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**The Portuguese
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Law on Austerity Measures:
A Reappraisal**

**By Roberto Cisotta
and Daniele Gallo**

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THE PORTUGUESE CONSTITUTIONAL COURT CASE LAW ON AUSTERITY MEASURES: A REAPPRAISAL*

By Roberto Cisotta** and Daniele Gallo***
(forthcoming in B. de Witte, C. Kilpatrick, 2014)

Abstract

In different cases in these last years, the Portuguese Constitutional Tribunal (PCT) has reviewed the legality on some of the austerity measures agreed with (but effectively imposed by) the *Trojka* – the European Commission (Commission), the European Central Bank (ECB) and the International Monetary Fund (IMF) – as conditions for the release of the loan package granted to Portugal in May 2011. As it is well-known, some of those austerity measures have been declared unconstitutional. This paper tries to shed some light on a number of questions, both theoretical and practical, to which those judgments give rise.

The jurisprudence of the PCT raises crucial issues which the constitutional courts of EU Member States will certainly need to address in the future: what is the boundary between judicial activism and the judicial recognition of fundamental social rights as a remedy to the legislature's minimalism in ensuring the protection of those rights? When can legislative action, insofar as resulting from the democratic process, no longer be regarded as the best way to secure that the rights of citizens are safeguarded? To what extent can judges require the legislature to take social rights 'seriously'?

In this regard, we believe that, even though judges obviously do not create the law, they should be active – rather than *activist* or creative – agents of change whenever constitutional rights are put at risk by national legislation – whether or not the latter is the result of an international obligation or constraint – in order to behave as guardians of last resort for citizens' fundamental rights.

SUMMARY: 1. Introduction. – 2. The Legal Nature of the Obligations Contracted by the Portugal (and the attempt to avoid any conflict with the European Legal Order). – 3. Criticism of the case law of the Portuguese Constitutional Tribunal on Austerity Measures. – 4.

* This article draws inspiration from (and develops the considerations carried out in) our essay *Il Tribunale costituzionale portoghese, i risvolti sociali delle misure di austerità e il rispetto dei vincoli internazionali ed europei*, in *Diritti Umani e Diritto Internazionale*, vol. 7, n. 2, 2013, 465-480. Roberto Cisotta has drafted paras 1-3, while Daniele Gallo has drafted par. 4.

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Constitutional Courts and Economic Crisis, between Pseudo Counter-limits and Social Sovereignty

1. Introduction

In different cases in these last years, the Portuguese Constitutional Tribunal (PCT) has reviewed the legality on some of the austerity measures agreed with (but effectively imposed by) the *Trojka* – the European Commission (Commission), the European Central Bank (ECB) and the International Monetary Fund (IMF) – as conditions for the release of the loan package granted to Portugal in May 2011. As it is well-known, some of those austerity measures have been declared unconstitutional¹. This paper tries to shed some light on a number of questions, both theoretical and practical, to which those judgments give rise. It is structured as follows: in the second paragraph, the legal nature of the obligations to implement such austerity measures are analyzed; in the third paragraph, some criticisms, expressed by a part of the legal doctrine and concerning the legal reasoning of the PCT, will be presented and scrutinized. Finally, in the third paragraph, the case-law of the PCT will be analyzed in a broader perspective, taking into account its implications regarding the legal framework governing the relationships between the internal legal order and the European and international ones, as well as its meaning in the light of the protection of national social sovereignty.

2. *The Legal Nature of the Obligations Contracted by Portugal and the (implicit) attempt to avoid any conflict with the European Legal Order*

The decision regarding the financial aid for Portugal has been adopted by the ECOFIN Council on 16-17 May 2011 and the related *Memorandum of Understanding on Specific Policy Conditionality* (MoU) has been signed immediately afterwards². The rescue package has been provided by the *European Financial Stabilisation Mechanism* (EFSM) – the only fund established within the EU legal order –³, by the *European Financial Stability Facility* (EFSF)⁴

¹ For a presentation, see the two papers by Júlio Gomes and Miguel Nogueira de Brito, forthcoming in de Witte, Kilpatrick, 2014.

² Memorandum of Understanding on Specific Economic Policy Conditionality, 18 May 2011, which incorporates the precedent Memorandum of Economic and Financial Policies (MEFP), www.ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf. The Portuguese crisis has to be understood in the more general framework of the responses provided by the EU and its Member States to the sovereign debt crisis: see A. VITERBO and R. CISOTTA, ‘*La crisi del debito sovrano e gli interventi dell’UE: dai primi strumenti finanziari al Fiscal compact*’, *Il diritto dell’Unione europea*, 2012, p. 323 ss., especially p. 329. For an analysis from the economic point of view of the deterioration of Portugal’s financial situation, see: D. GROS, ‘Greece and Portugal: Similar Fundamentals but Different Outcomes?’, CEPS Commentary, 17 February 2011, www.ceps.eu/book/greece-and-portugal-similar-fundamentals-different-outcomes; European Commission, ‘*The Economic Adjustment Programme for Portugal*’, *Occasional Paper 79*, June 2011, http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp79_en.pdf, especially pp. 5-13; F. CARBALLO-CRUZ, ‘*La crisis económica y financiera en Portugal: orígenes, ajuste y situación un año después*’, *Revista de Estudios Europeos* 2012, pp. 9-31.

³ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism *OJ L 118, 12.5.2010, p. 1–4*.

and by the International Monetary Fund (IMF), through the *Extended Fund Facility*⁵. Each of the three funds has provided 26 billion euro.

The Economic Adjustment Programme (*Programa de Ajustamento Económico e Financeiro*, hereinafter PAEF) is based on the following documents: a letter of intent from the Portuguese government and the *Banco de Portugal* and addressed to the President of the Eurogroup, the President of the ECOFIN Council, the Commissioner for economic and monetary affairs, the President of the ECB (the *Managing Director* of the IMF was in copy); the already mentioned MEFP and MoU; the *Technical Memorandum of Understanding* (TMU), containing, in particular, the indexes for the verification of the achievement of the objectives⁶.

As the EU has committed itself to providing 26 billion euro under the EFSM, the Council has adopted an implementing decision⁷ where it is clarified that '[t]he first instalment shall be released subject to the entry into force of the Loan Facility Agreement and the Memorandum of Understanding'⁸; furthermore, '[a]ny subsequent loan releases shall be conditional upon a favourable review by the Commission, in consultation with the ECB, of Portugal's compliance

⁴ The EFSF has been created by the Euro Area Member States as a *société anonyme* incorporated in Luxembourg and it can provide financial aid to Euro Area Member States. On the features of the EFSM and of the EFSF and on their birth in the aftermath of the Greek crisis, see A. VITERBO, R. CISOTTA, '*La crisi della Grecia, l'attacco speculativo all'euro e le risposte dell'Unione europea*', *Il Diritto dell'Unione europea*, 2010, p. 961 ss., especially pp. 980-988. Afterwards, the EFSF has been replaced by a permanent mechanism, the European Stability Mechanism (ESM): see the Treaty Establishing the European Stability Mechanism, <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>. The possibility to establish such a mechanism has been explicitly stated at primary law level thanks to an amendment to Article 136 TFEU: see European Council Decision No 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, *OJ L 91*, 6.4.2011, p. 1–2.

The Court of Justice has recently confirmed the validity of this decision in its judgment in case C-370/12, *Pringle* [2012], nyr. The judgment is quite complex and it addresses the compatibility of the whole legal solution with EU law. See B. DE WITTE and T. BEUKERS, '*The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*', *Common Market Law Review* 2013, p. 805 ff.; P. Craig, '*"Pringle": legal reasoning, text, purpose and teleology*', *Maastricht journal of European and comparative law*, 1/2013, p. 3 ff.; D. Thym and M. Wendel, '*Préserver le respect du droit dans la crise; la Cour de justice, le MES et le mythe du déclin de la Communauté de droit (arrêt Pringle)*', *Cahiers de droit européen*, 3/2012, p. 733 ff.

⁵ Such Facility has been constituted in 1974 to provide aid to Countries experiencing difficulties in their balance of payments.

⁶ On MEFP and MoU see fn 2-4. All the documents on which the PAEF is based are attached to '*The Economic Adjustment Programme for Portugal*', *Occasional Paper 79*, cit., p. 37 ff. A separate letter of intent has been addressed to the *Managing Director* of the IMF: see *infra*, fn 12.

⁷ Council Implementing Decision No 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal, *OJ L 159*, 17.6.2011, p. 88–92, as amended by the following Council implementing decisions: 2012/224/EU, of 29 March 2012, *OJ L 115* 27.4.2012; 2012/409/EU of 10 July 2012, *OJ L 192* 20.7.2012; 2012/658/EU of 9 October 2012, *OJ L 295* del 25.10.2012; 2013/64/EU of 20 December 2012, *OJ L 26* 26.1.2013; 2013/323/EU of 21 June 2013, *OJ L 175*, 27.6.2013; 2013/703/EU of 19 November 2013, *OJ L 322*, 3.12.2013. In recital (6) of this decision, it is recalled that the financial assistance is provided within the framework of the PAEF.

One may wonder whether the implementing decision is aimed at implementing one of the international instruments (of the PAEF) within the EU legal order, or Regulation 407/2010, cit. establishing the EFSM. In this context, it seems *more natural* to prefer the first alternative, as the EU has committed itself – although not being formally part of the relevant international instruments – to granting a part of the loan and there should be an act implementing this obligation within the EU legal order. Nonetheless, even the other alternative would not undermine the fact that, as it will be argued in the text, Portugal has essentially undertaken international obligations and that formally speaking EU law is merely playing an ancillary role.

