

PRIVATE VERSUS PUBLIC OR STATE VERSUS EUROPE? A PORTUGUESE CONSTITUTIONAL TALE

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INTRODUCTION

On May 17, 2011 the Portuguese Government, led by socialist Prime Minister José Sócrates, signed an agreement with the International Monetary Fund (“IMF”), the European Commission (“Commission”) and the European Central Bank (“ECB”) — the trio commonly known as Troika — in order to receive a financial package of EUR 78 billion that would prevent the country from going bankrupt. This agreement was also signed by the social-democrats and the popular party (center-right). The communist party and the left bloc (a left-wing party) refused to sign it.

Portugal had faced low economic growth rates for two years, and some cuts on social benefits had already been put into place. Then, interest rates associated with Portuguese debt in sovereign markets, provoked by the escalation of Greece’s near financial meltdown, soared to more than 7%. The rescue package was necessary in order to keep the country’s financing costs from escalating. Conditions were agreed to for the Portuguese State to undergo a series of social and economic reforms in order to receive the bailout. The socialist Government had fallen shortly before signing this agreement, due to the lack of political support from the Parliament.¹ The new Government, now composed by the social-democrats and the popular party, had the responsibility of implementing the document, which was called (and will be referred to throughout this paper) the Memorandum.²

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1. Elections were called after resignation of the Prime Minister and the dissolution of Parliament by the President of the Republic. *See* Decreto do Presidente da República [Portugal] n° 44-A/2011, Diário da República, 1.ª série N° 69 (refusing the stability and growth pact).

2. The Memorandum consists of three documents: GOV’T. OF PORT., MEMORANDUM OF ECONOMIC AND FINANCIAL POLICIES (May 17, 2011), *available at*

Their first action came with the approval of the budget law for 2012 (hereinafter “LOE 2012”).³ The budget was the first concrete measure of austerity applied in Portugal in order to face its troublesome financial situation, contemplating cuts in social benefits, public wages, pensions, and other measures.

Due to the size and temporal extension of these cuts, which greatly affected public sector workers, a claim was submitted to the Portuguese Constitutional Court (hereinafter “the Court”) by a group of socialist members of Parliament. On July 5, 2012 the Court delivered its decision in *Acordao 353/2012*.⁴

Acordao 353/2012 is arguably one of the most controversial in Portuguese constitutional history, not so much for what it concretely said but for the questions that it posed and directly raised. The budget law was the Portuguese domestic manifestation of an agreement with European Union (EU) institutions, which asked for a strong restructuring of the Portuguese State with regards to social, economic and financial policy. The recent restructuring restricts some of the most important principles of the Portuguese Constitution (hereinafter “Constitution”) embodied in the participation of the State in creating and guaranteeing social welfare for its citizens through mechanisms of social security and other social policies. Due to the competing social policies, the Memorandum is the most challenging manifestation of the constitutional duty of participating in EU Integration, laid down in article 7 of the Constitution.⁵ It would also have been an important opportunity for a national state to put into question EU measures and policies regarding financial assistance programs.

However, the Court overlooked this question and decided the case on a purely internal basis. The rationale was very typical of traditional Portuguese constitutional thought, which avoids open confrontation with European law. In the following pages I will analyze the decision and argue that the Court should have followed another rationale, taking into account the European implications of this decision.

I. THE CLAIM AT STAKE: ARTICLES 21 AND 25 OF THE LOE

The primary focus of the claim made to the Court was based upon

http://www.portugal.gov.pt/media/371354/mefp_20110517.pdf; GOV'T. OF PORT., TECHNICAL MEMORANDUM OF UNDERSTANDING (May 17, 2011), *available at* http://www.portugal.gov.pt/media/371360/tmou_20110517.pdf; GOV'T. OF PORT., MEMORANDUM OF UNDERSTANDING ON SPECIFIC ECONOMIC POLICY CONDITIONALITY (May 17, 2011) *available at* http://www.portugal.gov.pt/media/371369/mou_20110517.pdf. References to the Memorandum refer to all three documents unless otherwise specified.

