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Constitutional Adjudication as a Forum for Contesting Austerity: The Case of Portugal

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WITHIN THE FRAMEWORK of an excessive deficit procedure (EDP) followed by an international financial assistance programme granted by international and European institutions, the Portuguese legislature was charged with applying conditionality that translated into cuts to wages, pensions, social benefits and an overall decrease in welfare. Some of these policies were struck down by the Constitutional Court, whose rulings created political turmoil and forced the renegotiation of conditionality. This chapter takes stock of this case law and focuses on the contestation of austerity through constitutional litigation, its constitutional and political success, and its impact on the separation of powers.

The first section considers the repercussions of the eurozone crisis in Portugal and how it led to the need to implement regressive public policies to conform to conditionality. The second section reviews the case law that impinged upon austerity policies, differentiating its three stages: pre-bailout austerity, bailout austerity and post-bailout austerity. The third section analyses constitutional case law in light of the rearticulation of the principle of separation of powers in the context of a financial emergency. Under this rearticulation, from an internal perspective, the Constitutional Court stood as the last forum for the contestation of highly controversial policies. An external perspective shows that framing austerity as purely domestic measures immunised litigation from the influence of EU law. Possible long-term political and judicial consequences of contestation to austerity will also be discussed. The conclusion argues that analysis demonstrates that even in times of acute crisis, constitutions and courts can provide limits to the political discretion of legislatures and international institutions and set the stage for deliberation over alternatives to hegemonic financial narratives.

THE IMPACT OF THE EUROZONE CRISIS ON PORTUGAL

Fiscal consolidation and structural reforms were already a part of Portuguese political jargon during the first decade of the twenty-first century. The country went from being the European poster-child in the 1990s for its rapid convergence and economic dynamism to entering a prolonged period of economic stagnation with the introduction of the euro. Economic stagnation came in tandem with growing public debt. Like other Member States, Portugal took advantage of low interest rates, and public debt increased from around 51 per cent of the GDP to 68 per cent between 2000 and 2007.

When the financial crisis that followed the Lehman Brothers crash began to rear its head, the feeble Portuguese economy stumbled. Its already fragile fiscal situation was aggravated by a combination of factors, including excessive private and public debt, a large increase in the state-owned enterprise sector and the adoption of expansionary public policies.

Following the government's estimates for the 2009 deficit, the European Council initiated an EDP against Portugal.[1] Within the framework of the corrective arm of the Stability and Growth Pact, the government adopted three packages of austerity measures to reduce the deficit, including cuts in public spending and revenue increases. The measures contemplated progressive pay cuts to all monthly public wages above €1,500 gross, varying between 3.5 per cent and 10 per cent.

In February 2011, the interest rate on Portuguese sovereign bonds exceeded 7 per cent, a level considered to be unsustainable for any state. In a context of growing internal and external pressure, the Parliament rejected a new austerity package, leading to the government's resignation. On 7 April 2011, the resigning government requested financial assistance. The €78 billion loan would be delivered between 2011 and 2014 in partial disbursements following quarterly evaluations of loan conditions by the Troika – the IMF, the European Commission and the ECB.

When the sovereign debt crisis emerged, the European Union was ill-prepared. There was no mechanism to regulate emergency financial assistance if a eurozone Member State faced financial problems, and the view that each state bore full responsibility for its own financial disarray was dominant. When the escalation of the crisis threatened the integrity of the eurozone, the countries agreed to set up emergency mechanisms to provide financial assistance to those states in need. These mechanisms were temporary and followed different setups.

The Portuguese Financial and Economic Assistance Programme was made up of aid provided by three different institutions: the IMF, the European Union, within the framework of the European Financial Stabilization Mechanism (EFSM),[2] established under Article 122(2) TFEU, and the eurozone countries,

[1] Council Decision No 2010/288/EU of 19 January 2010.

[2] Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism [2010] OJ L118/1. See also Council Regulation (EU) 2015/1360 of 4 August 2015

under the European Financial Stability Facility (EFSF).[3] The programme was comprised of three documents: the Memorandum of Economic and Financial Policies, the Technical Memorandum of Understanding and the Memorandum on Specific Policy Conditionality (ie, the MoU). While the first two documents were sent as attachments to a letter of intent addressed to the IMF's Executive Board, the third document was signed between Portugal and the European Commission. The MoU detailed the general economic policy conditions embedded in Council Implementing Decision 2011/344/EU, of 30 May 2011, on granting EU financial assistance to Portugal.

