the arguments put forward by the court.

3.4. Concluding remarks

11. In conclusion, comparing both courts, MGP seems to criticise the SCC regarding two aspects: (i) the crisis is much longer than one could have imagined and it is doubtful that all the austerity measures are transitory since many of them aim at fulfilling the EMU requirements. This means that governments can no longer rely on the temporary need of austerity measures and courts cannot merely reason using the urgent need to tackle a temporary economic crisis. In this regard, for MGP the PCC's reasoning was more aware of this fact in comparison with the SCC's reasoning, which seems to reduce everything to the economic crisis and assumes its *transitory* nature; (ii) the solidarity principle's important role in the PCC's reasoning when assessing austerity measures and their impact on the (varying) economic capacity of those affected⁴³. In contrast, this principle has played no role in the SCC's reasoning⁴⁴, even in regards to the measures that affected impoverished groups⁴⁵. Curiously, the SCC declared the unconstitutionality of new court costs since it could restrict access to a *fair trial* for the ones with fewer economic resources⁴⁶. Therefore, it seems that the SCC distinguishes between the *positive dimensions* of social rights and civil and political rights, but only gives protection to the latter.

Within the Euro-crisis law framework, courts are being very cautious regarding the constitutionality of austerity measures. In fact, both the SCC and the PCC in some cases have not declared the constitutionality of austerity measures or have at least *manipulated* the effects of unconstitutionality of austerity measures' rulings and have preferred to rely on general principles or civil rights rather than social rights.

Let me just make two brief considerations on these aspects. On the one hand, it is obvious that as time passes, as austerity measures become less urgent, the restriction on social rights becomes more intense, and the court must take that into account. On other hand, as already stressed, the court cannot act as if social rights were not enshrined in the constitution; I will come back to this aspect in the last point.

12. To finish my comment, I would like to make some final remarks. Firstly, in accordance with what was said, a rough and general comparison between the Spanish and Portuguese jurisprudence of crisis may confirm the differences

43. PCC Ruling no. 413/2014 (Point 39) and no. 187/2013 (Point 75).

44. Dissenting opinion to SCC Ruling no. 49/2015.

45. SCC Ruling no. 139/2016 (irregular migrants' right to health).

46. SCC Ruling no. 140/2016.

stated by MGP. In the Portuguese case, between 2010 and 2012 (e.g. Rulings no. 399/2010 and no. 396/2011) the court was deferent to the government for two main reasons: (i) the context of urgency in taking measures to reduce the deficit and (ii) the transitory nature of those measures – and some Portuguese scholars have argued against these decisions saying that the PCC was not doing what it should: protecting the constitution⁴⁷. However, from 2013 until the present (e.g. Rulings no. 474/2013, no. 862/2013 and no. 413/2014), the PCC began to review the legislative measures much more closely and declared several measures unconstitutional, stressing that the context of urgency was at that time less important – it was argued that legislative power had more time to prepare different policies – and that crisis was not an absolute argument and that the legislative measures had to comply with constitutional principles, such as proportionality, equality or legitimate expectations. Then, curiously, a different group of scholars argued that the PCC was being too much of an *activist* and was violating the democratic principle⁴⁸. From what has been said, even if one may disagree with the reasoning, it seems the court was at least more moderate than some critics argued.

On the other hand, the SCC always decided whether to allow austerity measures or not in accordance with the economic crisis argument, without giving much importance to the different circumstances surrounding each case and the fact that they were changing as time passed. Therefore, notwithstanding apparent consistency, it seems the SCC was excessively deferent to the legislative branch. It is clear that social rights' polycentricity is a strong argument against adjudication of social rights when countries are financially assisted, but this does not mean that the remaining reasons may be simply set aside – it only means that the social right is more prone to be defeated in a concrete balancing.

As stated, normatively, the economic crisis is not an *absolute reason*, but only a reason to be balanced. Therefore, the described reasoning is very problematic because it has no normative basis – it rewrites constitutions that enshrine social rights. Furthermore, it also means the creation of a normative hierarchy within the constitution: financial crisis trumps social rights in all cases. And, ironically, I think this is a clear case of judicial activism. From another perspective,

47. Criticising the court for being too deferential, see LUIS TELES DE MENEZES LEITÃO, Anotação ao Acórdão do Tribunal Constitucional n.º 399/10 – Processos n.os 523/10 e 524/10, *Revista da Ordem dos Advogados*, ano 71, I, Jan.-Mar. (2011) 294-303; Anotação ao Acórdão do Tribunal Constitucional n.º 396/2011, *Revista da Ordem dos Advogados*, ano 71, IV, Out.-Dez. 2011, 1279-1285.

48. Actually, the successive constitutional court rulings declaring the unconstitutionality of austerity measures after the initial period of deference to the legislator would provoke a series of both critical and supportive responses from Portuguese legal scholarship. Among many other works, see JORGE REIS NOVAIS, *Em Defesa; O direito fundamental à pensão de reforma em situação de emergência financeira*, *Revista e-Pública*, no. 1, ano 2014; VITALINO CANAS, Constituição; AQUILINO PAULO ANTUNES, Breves notas ao Acórdão do Tribunal Constitucional n.º 187/2013 quanto à contribuição extraordinária de solidariedade, *Revista e-Pública*, no. 2, ano 2014 (available at <http://e-publica.pt/pdf/artigos/contribuicaoextraordinariadesolidariedade.pdf>); RAVI AFONSO PEREIRA, Igualdade, 317 ff; the several essays on GONÇALO ALMEIDA RIBEIRO/LUÍS PEREIRA COUTINHO (Eds.), *O Tribunal*.

this reasoning can be viewed as a kind of a new natural law doctrine – it is *cosmopolitan law*, according to which financial reasons defeat all law⁴⁹.

49. For example, criticising the PCC jurisprudence of crisis case-law because it was not sufficiently *cosmopolitan* – that is to say, because it allegedly did not take into account European Union law and international law in a sufficient way – see RUI MEDEIROS, A Jurisprudência Constitucional Portuguesa sobre a Crise: Entre a Ilusão de um Problema Conjuntural e a Tentação de um Novo Dirigismo Constitucional, GONÇALO ALMEIDA RIBEIRO/ LUIS PEREIRA COUTINHO (Eds.), *O Tribunal*, pp. 263 ff; *A Constituição Portuguesa num Contexto Global*, Lisboa, 2015, pp. 7 ff. Criticising this perspective, see JORGE REIS NOVAIS, *Em Defesa*, pp. 155 ff.