3. Lei No. 64/B2011, DIÁRIO DA REPÚBLICA de Dec. 30, 2012 (Port.), *available at* http://sifide.adi.pt/arq/fich/Lei_n._64-B_2011.pdf

4. Tribunal Constitucional [Port. Const. Ct.] 353/2012 (Port.)

5. For further information on Portuguese constitutional law, see JOSÉ GOMES CANOTILHO, DIREITO CONSTITUCIONAL E TEORIA DA CONSTITUIÇÃO (7th ed. 2003) and 1 JORGE MIRANDA, MANUAL DE DIREITO CONSTITUCIONAL (2011).

Articles 21 and 25 of the LOE 2012. Article 21 concerns the suspension of vacation and Christmas benefits for workers of the public sector, while Article 25 concerns the suspension of these same subsidies but for pensioners. This would lead to a reduction of a minimum of 14% in their value, depending on the concrete amount of the remuneration and pensions at stake. These suspensions would be exceptional, having as a limit the duration of the Economic and Financial Assistance Program (“Período de Assistência Económica e Financeira” (PAEF, in Portuguese) agreed in the Memorandum. The Government budgetary program was scheduled to run for three years, from 2011 to 2014.⁶

The Petitioners argued in their request that the articles violated four principles of the Constitution. The first violation concerned the principle of trust.⁷ According to petitioners; the approved budget gravely affected “legitimate expectations” of public workers and pensioners that are protected by the principle of trust, a necessary element of the Rule of Law, established by article 2 of the Constitution. The Court had already dealt with the issue of trust in a previous decision on the budget law of 2011.⁸ The Court found that when citizens make important decisions, relying on the durability of the acts adopted by the legislative and executive branch of the government, this creates legitimate and justified expectations.⁹ Based on the Court’s interpretation of Trust, petitioners argued that in the matter of workers the measures in question went beyond the “limits of bearable sacrifice” that the Court allows for. In the case of pensioners, they argued that they might have “the complete, absolute and unavoidable impossibility of adapting their life plan to a new set of conditions,”¹⁰ submitting that according to the Court’s interpretation of the principle of trust, only a very solid and overriding reason of public interest could justify the undermining of these expectations; a reason, according to the petitioners, that does not exist.

The second allegation was that the adopted measures failed the necessity test in the assessment of proportionality.¹¹ According to the petitioners, the Government could have achieved the same result — raising more money for the State — by other means, like for example affecting through taxes or other means the salaries of workers in the private sector, or taxing other types of earnings than just remuneration.¹² The third violation

6. See MEMORANDUM OF UNDERSTANDING ON SPECIFIC ECONOMIC POLICY CONDITIONALITY, *supra* note 2.

7. The principle of trust concerns the expectations created by a recurrent action of public powers in the life of citizens. See JORGE REIS NOVAIS, OS PRINCÍPIOS CONSTITUCIONAIS ESTRUTURANTES DA REPÚBLICA PORTUGUESA, 261-65 (2006).

8. Tribunal Constitucional [Port. Const. Ct.], 396/2011 (Port.).

9. *Id.*

10. *Id.* at ¶¶ 33-34.

11. The necessity test amounts to see if there was another less harmful measure for the right at stake that could be applied in this concrete situation.

12. Tribunal Constitucional 396/2011, at ¶ 16.

concerned the principle of equality, established in article 13 of the Constitution. According to petitioners, Articles 21 and 25 created an unjustified discrimination between public and private sector workers and pensioners, since the measures only affected the public sector and did not offer a sufficiently founded rationale for doing so.¹³ The petitioners' fourth and final submission was that the contested measures violated the principle of social security, protected by article 63 of the Constitution, since it frustrated the expectations of worker's contribution to this system.¹⁴

II. THE DECISION: A PROBLEM OF EQUITATIVE SACRIFICE

The decision of the Court had the support of nine of its twelve judges, and was written by Judge Cura Mariano. He began by contextualizing the measures impugned, recalling the history of the Portuguese bailout and the signing of the international agreement with the EU and the IMF, before looking into the LOE 2012 report made by the Government.¹⁵ Here, and before setting out the rationale of the decision, he held that the vacation and Christmas benefits had to be considered remuneration, and not another type of earnings. This conclusion was an answer to a point made by the Government in the report. By stating that subsidies were in fact remuneration, the Court seemed to be pointing out that the cuts had a strong effect on the economic "stability" of citizens.