The assistance provided under the EFSF also subjected the beneficiary Member State to conditions such as budgetary discipline and economic policy guidelines.[4]

The €78 billion financial aid package subjected Portugal to a severe austerity programme. Portuguese individuals, companies and political parties were forced to accept a strict conditionality programme that imposed fiscal retrenchments and 'structural reforms' in welfare policies and the labour market as well as a generalised decrease in social benefit entitlements.

The nature of the agreements comprising the assistance programme has been controversial. A persuasive analysis suggests that the 'European leg' of the Memoranda prevailed, as the 'pole normative position' was assigned to the 'EU sources containing the loan conditionality … not the international sources'.[5] In any case, conditionality was a vital component of the bailout agreement. As Ioannidis explains, 'Conditionality is the new *topos* of EU economic governance.'[6]

CONTESTING AUSTERITY THROUGH CONSTITUTIONAL LITIGATION

Between 2010 and 2014, the Constitutional Court became the preferred forum for disputes concerning restrictions brought about by austerity measures and the implementation of conditionality. This section explores the contestation of austerity measures through constitutional litigation. It asks how the Constitutional Court was mobilised to challenge austerity and how its case

amending Regulation (EU) No 407/2010 establishing a European financial stabilization mechanism [2015] OJ L210/1.

[3] A Special Purpose Vehicle incorporated in Luxembourg on 7 June 2010 as a *société anonyme*, whose shareholders are the eurozone Member States. See EFSF Framework Agreement (available at www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf (accessed 7 October 2020).

[4] The EFSF was replaced for future assistance programmes in 2012 by the European Stability Mechanism (ESM) which was also established as an international agreement between the eurozone states.

[5] Kilpatrick 2014: 401.

[6] Ioannidis 2014: 62.

law impacted political practice. To contextualise the Court's case law, it begins by describing the Court's position in the political system prior to the eurozone crisis and providing an overview of its institutional design.

The Portuguese Constitutional Court: Background and Institutional and Procedural Context

When the eurozone crisis hit Portugal, the Portuguese Constitutional Court was not a salient figure within the political system. Empirical studies suggest a traditionally low social awareness of the Court and show that it had never gained prominence as a robust counter-majoritarian institution, either due to a low level of requests (especially in the early years) or to a moderate level of activism. In fact, before the 2012–14 period, the Court had not risen as a significant veto agent, at least from a comparative perspective.[7]

During the political and doctrinal struggle to give meaning to the 1976 Constitution – a text adopted in a highly ideologically polarised political context after the Carnation Revolution – the Court refrained from embracing strategic and purposive readings of this fundamental text, managing to maintain the most disputed arguments separate from constitutional case law.

While some observers have praised the Court's 'stealth'[8] and 'prudence',[9] others criticise its concern for neutrality for failing to uphold significant constitutional promises that comprise the Portuguese constitutional identity. These unfulfilled promises encompass the catalogue of welfare rights, often qualified as the longest bill of social and economic rights in a national constitution. As the Court's efforts to avoid political struggle over the predominance of the liberal or social dimensions of the Constitution led it to seek refuge in foreign scholarship and constitutional case law, it also failed to develop legal interpretation aligned with the ambitious welfare and economic programme of the 1976 Constitution. An aspirational, ambitious Constitution was followed by 'self-restrained', 'minimalist' and 'shy'[10] socioeconomic rights jurisprudence, despite the length and detail of the catalogue.

The Constitutional Court's undisturbed existence was shaken by the eurozone crisis. Between 2010 and 2014, it reviewed several challenges to austerity measures.[11] The institutional design of abstract constitutional review is generous and favoured active judicial management of the crisis. On the one hand, the

[7] Araújo and Magalhães 2000: 207.
[8] Miranda 1995: 98.
[9] ibid.
[10] Novais 2010: 374, 380.
[11] For a detailed description of this case law, see Canotilho, Violante and Lanceiro 2015; Violante 2019a; Violante and André 2019. The Portuguese version of the Court's rulings is available at the official website (www.tribunalconstitucional.pt/tc/acordaos/). Most of the decisions referred to in this chapter also have an English summary provided by the Court (www.tribunalconstitucional.pt/tc/en/acordaos/).