⁸ By the *Loan Facility Agreement*, signed on 27 May 2011, the loan has been effectively granted; see now the *Master Financial Assistance Facility Agreement* of 24-25 May 2012, www.efsf.europa.eu/attachments/efsf_portugal_ffa.pdf.

with the general economic policy conditions as defined by this Decision and the Memorandum of Understanding'. (Article 1(4)).

As to the subjects entrusted with the task of monitoring Portugal's compliance with the decision itself and (that is to say) with the MoU, the Council implementing decision makes reference only to the Commission and the ECB and not to the IMF, since only the loan granted under the EFSM – an EU law instrument – is at stake in this context. Nevertheless, conditionality terms have been set with reference to the whole lending operation – involving the EFSM, the EFSF and the IMF –, therefore the three members of the *Trojka* actually work together and the IMF is involved in the monitoring activity on the same footing as the two EU Institutions.

The *Trojka*⁹ intervenes as a monitoring body, but it had also conducted the negotiations to finalize the various instruments of the PAEF. Once more, Portugal had to negotiate with it after the Constitutional Tribunal has struck down provisions implementing obligations stemming from the PAEF.

The complex architecture set up to provide financial aid to Portugal – and the conclusion would not be *substantially* different for the other rescued States – is *avant tout* based on instruments, which, as to their legal nature, are to be qualified as international agreements (with a private contracting party, where the loans are granted by the EFSF). As just said, even the part of the loan granted under the EFSM – that is to say an EU law instrument – has to be understood as a segment of the machinery based on the PAEF and the conditionality terms are those established by the MoU and the other instruments mentioned. Therefore, the move of the Euro Area Member States aimed at rescuing Portugal is principally framed outside the EU legal order, even if links with that legal order nevertheless exist¹⁰.

As a consequence, the obligations undertaken by Portugal respectively under international and under EU law cannot be easily separated and an action in breach of the

⁹ In principle, the Commission and the ECB, as Institutions of the EU, should act on his behalf and the Union, not its Institutions, is endowed with international legal personality (see for instance: A. TIZZANO, *La personalità giuridica dell'Unione europea*, *Il Trattato di Amsterdam*, Milano, 1999, p. 123 ff., espec. p. 149; other authors do not share this view and affirm the ECB is an autonomous legal person under international law: see C. ZILIOLO, M. SEMAYR, *The External Relations of the Euro Area: legal aspects*, *Common Market Law Review* 1999, p. 273 ff. espec. p. 282). In this context, one may wonder whether the two EU Institutions, because in particular of the involvement of the EFSM – an EU instrument, as we have seen – are effectively acting as *arms of the Union*. Nevertheless, despite the decision regarding the involvement of the EFSM has to be clearly adopted within the EU legal framework and according to its relevant rules, it seems more appropriate to affirm that it is not the EU that is acting within the *Trojka* (through its Institutions and alongside the IMF), but the Member States of the Euro Area, so the Commission and the ECB are actually acting on their behalf (or on behalf of the EFSF and, in the future, they will act on behalf of the ESM: both mechanisms can be considered independent legal subjects, however it has to be recalled that they have been established by those States and the EU once more is not formally involved). In fact, the EU has not directly concluded with Portugal any of the relevant instruments: the procedures existing under EU law to conclude international agreements have not been used and formal obstacles do exist in EU law that could not be overcome (see *infra*, fn 13). The only foothold of the EU is the EFSM, which is not a legal subject under international law and therefore cannot *per se* subscribe any of those instruments. It has been (apart the IMF) the EFSF, which has directly entered into formal agreements with Portugal: see in particular *Master Financial Assistance Facility Agreement*, cit.

What is relevant for the EU legal order here is that the Commission, in line with its general tasks, as enshrined in Article 17 TEU, should grant the compatibility of the instruments which are negotiated and adopted in this context with EU law (this has been affirmed by the Court of Justice with reference to the activity of the ESM and should be considered true, *mutatis mutandis*, for the EFSF: see *Pringle*, cit., paras 160-165, espec. 164).

¹⁰ Such links could not lead to attract the instruments in question to the EU legal order, since the obstacle of their international legal nature cannot be overcome. This has been the choice of the Euro Area Member States and this circumstance cannot be called into question.

latter – fully dependent on, and functionally linked to, the PAEF – would turn out to be, in its substance, a breach of the former.

a. In particular: the MoU

This conclusion cannot be called into question by the doubts raised in the legal doctrine on the binding character of the MoU¹¹. It is true that it seems to be presented as a *gentlemen's agreement*, however the legal mechanism set up to provide financial aid to Portugal has to be understood in its entirety. Two considerations can be made. First, even if it looks as though it is a kind of *addendum* to the (legally binding) instruments¹², it actually sets the terms under which the various *tranches* of the loan can be released and this has to be considered a *core point* in the whole legal mechanism.