The Court then proceeded to address the first argument raised by petitioners, concerning the violation of the principle of equality.¹⁶ It held that the measures under discussion did affect a specific category of people more than another, thus creating a discrimination that had to be justified in order to be allowed. The Court then stated that this discrimination in the budget of the previous year¹⁷ was justified due to overriding reasons of public interest and effectiveness in achieving their purpose in the short-term. However, it added that they were justified only as long as the situation remained exceptional, time-constrained, and within certain limits. If it went beyond this, then it was unjustified, and therefore unconstitutional.

In the LOE 2012 report the Government stated that public sector workers, due to the benefits received and the stability offered by the position, were in a better position than private sector workers to support this kind of measure. The Court did not agree with the Government's position, stating that it was difficult to prove that the benefits earned by public workers made them better off economically than their private sector

13. *Id.* at ¶¶ 40-48.

14. *Id.* at ¶ 50.

15. *See* GOV'T. OF PORT., ORCAMENTO DO ESTADO PARA 2012 (2012) (PORT.) available at http://www.igcp.pt/fotos/editor2/2012/Aparentacao_Investidores/Rel-2012.pdf. This is an explanatory note attached to the legal document in which the Government explains its reasoning. No governmental submission was presented to the court.

16. Tribunal Constitucional [Port. Const. Ct.] 353/2012, ¶ 4.

17. Tribunal Constitucional [Port. Const. Ct.] 396/2011.

counterparts, and that this argument could not justify discrimination in terms of contribution for public finances. The only acceptable criteria was the concrete amount of remuneration of the people involved — those who have more can contribute more to the State than those who have less.

There was no question regarding the admissibility of this justification, as long as its temporal limits were clear. The problem was that, unlike the decision for the 2011 budget, which was deemed to be limited in time and affected remuneration up to a reasonable amount, the measures of LOE 2012 affected the total remuneration of workers up to a level — 14% reduction — and during a time-span — three years — which was too long to be considered acceptable. Since the reduction applied to the remuneration of public workers in LOE 2012 was too big and there were no other measures extending this reduction to private workers, or producing a similar effect (like the taxation of certain types of earnings) the discrimination was unjustified and unconstitutional. Judge Mariano summarized the court's reasoning by stating that: "The bigger the sacrifices demanded to citizens in order to achieve public interest goals, then the more equative and just their distribution must be." Thus, the measures were struck down.¹⁸

However, the Court did something rather surprising in the end, by deciding to suspend the effects of its own decision, allowing the law to continue in force. The Court took this pragmatic action in order to protect the budget's execution, which had been going on for half a year already.¹⁹ To strike it down would have meant, according to the Court, "put[ting] in danger" the continued financing of the Portuguese State by the Troika.²⁰ This action was the most controversial point of the decision, frustrating petitioners and the political opposition that hoped the budget would fail, and at the same time provoking various divisions inside the Court itself.

III. BEYOND THE DECISION: THE OTHER CONFLICT IN THE CASE

The Court's rationale was limited to discrimination between public and private sector workers with regards to salary and budget cuts. However, in my opinion, the Court did not look at another contentious, conflict-like issue, which may rise again in the future. This issue concerns the frustration of social and existential expectations based on the Constitution by another constitutional duty: the duty to comply with European Integration and international agreements. Only in the dissenting opinion of Judge Maria Lúcia Amaral, one of the three judges that voted against the decision, do we find a more explicit reference to this question.

As stated before, the Court did not draw any argument on the principle of trust, although it was one of the main points raised by petitioners. The Court has rarely dealt with this principle in a structured and coherent way

18. Tribunal Constitucional [Port. Const. Ct.] 353/2012, ¶ 5.

19. Various examples exist in national and European systems. *See, e.g.*, Case 43/75 Defrenne v. Sabena, 1976 E.C.R. 455.

20. Tribunal Constitucional [Port. Const. Ct.] 353/2012, ¶ 6.

throughout its history.²¹ To make it even more difficult, the principle is not itself explicitly formulated in the Constitution, having been structured more by academic and judicial interpretation.²² It is possible to understand the difficulties of having to deal with this issue.