Constitution allows for both a priori and a posteriori review. A priori review takes place before the legislative bill is promulgated; it is subject to strict time-limits and remains the exclusive power of the President of the Republic (for national legislation). A posteriori review can be requested at any time at the initiative of the President of the Republic, the President of Parliament, the Prime Minister, the Ombudsperson, the General Public Prosecutor and one-tenth of the members of Parliament. Notably, abstract review covers any constitutional challenge, from fundamental rights' claims to questions related to institutional and procedural constitutional provisions. This broad framework of constitutional review proved decisive in the contestation of austerity in Portugal through constitutional litigation. The most significant bulk of case law was delivered in abstract review (ie challenges to the constitutionality of legislation initiated by institutional actors such as the President of the Republic, the Ombudsperson and parliamentary minorities).

Pre-Bailout Austerity: A Self-restrained, Deferential Court

From the very beginning, the Constitutional Court took an active role in the scrutiny of austerity legislation. In 2010, at the request of the President of the Republic, the judges were called to review increased income taxation adopted in the context of the EDP initiated in January 2010. In its first austerity ruling,[12] the Court applied a rational basis test to the legislature's options to tackle the escalating emergency in light of the international economic and financial crisis. In a concise judgment, the Court accepted the increase in income taxation in the middle of the fiscal year as a valid policy to raise revenue and improve the budgetary balance.

During the 2011 electoral campaign that followed the assistance programme, the bailout and its regressive effects were central to the electoral campaign. The conservative leadership, which would soon form a government and take on the responsibility of executing the rescue programme, converged politically with the international lenders' view that the only way out of the crisis was through internal devaluation.

In September 2011, two months after elections, the Court reviewed, for the first time, pay cuts for public workers at the request of several members of Parliament.[13] These pay cuts were enforced in the 2011 budget law and were part of the third package of austerity measures adopted under the EDP (ie before the bailout). Despite its provisionality – budgetary provisions are valid for the fiscal year at stake – the Court, in a forward-looking analysis, considered that the legislature would very likely adopt similar measures during the entire financial assistance period. Therefore, the Court implicitly accepted that

[12] Decision 399/2010.
[13] Decision 396/2011.

future re-enactments of the cuts would be constitutionally valid for the financial retrenchment period.

The Court upheld a light level of scrutiny and deferred to the legislature's discretion to choose the adequate means to reach the fiscal consolidation, endorsing a wide margin of appreciation for the political branches. For the Court, the legislature's margin of choice permitted differentiation between public workers and other citizens. Given the amount of the reductions and their temporary nature, the Court found that the pay cuts conformed to constitutional rules, namely the principles of proportionality and the prohibition of arbitrariness.

Bailout Austerity: From Warning to Biting

The Court's case law on bailout conditionality revealed, from the first moment, that the reduction in the margin of political choice stemming from bailout conditions would not translate into limited judicial scrutiny. In the first bailout case,[14] the Court assessed the validity of additional cuts to the salaries of public workers and pensions paid by public pension schemes that affected Christmas and holiday allowances. The challenge was again brought by members of Parliament. Neither the review request nor the Court's analysis noted that these cuts implemented a loan disbursement condition added to the MoU in its second version. This strategy allowed the Court to qualify the conflict as purely domestic, declining to affirm the possible relevance of EU law despite qualifying the MoU as 'ultimately founded on Article 122(2) of the TFEU'.

For the first time in its austerity case law, the Court adopted heightened scrutiny. This less deferential approach was grounded on the fact that the new pay cuts added to the initial reductions that had been cleared by the Court in 2011. As public employees were already burdened by monthly pay cuts, the Court considered that there were limits to the degree of sacrifice public authority can demand of these individuals for the sake of consolidating public accounts. Taking this cumulative effect into account, the judges found that the additional cuts breached the principle of proportional equality. Under this threshold, the Court would not accept the legislature's justifications for imposing another, cumulative burden on public employees. The report on the budget law invoked, on the one hand, the urgent need to reduce the budget deficit and, on the other, the fact that this category of workers, on average, enjoyed higher wages and superior job security. However, the Court upheld a limit to the sacrifices requested of public workers in the context of financial distress and ruled against the additional pay cuts. In the words of the Court:

> The Constitution certainly cannot remain unaware of the economic and financial reality, and in particular of a situation that can be considered to be of serious difficulty. But it has a specific normative autonomy that prevents economic or financial

[14] Decision 353/2012.

> objectives from prevailing, without any limits, over parameters such as equality, which the Constitution defends and must enforce.[15]

The decision, however, represented a mere warning to the legislature; the judges suspended the effects of the declaration of unconstitutionality for the remaining fiscal year. This was the first and only time that the Court applied this type of remedy.

The Court's option to adopt stricter scrutiny has raised some doubts. On the one hand, the fact that the new cuts were adopted in the context of an international bailout might imply that the legislature should be allowed a wider margin of appreciation. However, on the other hand, the new cuts were cumulative, adding to previous reductions in wages, thus creating further restrictions to pensioners' and employees' rights. This tension was solved by the Court through a mixed strategy combining substantial and heightened review with a weak remedy that froze the effects of the ruling; as the cuts were implemented through budget provisions, they effectively applied for the full period of the budget law (2012). Since fiscal options were effectively preserved during that fiscal year, the Court made clear that its judicial bite would be felt should the legislature, in the future, fail to respect the limits on sacrifices demanded of public employees.

The Court delivered a strong message to the legislature by claiming that being subjected to the conditions of an international financial assistance bailout did not render the Constitution ineffective nor did it reduce judicial scrutiny regarding austerity measures. This strategy, however, was founded on the construction of austerity measures as purely domestic policies, neglecting both their European and their international origins and the reduced room for manoeuvre of the national legislature and the executive in meaningfully negotiating conditionality with lenders.

The mitigated veto power of the Court appeared in 2012 within the rich context of social mobilisation, when, for the first time since the 'hot years' of the democratisation period, large popular demonstrations were taking place to protest precariousness and the lack of alternatives. Some of the protesters wore T-shirts with the words 'I Love TC'[16] on them, showing their appreciation of the Court's importance as a shield against austerity.[17]

The request leading to the 2012 ruling was drafted by a politically diverse group of members of Parliament and set down the roots for a cohesive oppositional front. Convergence with the political lines that demanded more progressive management of the crisis grew stronger with time. Although unsuccessful, the six censure motions[18] presented in Parliament during this period by opposition groups gave voice to the dissonance between the Constitution's normative

[15] ibid, para 5.

[16] TC is the Portuguese abbreviation for Constitutional Court.

[17] Blanco de Morais 2014: 721.

[18] The PSD/CDS-PP government faced the largest number of censure motions in the history of Portuguese democracy (Seguro 2019: 108).

promise and the 'no-alternative' paradigm that obliterated the protection of social rights and democratic debate.

Encouraged by the Court's new, stricter approach, a more diverse parliamentary minority challenged the 2013 budget law. The President of the Republic and the Ombudsperson also challenged the constitutionality of several restrictive policies. These challenges led to the declaration of unconstitutionality of some provisions, which, for the first time, produced financial effects and forced the government to renegotiate bailout conditions, the most significant of which concerned a new pay cut scheme for public employees introduced in the 2013 budget law in reaction to the Court's 2012 warning.

The Court upheld the 2011 cuts but again dismissed the possibility of increasing the level of sacrifice imposed on public workers under the proportional equality review.[19] Notably, it emphasised two lines of reasoning. First, it claimed that unlike the measures reviewed in 2011 and 2012, in 2013 the legislature had enjoyed more time to draw up efficient consolidation measures without having to resort, prima facie, to cuts in wages. Second, the Court stressed that the course of time imposed stronger duties on the legislature to devise alternative measures that would not overburden certain categories of individuals. Moreover, the course of time would also render a stronger burden of justification as the legislature should present and quantify the possible alternatives for increasing revenue or reducing expenditure. The judgment emphasised that other policy options were still available and rejected the argumentation that no viable alternative existed to abide by the fiscal goals.

The decision's financial impact was reported to amount to €1.35 billion and set off a political crisis leading to the resignation of the Minister of Finance, a prominent supporter of austerity policy. Political erosion was also felt at the EU institutional level as the Court's ruling led to renegotiation of the rescue programme. According to *The Economist*, European bureaucrats were outraged at the 'last Socialist Constitution in Europe', whose enforcement jeopardised the austerity strategy designed to cope with the sovereign debt crisis, and threatened political support in other countries.[20]

The existence of a 'constitutional risk' to the implementation of the assistance programme led to the introduction of 'legal safeguards' in the MoU to mitigate 'legal risks from future potential Constitutional Court rulings'. As such, reforms should rely on the principles of public/private sector and intergenerational equity – justified on the basis of the Fiscal Compact – and be enacted through general laws to permit prior constitutional review and early reaction by the government should constitutional issues arise.[21] Through the

[19] Decision 187/2013.
[20] www.economist.com/europe/2013/04/13/euro-wobbles (accessed 7 October 2020).
[21] See the revised versions, following the seventh, eighth and ninth updates (June and November 2013).

introduction of these legal safeguards, lenders acknowledged the centrality of the Constitutional Court for future contestations of austerity. In fact, the wording suggests that a priori reviews should be favoured in order to provide for legal security and clarification at an earlier moment.

The renegotiation of the MoU introduced supplementary policies to compensate for the cuts rejected by the Court, such as the requalification of public employees, a forty-hour working week in the public sector and the convergence mechanism of the pension system. Some of these compensatory measures would later meet with opposition from the Constitutional Court. Despite the 'legal safeguards' inserted in the MoU by lenders, the Court remained oblivious to the international dimension of austerity policies.

Political pressure did not impress the Court. Some months later, in an a priori review, the Court halted the reform regarding the requalification of public employees.[22] The bill would have broadened the legal basis for the dismissal of public employees which was necessary to achieve a gradual reduction of budgetary burdens. The judges found it to be in breach of the principle of protection of legitimate expectations as well as the principle against dismissal without just cause.

Later that year, the Constitutional Court further invalidated several provisions introduced by a revision to the Labour Code[23] at the request of members of Parliament and, by unanimous vote, permanent cuts to former public employees' pensions, on a challenge submitted by the President of the Republic.[24]

In 2014, the Court ruled[25] on several provisions of the budget law, following requests lodged by the Ombudsperson and two groups of parliamentarians. This time the Court rejected another legislative scheme that aggravated the 2011 pay-cut threshold, thus again protecting public workers from increased reductions in their wages. The decision was announced on 30 May 2014, two weeks before the closure of the bailout programme. Negotiations with the Troika to compensate for the financial impact of the Court's decision failed, leading the government to decline the last disbursement of the loan to avoid a prorogation of the assistance programme.

Post-Bailout Austerity: The EU Law Dimension of Austerity?

When the financial assistance programme closed, Portugal again found itself within the framework of the EDP suspended in 2011, meaning that strict conditionality was still in force under a strengthened European Monetary Union

[22] Decision 474/2013.
[23] Decision 602/2013. The forty-hour work week in the public sector was cleared by Decision 794/2013.
[24] Decision 862/2013.
[25] Decision 413/2014.

institutional framework.[26] Against this backdrop, the Court was again asked, in a priori proceedings, to review the most significant austerity measures adopted after the bailout. These measures included pay cuts for public workers until 2018 and permanent contributions to certain pensions. In the first case, the Court accepted the proposed cuts for the years 2014 and 2015 but overturned the provisions governing the reductions for the following years, claiming that they were in breach of the proportional equality principle.[27] The Court also rejected the proposed contribution for pensions, which would imply a permanent reduction in the total amount, for being in breach of the principle of protection of legitimate expectations.[28] The distinctive character of these two rulings lies in the fact that the Court openly acknowledged, for the first time, the normative relevance of EU law to the adjudication of austerity measures adopted in the context of the EDP.

After detailing the operative principles governing the EU framework of the EDP, as well as the intergovernmental nature of the Fiscal Stability Treaty, the Court concluded that the complex normative framework did not create legal obligations regarding specific public policies adopted to reach the fiscal deficit limits. Again, the legislature was free to choose the means to comply with the binding commitments regarding the deficit limit in EU and international law. The national origin of the austerity measures grounded the Court's jurisdiction to rule on their compatibility with domestic constitutional standards. Moreover, in a relevant obiter dictum, the Court affirmed that there was no divergence between EU law and Portuguese constitutional law regarding the principles of equality, proportionality and legitimate expectations – the basic yardsticks used to review several austerity policies.

In hindsight, contesting austerity through constitutional litigation proved a successful strategy. As Blanco de Morais sagaciously notes,[29] no apocalypse followed the constitutional overturning of successive austerity policies developed under the mantra of 'no alternative'. The Court's decisions impacted the political process but did not hinder the adjustment programme. They had the effect of forcing political branches, in coordination with lenders, to search for alternative measures that would have a reduced regressive effect. Thus, the Constitutional Court's rulings slashing austerity policies proved to be effective counterchecks to the hegemonic narrative of exceptionalism that framed the programme's conditionality as the 'only credible option' to handle the country's financial distress.

[26] See generally Hinarejos 2015.
[27] Decision 574/2014.
[28] Decision 575/2014.
[29] Blanco de Morais 2014: 723.

CONSTITUTIONAL LITIGATION AND THE SEPARATION OF POWERS

Constitutional Litigation and the Horizontal Separation of Powers

The Court's case law has been severely criticised for being 'autarchic',[30] 'insular'[31] and 'parochial'.[32] According to these critical views, the Constitutional Court failed to articulate austerity conflicts in light of their transnational dimension and to address the impact of European integration on the national constitutional system and its own role as guardian of the Constitution.[33]

According to the critics, the idea that domestic decision-makers enjoy the autonomy to decide fiscal policy under a fiscal adjustment process would be nothing more than 'an idyllic interpretation of reality'.[34]

The discretion left to the recipient Member State when implementing the conditionality spelled out in the assistance programme varies.[35] Yet, there is a prevailing notion that countries facing a financial assistance programme are severely constricted in their sovereignty. As Claire Kilpatrick explains: 'During a bailout, a wide range of national democratic choices become suspended as external lenders set the terms for loan disbursements.'[36]

Against this backdrop, proper analysis of the Portuguese Constitutional Court's management of the austerity legislation cannot be limited to doctrinal frames regarding rights adjudication in emergencies, judicial standard-setting or the democratic legitimacy of constitutional justice vis-a-vis the legislature. The structural transformations that affect a constitutional democracy forced to accept an international bailout to avoid bankruptcy must also be taken into account. Part of these structural transformations pertain to the core democratic principle and the need to link policy-making to the choices made by the people. In the Portuguese case, bailout assistance was concluded by a resigning government that chose to leave Parliament on the sidelines. The agreement was never even officially translated into the national language nor published in the official journal, adding 'incomprehensibility' to the charge of 'inaccessibility'.[37]

Within the context of the constricted role of parliaments and the political process, where the margin of decision by domestic actors is compressed by the need to accommodate lenders' conditions to clear aid disbursements, parliaments and other political fora fail to provide the adequate setting for pluralistic debates and meaningful deliberations over controversial policy choices. Within this context, where political choices are presented as inevitable and hegemonic

[30] Maduro, Frada and Piedominici 2017.
[31] Almeida Ribeiro 2014.
[32] Medeiros 2015.
[33] Almeida Ribeiro 2014; Pereira Coutinho 2016; Medeiros 2015.
[34] Medeiros 2015: 78.
[35] Ioannidis 2014.
[36] Kilpatrick 2017: 310.
[37] Kilpatrick 2015: 340–43.

and parliaments' sovereign right to deliberate and choose between different choices is curtailed, constitutional courts bear a distinctive responsibility for the protection of the right to self-government as the normative core of the right to democracy.[38]

The literature emphasises that the eurozone crisis brought about a shift in the separation of powers for debtor states.[39] Under a rearticulated division of powers, constitutional or supreme courts stood as the last line of defence for national sovereignty while parliaments and the executive were forced to take a political step back, subject to the demands of lenders. In Portugal, the lack of consensus over the implementation of austerity was meaningfully channelled through constitutional case law with the constitutional jurisdiction replacing Parliament as the preferred forum for addressing political conflicts.[40]

Constitutional Litigation and the Vertical Separation of Powers

Through a strategy which qualified austerity policies as purely domestic affairs, the Court was able to immunise the challenged legislation from the influence of EU law and thus frame constitutional conflicts as an issue of political discretion and an option between viable competing alternatives. The Court's reasoning construed austerity measures as purely national policies, the domestic means to reach the ends imposed by external conditionality.

The strategy of 'nationalization of the crisis'[41] was not limited to judicial discourse. Both the Court and a majority of politicians insisted on framing austerity legislation as discretionary political options decided at the domestic level. The national framing of austerity created a formal setting for judicial discourse that spared the Court from facing difficult issues such as the legal value of bailout documents. It also downplayed the role of EU law when its demands encroached on constitutional fundamentals such as the principle of equality or the protection of legitimate expectations. Therefore, the Court circumvented the difficult constitutional questions underlying austerity case law concerning the relationship between the national Constitution and EU law.

However, it must be noted that the Constitutional Court stood as the only forum available for the contestation of austerity measures. The fragmented and complex framework underlying not only the financial assistance programme but also the conditionality adopted in the EDP rendered judicial review difficult. At the height of the crisis, the CJEU kept its doors shut to referrals made by

[38] I have developed this argument further in relation to the *PSPP* judgment of the Bundesverfassungsgericht: Violante 2020.

[39] Blanco de Morais 2014: 774; Cisotta and Gallo 2014: 92–93; Reis Novais 2014: 190; Fasone 2014: 51; Nogueira de Brito 2014, 2016, 2017.

[40] Fasone 2015: 26.

[41] Violante and André 2019: 254–55.

Portuguese ordinary courts on the compatibility of EDP conditionality with EU law, more specifically with the Charter of Fundamental Rights.[42] The only case where the CJEU agreed to rule on the Portuguese austerity crisis was, ironically, on the brink of another European crisis, concerning threats to the rule of law in Poland. Nevertheless, even in said case, it maintained absolute silence as to the relationship between austerity measures and EU law.[43] The case concerned the reduction in the salaries of judges who, as public workers, were also affected by the wage reductions approved in 2014, following the bailout closure. Both the order of referral and the Opinion of the Advocate General, Saugmandsgaard Øe, argued that the adoption of the austerity measures at stake constituted the implementation of provisions of EU law, and therefore, the CJEU was competent to rule on the request. The CJEU, however, remained silent with regard to this topic and claimed jurisdiction by clarifying that the concerned judges might, as a national court, rule on questions concerning the application or interpretation of EU law, thus triggering the threshold of the requirements essential to effective judicial protection, under the second subparagraph of Article 19(1) TEU.

The 'nationalization of the crisis', championed by the Constitutional Court at the domestic level, was therefore also matched at the supranational level by the CJEU, firstly, by summarily rejecting preliminary references made by ordinary courts; and, secondly, by subtly avoiding a decision as to whether EDP conditionality constitutes an implementation of EU law.

In retrospect, the Constitutional Court's decision to avoid entering into dialogue with the CJEU seems wise. It is true that, by declining to recognise the transnational dimension of austerity conflicts, the Court failed to bring the issues to their natural stage and to allow for contestation of the real roots of austerity. Bringing austerity to the CJEU would surely have had the advantage of forcing the Luxembourg court to face the legal conundrums underlying the European governance of bailouts and conditionality in a serious manner.

The Constitutional Court, nonetheless, preferred to avoid this confrontation and with good reason. First of all, following a long period of reluctance to explicitly engage with EU law and the CJEU, the Constitutional Court lacked a doctrinal toolbox and established normative standards to adequately construe the relationship between EU and national constitutional law. For a long period, EU law was seen as separate from constitutional law, the primary province of the ordinary courts. This became even more difficult in light of the constitutional provision governing the relationship between EU law and the Constitution,

[42] CJEU, Cases C-128/12, *Sindicato dos Bancários do Norte and Other v BPN* [2013] ECLI:EU:C:2013:149; C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial* [2014] ECLI:EU:C:2014:2036; and C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa* [2014] ECLI:EU:C:2014:2327.

[43] CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117. This case concerned austerity adopted in the framework of the EDP following the bailout closure.

introduced in 2004 to accommodate the constitutional system of sources of law with the Constitutional Treaty. According to Article 8(4):

> The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.

Despite the political failure of the Constitutional Treaty, the operative principle of primacy was enshrined in the constitutional text, with the limits derived from the 'fundamental principles of a democratic state based on the rule of law'. The meaning of this provision is highly debated in legal scholarship, and the Court has only recently – in July 2020 – fully addressed it.[44]

The underdevelopment of Portuguese constitutional caselaw regarding EU law can be partially attributed to procedural[45] and doctrinal specificities.[46] The point is that the normative and institutional impact of EU integration was not fully realised at the constitutional level until the eurozone crisis hit.

In the midst of a normative conundrum and pressed by the urgency of the bailout timeframe,[47] the Court preferred to avoid dealing with a possible conflict between EU and domestic constitutional law, thereby prompting confrontation with the CJEU on this ground.

LONG-TERM CONSEQUENCES[48]

The effects of the financial crisis were complex and still unfolding when the COVID-19 crisis returned the country to the throes of economic trouble. Politically, the broad reaction to austerity ultimately led, for the first time in the history of Portuguese democracy, to the formation of a leftist parliamentary majority. As became currency in the political debate, a political 'arc of the Constitution' rose to replace the former 'arc of government', a traditional designation for the centrality of the two main political parties that had dominated the political spectrum in

[44] Decision 422/2020.

[45] In concrete review, the Court does not review other courts' decisions or limit its jurisdiction to incidental questions. As such, the Court cannot review ordinary courts' failure to submit preliminary references to the CJEU, since there are no procedural avenues oriented to the direct protection of individuals' fundamental rights. The jurisdiction of the Court is solely concerned with the judicial review of legislation.

[46] The Court developed a consistent standard according to which its jurisdiction is limited to cases of an alleged direct breach of a constitutional provision, thus rejecting cases where indirect unconstitutionality for breach of Community or Union law was raised. By not including EU law as a parameter of review, the Court reduces substantially the range of cases where issues of interpretation of EU law might trigger a referral to the Court of Justice.

[47] Judges were sensitive to the time constraints imposed by the periodic reviews of the programme whose positive outcome was essential to clear disbursements of the loan. Between 2012 and 2014, the decision process never exceeded five months, except in the case concerning the revision of the Labour Code.

[48] This part draws on work previously published in Violante 2019b.

the four decades of democracy. The first legislative elections following the implementation of the bailout programme, held on October 2015, were particularly fragmented and provided the opportunity for leftist radical parties to support, for the first time, a parliamentary coalition that was able to overthrow the minority government of Pedro Passos Coelho, in office for just 27 days.

The 'arc of the Constitution' rhetoric that enhanced the new political arrangement was broadly framed as a discursive reaction to hegemonic austerity. This 'unprecedented level of cooperation between the parties of the left',[49] that in the past had had a history of divergence, created a new governance formula that has stood the test of time. In 2019, new parliamentary elections with similarly fragmented results allowed for the continuation of this political arrangement, a hefty symbolic consequence of the constitutional case law on austerity.

The shadow of austerity brought about by the conservative government remains a powerful rhetorical instrument in political debate. How powerful it will remain in the course of the upcoming devastating crisis produced by the pandemic is still to be seen.

Another question is whether the new prominence of the Constitutional Court has become a permanent fixture of the political system. From 2016 onwards, an alignment of circumstances has prevented both legal and political litigants from taking significant cases to the Court. Two of the institutions that were key in bringing austerity cases to court – the President of the Republic and the Ombudsperson – are now held by individuals who publicly envisage constitutional litigation as a last-instance mechanism, favouring a more cooperative, dialogue-based approach with the legislature.

Courts act upon request and are limited to the adjudication of controversies raised by litigators. Constitutional adjudication is one of several avenues available in the political arena to channel dissent and influence outcomes.

This can, in part, account for the fact that despite the massive body of legislation produced in the fight against the pandemic, no significant case has yet been taken to the Constitutional Court. The lively scholarly debate surrounding the constitutionality of some of the significant political tools used to restrict the spread of COVID-19 has not yet found its way through constitutional litigation. This is perhaps a sign that, for the present crisis, institutional actors do not regard the Constitutional Court as the preferred forum for the contestation of highly controversial policies that are adequately addressed in traditional political loci.

CONCLUSIONS

Court decisions alone are not sufficient to change fundamental political options, but as analysis of the Portuguese constitutional case law on austerity measures shows, they play a role in achieving changes in policy.

[49] Jalali 2019: 78.

The eurozone crisis saw the Portuguese Constitutional Court take up a central role within the political system. The Court became the last forum for several highly politicised conflicts disputed in domestic and European arenas. The institutional design of abstract review, especially with regard to locus standi, enabled constitutional control of austerity policies early on. Remarkably, parliamentary minorities were not the sole actor to bring constitutional challenges to austerity policies to the judicial arena. The President of the Republic and the Ombudsperson initiated some of the challenges that led to essential rollbacks of the adjustment strategy. It is worth mentioning that no other President has raised so many constitutional challenges to legislation approved by sovereign bodies dominated by members on the same political-ideological spectrum.[50] All nine of the presidential challenges, lodged over three years, led to decisions of unconstitutionality.

From a comparative perspective, the Portuguese Constitutional Court's role as an effective countercheck to austerity policies is remarkable due to the number of decisions and their impact not only at the domestic level but also on international and European institutions. The Court took up a high political and media profile by preventing or striking down austerity policies adopted in execution of the financial assistance programme.

The reaction of the Portuguese Constitutional Court to austerity legislation was complex and difficult to categorise. Although in some cases the Court struck down political measures adopted to combat financial distress, several other measures, including direct and indirect slashes to labour costs, met with judges' sympathy in the context of the acute financial crisis. By simply pointing to the activist nature of the rulings of unconstitutionality, such a critical view of the case law runs the risk of telling just one part of the story.

Moreover, in a context where the political branches of government were severely constrained, the Court signalled that the Constitution had an autonomous value that prevented the swift judicial endorsement of a political narrative as to the inevitability of concrete austerity measures even when the financial rescue of a eurozone country was at stake. By doing so, the Constitutional Court confirmed its institutional pedigree; as a constitutional court, it can intervene in political decisions even when critical political and economic interests are at stake. The integration process and economic demands are not red lines for the Court when it comes to upholding fundamental constitutional values such as the principles of equality and proportionality. This is the most remarkable effect of the eurozone crisis on the Portuguese constitutional system: the exceptional protagonism of a traditionally self-restrained Constitutional Court. Whether this will become a permanent fixture of the political system remains to be seen.

[50] Blanco de Morais 2014: 776.

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