Second, one may make reference to Article 2(1) (a) of the Vienna Convention on the Law of Treaties, whereby a treaty is 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Even if this definition is aimed at clarifying the use of terms for the purpose of the Convention, it can be accepted as a general definition which can shed some light on the understanding of the MoU. The expression 'two or more related instruments' is, first of all, to be intended as a reference to the exchange of letters, a form under which treaties are often concluded in diplomatic practice. But other cases of 'related instruments' are also possible. Thus, our situation could be interpreted as follows: the MoU has to be inserted in a wider legal mechanism and all the related instruments are to be considered as the 'treaty'. The MoU could appear as a non binding instrument, but it is functionally linked to other instruments, so that the terms laid down in it *play a clearly legal role*, as Portugal is obliged to respect them (to obtain the (following release of the) loan).

Whatever stance might be taken as regards the legal value of the MoU, the essentially international nature of the obligations stemming from the whole mechanism and its *absorbing character* over EU law obligations clearly emerges from the analysis above¹³.

¹¹ For an analysis of this problem in the Portuguese literature, see: E. Correia Baptista, '*Natureza jurídica dos memorandos com o FMI e com a União Europeia*, *Revista da Ordem dos Advogados*, 2011, p. 477 ff.

¹² In particular, the MoU is attached to the mentioned letter of intent and to the other one addressed to the *Managing Director* of the IMF. See *supra*, fn 2-4 and 6. The letter of intent sent to the *Managing Director* of the IMF and the annexed documents are published on the website of the IMF: <https://www.imf.org/external/np/loi/2011/prt/051711.pdf>. The form (and formal presentation) of the MoU, and of the whole PAEF, simply makes amendments easier. To date there have been nine updates.

¹³ This escape from EU law is due to the lack under that legal order of instruments suitable to provide assistance to Member States whose currency is the Euro experiencing financial troubles. This is due to two factors. First, there is an explicit prohibition, enshrined in Article 125 TFEU (*no bail-out* clause) for the Union and for Member States to assume (and it cannot be liable for) the financial commitments of (another) Member State. This rule is rigidly applied only to Member States whose currency is the Euro with a view to preserving the financial stability of the Euro Area: in fact the TFEU itself (Article 143) does provide the possibility of provide financial aid to Member States with a derogation (i.e. whose currency is not the Euro). Nonetheless, after the first rescue package provided to Greece in May 2012, Article 125 has been (re-)interpreted, also on the basis of solid textual arguments, as non-absolute prohibition limited only to direct commitments. Second, the Union enjoys only weak competences in the field of 'economic policy' (Chapter 1, Title VIII of the Third Part of the TFEU), while it has an exclusive competence as regards monetary policy for Member States whose currency is the Euro (Article 3(1) (c) TFEU). As it results from Article 2, TFEU, such competences in economic policy only allow a coordination of national policies at the EU level and cannot be classified within anyone of the canonical forms of competences (exclusive, shared or competences to support, coordinate or supplement Member

This explains why the *Tribunal constitucional* has raised no argument related to EU law¹⁴. Nevertheless, it might be wondered whether this absence of references to EU law was precisely intended to avoid any direct conflict with the EU and, moreover, to deal with any clash between potentially conflicting (international and EU) obligations.

The Court of Justice of the EU seems to have confirmed this solution, by refusing to respond to a preliminary reference by the *Tribunal do trabalho do Porto* concerning the budget law 2011 (*Lei do Orçamento de Estado para 2011 – LOE2011*), as no element has been brought which allows to understand that that law is implementing EU law; as a consequence, the Court does not scrutinize the conformity of the Budget law with the Charter of fundamental rights of the EU¹⁵.

States' actions): see M. DOUGAN, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, in *Common Market Law Review*, 3/2008, p. 617 ss., espec. pp. 655-6. Furthermore, according to Article 5(1) TFEU (which, like Articles 2 and 3, just mentioned, is inserted in Title I of the First Part of the TFEU, whose title is: 'Categories and Areas of Union Competences'), '[s]pecific provisions shall apply to those Member States whose currency is the euro': many of the innovations introduced in the context of the sovereign debt crisis can be probably associated to the 'specificities' of the situation of Member States of the Euro Area. On these issues, and on the problems emerging from the setting up of a mechanism like the EFSM, see: A. VITERBO, R. CISOTTA, '*La crisi della Grecia, l'attacco speculativo all'euro e le risposte dell'Unione europea*', cit., espec. pp. 964-974. The Court of Justice of the EU has dealt with the interpretation of Article 125 TFEU in the *Pringle* case, cit. (see paras 64, 108-114, 130-137) (see *supra*, fn 4) and it has in substance endorsed the restrictive interpretation of the prohibition laid down in Article 125 TFEU, just recalled, on which the EU Institutions and Member States (in particular those of the Euro Area) have relied upon in the context of the crisis. This judgment regards (indirectly) the institution of the ESM (which, according to a widespread opinion, can be regarded as the financial stability mechanism for Euro Area Member States which lacked in the original design of the founding Treaties): the weakness of the competences of the EU in the economic policy field has lead the Court, amongst other arguments, to derive from the system of the Treaties the existence of a competence of the Member States of the Euro Area to establish a system like the ESM.

¹⁴ On the absence of any reference to 'counter-limits' and to Article 8.4 of the Portuguese Constitution, see *infra*, par. 4.

¹⁵ See order in case C-128/12, *Sindicato dos Bancários do Norte et al. v. BPN – Banco Português de Negócios SA* [2013], nyr (see in particular paras 10-12). The referring court raised some doubts as to the conformity of the budget law with the principles on human rights protection under EU law and the Charter; however, according to Article 51, par. 1 of the Charter itself, it has to be respected by Member States only when applying EU law (the same is true for principles on human rights protection). Moreover, the Court stresses that, according to Article 6 TEU, the Charter has the same legal value as the Treaties, but it does not create new competences for the Union: by recalling this statement, the Court seems to stress once more that the EU does not enjoy any kind of competences in this area. Even if this was the real underlying intention of the Luxembourg judges, it is not clear whether it has been the referring court to fail to provide evidence of application of EU law (thus giving the European judges a chance to give up), or it has been the Court of Justice that has not attached importance to the involvement of the EFSM (therefore to Regulation 407/2010, cit. and to the Council implementing decision No 2011/344, cit.). It seems nevertheless quite clear that the Court of Justice is willing to preserve the essentially international nature of the rescue package, probably at the same time keeping the EU legal order not involved in the delicate issue of the contrast between austerity measures and fundamental rights. However, the question arises as to whether the application of the Charter of fundamental rights of the EU can be (so easily?) avoided, given that it cannot be denied that pieces of EU law are applied in this context (even if, as explained in the text, such pieces of EU law play only an ancillary role in the context of the provision of financial aid to Portugal).

The Court might have the chance to better explain its views in some pending cases: case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial - Companhia de Seguros, SA* (once more from the *Tribunal do trabalho do Porto*, concerning this time budget law 2012); Case C-566/13, *Jorge Ítalo Assis dos Santos v. Banco de Portugal*; case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins* (from the *Tribunal do Trabalho de Lisboa*).

3. Criticism of the case-law of the Portuguese Constitutional Court on Austerity Measures

On a more specific plane, the case-law of the PCT has been subjected to criticism. In substance, there are two main critical points. The first one regards the way the equality principle has been applied: it has been argued that the Tribunal has used it as an *excessively flexible tool*, in order to achieve some pre-determined objectives. By so doing, the Portuguese Constitutional Judges would have chosen their objectives and then found the legal reasoning apt to achieve them *a posteriori*. Thus, they would have acted as a legislator.

In particular, some authors¹⁶ have found the way the Tribunal has justified the choice of applying austerity measures only to public workers not convincing and, all in all, incorrect. For instance, with regard to the cut of the fourteenth-month salary bonus, the Tribunal first considers the situations of private and public workers as, in general, comparable¹⁷ and it does not justify the cut of the bonus only for public workers. The legal reasoning through which it achieves this result can be summarized as follows. First, the measure has not been considered arbitrary by the Tribunal, as it is functional to the pursuit of a public good. According to the authors who have criticized the Tribunal, it should have stopped here. On the contrary, the Tribunal considers that the difference in treatment of the two categories (public and private workers) has to be evaluated in the light of the 'proportional equality' principle. According to the Tribunal, the guiding parameter is the aptitude of the measure to achieve the objectives laid down in the PAEF, but this is not related to intrinsic elements of the two categories and cannot justify a greater sacrifice for public workers. On top of that, what is decisive for the PCT is the combined effect resulting from the continuous imposition of austerity measures upon public workers.

As far as the reduction for extra-time work is concerned, the Tribunal considers the two situations as not comparable, as private workers normally work for more hours. Apart the alleged weakness of this consideration *per se*, the authors in question argue that the Tribunal – here as in almost all the other cases – is not clearly distinguishing between the preliminary question of the comparableness of the two situations and the justification of a different treatment.

The second critical point¹⁸ is not only related to the results achieved by applying the *equality principle test*, but involves the more general approach of the Tribunal: it regards the intrusion in an allegedly exclusive competence of the national legislator. As the legislator should be granted a particularly wide margin of discretion in economic policy choices, this approach would be inadmissible *a fortiori* as regards budget laws. Moreover, one may wonder whether, as the considered budget laws implemented international obligations, the margin of

¹⁶ See G. Coelho, P. Caro de Sousa, «La morte dei mille tagli». *Nota sulla decisione della Corte costituzionale portoghese in merito alla legittimità del bilancio annuale 2013*, *Giornale di diritto del lavoro e di relazioni industriali*, 3/2013, 527 – 544. The two authors make reference in particular to judgment No. 187/2013.

¹⁷ The greater the difference between the two groups, the wider the discretion enjoyed by the public authorities in establishing differentiated treatments: this is the way the Tribunal itself interprets the comparison. However, according to the reported authors, the lack of sufficient legal justification for considering the two group comparable – and the omission of important circumstances, like the different benefits and guarantees in case of unemployment, as well as the differences in treatment between the two groups envisaged by the Portuguese Constitution itself – constitutes the first flaw of the legal reasoning of the Tribunal.

¹⁸ *Ibid.*, 540 ff. For similar criticisms see also *infra*, fn 33, 34 and corresponding text.

intervention to be recognized the Constitutional Judges had to be even narrower. By declaring some provisions unconstitutional, the Tribunal has *anceled* some measures agreed by the Portuguese government and the *Trojka* to put public expenditure under control and to make Portugal be able to finance its debt regularly through the markets. Therefore, the government has been forced to find new ways to make ends meet. Thus, the *dictum* of the Tribunal influenced the outcome of delicate political negotiations and it might be wondered whether this should be considered beyond the reach of a Constitutional Court.

It can be nevertheless noted that it is quite *natural* that a Constitutional Court can be called to evaluate the reasonableness – in terms of proportionality, as well as of aptitude to achieve the pre-fixed goals – of measures adopted by a government, also if previously agreed on the international plane. Some more detailed thoughts will be presented on this issue in the following paragraph, bearing in mind that a more general question has to be answered: *to whom is the PCT speaking?* When pieces of national legislation are struck down, the national legislator is naturally seen as *under accusation*, but taking into account that those provisions were negotiated with (or imposed by) the *Trojka*, the latter might be considered as the *second addressee* of the PCT decisions. Therefore, such decisions can be *paradoxically* regarded as aimed at protecting the national legislator, by giving back to it the power to re-decide on some critical issues, under, evidently, the guidance provided by the PCT as regards the respect of fundamental rights under the national Constitution.

4. Constitutional courts and economic crisis, between pseudo counter-limits and social sovereignty

The PCT, in its jurisprudence on austerity measures and (*lato sensu*) social rights, has declared unconstitutional several provisions of LOE2012 and LOE2013 on the basis of the principle of equality, «consagrado» in Art. 13 Const., whose corollaries – the principles of proportionality and legitimate expectation, both implied in Art. 2 Const. – were also deemed to have been breached.

The jurisprudence is of great importance in order to provide new answers to the questions raised by the role of constitutional courts in protecting fundamental rights and assessing the legitimacy of national legislation implementing international and EU constraints¹⁹. At stake is the quest for a fair balance between the financial and economic objectives of the reduction of public spending required by international and European Institutions, on one hand, and the application of national constitutional principles concerning the protection of fundamental social rights, on the other. From this point of view, the PCT jurisprudence can be regarded as finally providing a practical dimension to these principles, rather than one merely based on theoretical speculations on the relationship between external obligations contracted by the country at international and European level and fundamental rights recognized and safeguarded by the national legal order.

¹⁹ On the topic see *supra*, par. 2.

The main argument conducted in judgments nos. 253/2012, 187/2013, 474/2013 and 602/2013 is that it is not constitutional to impose stringent measures and additional burdens on public servants and employees of state owned enterprises as those laid down in LOE2012 and LOE2013 since they would create unjustifiable disparities and differences in treatment between workers in the public and private sectors. However, the Tribunal does not say that some serious sacrifices might not be asked to the former in order to fulfil international obligations contracted by the country aimed at reducing public expenditure and securing efficiency, namely the *Troika's* package described *supra*, par. 2. The principle of equality, in fact, must be read in light of the principle of proportionality: when the latter is respected, there is no violation of the Constitution. This has been clearly stated in judgments 396/2011 and 794/2013 where the PCT did not find any violation of the Constitution in relation, respectively, to LOE2011 and LOE2013, but also in the other judgments mentioned above with regard to a number of provisions contained in LOE2012 and LOE2013 that were not found unconstitutional by the PCT.

This circumstance shows that the PCT jurisprudence on the social implications of the austerity measures required by the *Troika* and implemented by the Portuguese Parliament (under the pressure of the Executive) does not represent a genuine revolution, that is to say, a radical twist of the overall framework of the contested state budget laws. The PCT does not call into question the prerogatives of the Legislature which decided to pass the state budget laws that have been challenged before it. This point may be clarified by examining a passage from judgment no. 187/2003. Based also on its previous case law²⁰, the PCT started by considering that the right to pension, although not explicitly enshrined in the Constitution, can be derived from the right to property and the right to social security, which are recognized, respectively, in Articles 62 and 63 Const. It then observed that, since the right to pension is a social right, the task of deciding whether to impose restrictions on said right falls within the wide discretion the legislator, who must ensure that an equal balance is struck between the pensioners' interests in receiving the amount originally established and the public interest represented by the 'sustentabilidade do sistema de pensões'²¹. The Tribunal had no intention to claim for itself the power to determine the minimum content of positive benefits that the State must ensure to its citizens, i.e. the core of those rights whose protection is certainly more dependent on state resources than civil and political rights²². As stressed by the PCT, this determination falls within "uma maior margem de livre conformação, por parte do legislador, do que a generalidade dos direitos, liberdades e garantias, uma vez que a sua aplicabilidade direta (não estando excluída), é necessariamente mais limitada"²³. The reason

²⁰ See judgments 72/2002, of 20 February 2002 and 3/2010, of 6 January 2010.

²¹ According to the Tribunal, "[è] ao legislador que incumbe fazer as necessárias ponderações que garantam a sustentabilidade do sistema e a justiça na afetação de recursos" (judgment 187/2013, para. 57, p. 2376); see also para. 58, p. 2377 of judgment 187/2013.

²² On this point, see the still-relevant observations by M. S. GIANNINI, *Stato Sociale: una nozione inutile*, in *Aspetti e tendenze del diritto costituzionale. Scritti in onore di C. Mortati*, vol. I, Milano, 1977, p. 141 ff.; see also R. PLANT, *Modern Political Thought*, London, 1991, p. 269, according to whom "[p]ositive rights, as rights to resources, are always claimed against a background of scarcity and therefore there are limitations on satisfying them" and S. HOLMES, C. R. SUNSTEIN, *The Cost of Rights. Why Liberty depends on Taxes*, New York-London, 1999. From a different perspective, on the similarities between social rights and civil/political rights see M. LUCIANI, *Sui diritti sociali*, in *Democrazia e diritto*, 1995, p. 545 ff.

²³ See judgment 187/2013, para. 57, p. 2376.

why the Tribunal found a violation of the Constitution does not lie in the fact that a reduction of the pension would be *per se* in conflict with the right to social security under Art. 63 Const., since the Tribunal was not entitled to a declaration to that effect. Rather, the unconstitutionality of Art. 77 of LOE2013 lies in the fact that the measure therein provided for is meant to apply to a wide, undifferentiated ‘audience’ of citizens; in this sense, it results from the application of the principle of equality²⁴, in the field of fiscal policy, that is, the “subprincipio densificador”²⁵ of a progressive income tax system²⁶.

From what has been said above it may be inferred that lying at the core of the Tribunal’s overall approach in its jurisprudence on the social side effects of the economic crisis is the issue of the relationship between the legislature and the judiciary, with regard to the legitimacy of measures which are the result of redistributive policy decisions democratically taken by the Parliament. In this respect, the Portuguese jurisprudence represents a judicial response to austerity measures, a response which is comparable to the legislative reaction of the Cypriot Parliament to the decisions made by the Government of that country. In both cases, the main problem revolves around the scope, extent and limits of democratic legitimacy, as well as the relationship with the principles, values and rights enshrined in national constitutions, with the crucial difference that in Portugal social sovereignty²⁷ has been reaffirmed, rather than by its natural agent, by the Tribunal²⁸. In this way, the PCT, relying on the principle of equality (and on its corollaries), seems to have urged the Legislator to better exercise the competences and powers it seems to have given up in favour of international and European constraints.

The approach taken by the Tribunal seems destined to exceed national boundaries and become a tool of confrontation and fertilization amongst constitutional courts in the wake of the growing phenomenon of horizontal dialogues between national judges²⁹. One of the issues that will have to be assessed in the future is to what extent the Portuguese jurisprudence may

²⁴ See judgment 187/2013, paras 54 and 59, p. 2375 and p. 2377.

²⁵ This expression, in the plural, has been employed by the Tribunal to clarify that the principle of equality is a sub-principle, like others, of the principle of “Estado de direito democrático” recognized in Art. 2 Const.; see para. 54 of judgment 187/2103, para. 54, p. 2375.

²⁶ See judgment 187/2013, para. 54, p. 2375.

²⁷ On the notion of “social sovereignty” see R. LATHAM, *Social Sovereignty, Theory, Culture and Society*, 2000, p. 1 ff.; see also M. FERRERA, *The Boundaries of Welfare. European Integration and the Spatial Politics of Social Protection*, Oxford 2005 and S. SCIARRA, *L’Europa e il lavoro – Solidarietà e conflitto in tempi di crisi*, Roma-Bari, 2013.

²⁸ On the relationship between constitutional courts and politics see G. ZAGREBELSKY, *Principi e voti. La Corte costituzionale e la politica*, Torino, 2005.

²⁹ On the concepts of legal pluralism as well as on the constitutionalisation of international law and internationalisation of constitutional law see, *inter alia*, G. DE BÚRCA, O. GERSTENBERG, *The Denationalization of Constitutional Law*, *Harvard International Law Journal*, 2006, p. 243 ff.; N. WALKER, *Beyond boundary disputes and basic grids: Mapping the global disorder of normative disorders*, *International Journal of Constitutional Law*, 2008, p. 373 ff.; A. VON BOGDANDY, *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law*, *ivi*, p. 397 ff.; M. POIARES MADURO, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, J. L. DUNOFF, J. P. TRACHTMAN (eds.), *Ruling the World? Constitutionalism, International law, and Global Governance*, Cambridge, 2009, p. 356 ff.; A. NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford, 2010; C. FOCARELLI, *International law as Social Construct. The Struggle for Global Justice*, Oxford, 2012, ff. 316-349; D. TEGA, *I diritti in crisi. Tra Corti nazionali e Corte europea di Strasburgo*, Milano, 2012, ff 23-44.

be read in the sense of constitutionalizing the principles – and the rights that derive from them³⁰ – which have been given primacy over international constraints and, thus, have acquired universal status – principles and rights that, as a consequence, cannot be derogated from by international law and which may apply to all EU legal systems. Therefore, we have to wait for future developments in the jurisprudence of national constitutional courts.

A closely connected issue is that of the so-called counter-limits, to be understood as national principles which must be necessarily protected and which limit the effectiveness of EU law within the national legal system. Now, it is clear, first of all, that the obligations at the core of the PCT jurisprudence do not only, and mainly, derive from EU law – as has been already highlighted *supra*, par. 2 – but also from international law and, secondly, that they operate with respect to provisions that, even though adopted because of external constraints, are formally internal sources of law, as is the case of LOE2012 and LOE2013. The *vis expansiva* of EU law, through the principle of primacy, cannot be therefore automatically transposed to the dialectical relationship between international legal order and national law. This is also the reason why the PCT did not ground its reasoning on Art. 8.4 Const., according to which “As disposições dos tratados que regem a União Europeia e as normas emanadas das suas instituições, no exercício das respectivas competências, são aplicáveis na ordem interna, nos termos definidos pelo direito da União, com respeito pelos princípios fundamentais do Estado de direito democrático”³¹.

In conclusion, the jurisprudence of the PCT raises crucial issues which the constitutional courts of EU Member States will certainly need to address in the future: what is the boundary between judicial activism and the judicial recognition of fundamental social rights as a remedy to the legislature’s minimalism in ensuring the protection of those rights? When can legislative action, insofar as resulting from the democratic process, no longer be regarded as the best way to secure that the rights of citizens are safeguarded? To what extent can judges require the legislature to take social rights ‘seriously’? In this regard, we believe that, even though judges obviously do not create the law³², they should be active – rather than *activist* or *creative* – agents of change³³ whenever constitutional rights are put at risk by national legislation – whether or not the latter is the result of an international obligation or constraint – in order to behave as guardians of last resort for citizens’ fundamental rights³⁴.

³⁰ On rules and principles see, among others, R. DWORKIN, *Taking Rights Seriously*, London, 1978, Ch. 2.

³¹ The fact that the main *sedes materiae* is international law rather than EU law entails that the EU Charter of fundamental rights is not applicable; on this point see F. COSTAMAGNA, *Saving Europe Under Strict Conditionality’: A Threat for EU Social Dimension?*, *Working Paper-LPF*, 2012, n. 7.

³² In these terms J. KLABBERS, A. PETERS, G. ULFSTEIN, *The constitutionalization of international law*, Oxford, 2009, p. 127.

³³ *Contra*, with regard to the PCT jurisprudence see G. DE ALMEIDA RIBEIRO, *Judicial Activism Against Austerity in Portugal*, *International Journal of Constitutional Law Blog*, Dec. 3, 2013, available at: <http://www.icconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/> who, in his harsh criticism of the PCT’s approach, refers to the risk that democracy would give way to “juristocracy”.

³⁴ On the risks deriving from such ‘creativity’ see M. CAPPELLETTI, *Giudici legislatori?*, Milano, 1984 and J. WALDRON, *The Core of the Case against Judicial Review*, *Yale Law Journal*, 2006, p. 1346 ff. On judicial activism and *originalism* see J. RUBENFELD, *Freedom and time – a theory of constitutional self-government*, 2001, p. 188.