If constitutional justice already has to “bear the weight” of being the most political of justices due to its umbilical connection to what is typically considered the functions of statehood, then the principle of trust has to be seen as the most political of all these functions, since it not only affects the expectations that public bodies create in their citizens but also the power these public bodies have to achieve their said goals. To put the problem bluntly: how much can a court act in order to safeguard a political and social status quo that is a normative requirement of the constitutional text, when it means it has to act against facts that reduce the possibility of sustaining that same status quo? It is somewhat the “soul” of the constitutional project that it is at stake, thus creating an “existential” crisis of constitutional sorts that will have impact in the political and social development.

But then we might also ask: what if this status quo is being affected by an international agreement that is constitutionally binding on the State? The purpose of the Memorandum, in the case at hand, is to solve the Portuguese financial and economical situation but is not limited only to that. The policies also aim to make the country comply with European financial policies. This is the point made by Judge Lúcia Amaral when stating that the measures at stake have also to be seen through the lens of European and international cooperation, “towards the financial and economic stability of . . . the euro zone”²³. The Court avoids the fact that the constitutional expectations of Portuguese citizens were not undermined by a decision of the national government (which is true in a formal sense) but by an international agreement, which binds the Portuguese State and its public bodies. Overlooking this is to put too much burden on the Government. It is not just a national budget that is on the line, but an international agreement and a constitutional duty to a supra-national project.

In sum, the Court should have not dodged this European connection. It did so, in my opinion, due to reasons of political and constitutional culture. For example, Portugal holds serious reverence for international institutions. To challenge a European measure with the impact of the Memorandum could be seen as a sign of judicial activism against the political will of the Government and of European institutions. The Court did not want to enter a battle, which it does not feel comfortable fighting, preferring to deal with the issue in a national perspective. It is interesting to see how, unlike the

21. We have already dealt with the principle of trust in the Portuguese financial situation in the context of expectations of creditors during debt restructuring. However, a great deal of the rationale will also apply in this case. See, Martinho Lucas Pires, *Realities and Priorities of Portugal's Debt Management, Pt. III*, JURIST, <http://jurist.org/dataline/2012/04/martinho-lucas-pires-portugal-debt.php> (Apr. 5, 2012).

22. REIS NOVAIS, *supra* note 7, at 261-65.

23. Tribunal Constitucional [Port. Const. Ct.] 353/2012 (Port.) (Amaral, J., dissenting).

German Constitutional Court, which does not fear to bring Europe to the table when it is needed,²⁴ the Portuguese Constitutional Court avoids a difficult, but necessary route for this question, and for Europe itself. The Court avoided dealing with the largest or thorniest question, preferring to narrow its adjudication to the judgment of equality. As we say in Portugal, it preferred not to “hold the bull by the horns”.

CONCLUSION

Due to the failing results of the austerity program implemented by the Government, the LOE 2013 maintained most of the sacrifices of the previous year. This time, criticism for the budget came not only from the parliamentary opposition but also from the public Ombudsman and the President of Republic. The Court joined the three suits, and published its decision on April 4th 2013, deciding again on the unconstitutionality of the austerity measures proposed by the Government due to the same violation of the equality principle.²⁵ This time, the Court did not suspend the effects of the decision, meaning that the amounts due to workers and pensioners will have to be paid. Again, the Court chose to maintain the same, narrow national focus on the issue.

There was another route that the Court could have chosen in both decisions, which was to tackle the European connection and bring this matter to where it belongs: Europe. This seems to be, due to the financial European crisis, the biggest conundrum that the Court had to deal with, and for the second time it refused to even touch it. How to maintain vital and important features of the constitutions, such as social security, when there is no other option for the political branch but to restrict them in order to comply an European agreement? With a series of financial and political reforms taking place at an EU level,²⁶ Member States will be asked to adhere to new constitutional paradigms that might affect their own, national constitutional structures. If these discussions are not raised into Europe, then no real solution will be found.

24. See, e.g., Decision on the European Stability Mechanism, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Sept. 9, 2012, 2 BvR 1390/12.

25. Tribunal Constitucional [Port. Const. Ct.] 187/13 (Port.)

26. See Herman Van Rompuy, EUROPEAN COUNCIL, *Towards a Genuine Economic and Monetary Union* (2012), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf.