Judicial Activism Against Austerity in Portugal

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[Editors’ note: below is an essay on the current situation in Portugal. We thank Professor Ribeiro for the opportunity to publish this essay in the form of an extended post on the blog.]

Introduction

The Portuguese Constitutional Court, the main judicial actor in charge of enforcing the national constitution, has played an active role in domestic politics in the past couple of years. The Court has struck down a number of laws adopted by the Portuguese Government[1] in the wake of the public debt crisis and in order to meet the budget deficit targets set by the ensuing adjustment program. The laws in question fell into two basic categories. The first, included in the Budget Laws of 2012 and 2013, enabled the Government to temporarily implement pension cuts and slash wages in the public sector. The second, adopted as a consequence of the Court’s unwillingness to validate the pay cuts, broadened the legal basis for firing civil servants, both objectively — concerning the permissible grounds of firing — and subjectively — concerning the permissible targets of firing.

The Court did not deem these policies unconstitutional on the basis of narrow constitutional provisions — often called by academic lawyers ‘rules’ — such as those proscribing the death penalty or setting the age requirement for a presidential candidate. The Court is not oblivious to the fact that nothing in the constitutional text inhibits verbatim the austerity measures adopted by the Government. Its decisions were rather based on the interpretation of either vague standards such as ‘fair dismissal’ or, in most cases, highly abstract principles such as ‘equality’, ‘proportionality’, and ‘reliance’ rooted in the even more abstract ideal of the rule of law. Principles are part of the Portuguese and indeed of any other constitution as much as rules are, and in fact their importance is normally greater on account of their fundamental status. It is not without good reason that Ronald Dworkin, one of the greatest constitutional theorists of the 20th century, described the United States Supreme Court as a ‘Forum of Principle’.[2] And yet handling principles properly in constitutional argument requires a measure of intellectual and institutional prudence absent from the recent case law of the Portuguese Constitutional Court.

I believe indeed that if we take the case law as a whole the Court has erred in virtually every dimension of its role as a ‘Forum of Principle’: substantive, formal, institutional and cosmopolitan. Let me review them briefly in that order, following an ascending scale of flaw. (1) At the substantive level, the Court issued many incorrect judgments of what equality, proportionality or reliance requires in the cases it decided. (2) At the formal level, the Court failed to articulate predictable guidelines to avoid legislating against the constitution in the future. (3) At the institutional level, the Court misunderstood the role of judicial review in a democracy, blurring the line between constitutional censorship and political condemnation of the Government. Finally, (4) at the cosmopolitan level, the Court has ignored the implications of the European dimension of the crisis, notably the interlocking of national constitutions and of their judicial interpretation within the EU. I will rely on the Court’s decision to strike down the provisions enabling pay cuts in the public sector to illustrate each of those errors — unfairness, unpredictability, illegitimacy, and insularity.

Before I turn to them, however, a preliminary clarification is in order. Portugal is a constitutional democracy. The law-making power of elected majorities in the Parliament is limited by a written constitution enforced through judicial review of legislation. The theoretical debate about the legitimacy of judicial review — or what Alexander Bickel famously called ‘the counter-majoritarian difficulty’[3] — has been for more than two centuries, when the institution was first adopted in the United States of America, a hot topic in the seminar rooms of law schools and government departments across the world. Yet it is worth noting that there is nothing bizarre about it so far as democratic practice teaches us: it exists in various forms in most democracies in the world. Any plausible critique of the case law of the Portuguese Constitutional Court about austerity, therefore, will have to be a critique that takes for granted the premises of the democratic system within which the Court operates. That is the nature of the task ahead.

What the court said[4]

The policy of slashing the pay of civil servants began in the Budget Law of 2011, under the previous Government and at a time in which Portugal had not yet requested a bailout. The 2011 cuts applied to civil servants whose monthly income exceeded € 1,500 and ranged progressively from 3.5%, to 10%. The Court decided that those early cuts were not unconstitutional because the Government was under pressure to reduce public expenditure and it retained a wide margin of political discretion to choose a path to fulfill that goal.[5] At the same time, the Court debated whether reducing the income of civil servants was a fair way of distributing the burden of austerity given the alternative of raising taxes that has an impact on each person proportional to her ability to pay. The Court concluded that the two policies are not perfect substitutes, since they might have quite different fiscal and economic effects, and that in any case it is up to the Government to decide, particularly in a context of crisis, which policies are appropriate to reduce the budget deficit. The opinion ends with the assertion that the temporary nature and the extent of the cuts fall within the measure of sacrifice that can be legitimately inflicted on civil servants. It is worth noting an ambiguity in the judgment: it is not clear whether the Court meant that the fiscal and economic differential between pay cuts and taxes is the only legitimate reason to support the measure or if no further reason needs to be considered given the sufficient strength of that reason to validate the judgment.

The Budget Law of 2012 was prepared by a newly elected Government constrained by the adjustment program and against the background of an emerging recession. It carried further the policy of pay cuts in the public sector, maintaining the 2011 cuts but adding to them new cuts on two of the fourteen installments (the so-called ‘vacation’ and ‘Christmas’ benefits) in which the annual income of a civil servant is divided and paid in Portugal. The latter measure involved the suppression of the benefits for all incomes above € 1,100 and a progressive reduction of their payment to those who earn between € 600 and € 1,100; workers whose salaries are lower than € 600 were exempted. The Court held the new cuts unconstitutional, running essentially two complementary arguments.[6] The first argument was of the negative sort: it rejected the Government’s claim that there are reasons of fairness to place a heavier burden on civil servants than income-earners generally since the
former’s salaries are on average higher and they benefit from a much more favorable regime of dismissal than private sector employees, reflected in the rate of unemployment. The Court reasoned that it is impossible to compare salaries in the two sectors, given job description and level of instruction differentials, and that it makes no sense to invoke the unemployment rate, since the alternative policies under discussion — pay cuts and taxes — target employed workers. The Court’s second argument was to affirm that the only legitimate reason to favor pay cuts over taxation is the pragmatic concern with the differential fiscal and economic effects of the two policies. That reason had been sufficiently strong to validate the measures in the 2011 budget, but the Court argued this time that the new cuts exceeded the margin of distributional difference that it could possibly justify — in other words, that although there are reasonable grounds to have civil servants bear a heavier burden than private sector employees, the additional pay cuts in the 2012 budget placed an excessive burden on the former’s shoulders.

The decision was issued in July. The normal effect of the Court’s judgment that the cuts were unconstitutional — hence void — would have been the retroactive elimination of the corresponding legal norms. The Government would thereby have to pay both subsidies in 2012, an expenditure not foreseen in that year’s budget. Since there was no time to design policy alternatives that could compensate the imbalance, the decision would imply a serious aggravation of the budget deficit. Taking that into account, the Court used an exceptional constitutional device — a prerogative which enables it to shape the effects of a judgment of unconstitutionality inter alia for reasons of public interest — to block the effects of the decision in the year of 2012. In practical terms, the Court let the pay cuts go through but warned the Government that it would disallow the measure in the future.

The Government appears to have taken due regard to the Court’s warning as it drafted the Budget Law of 2013. Indeed, the new budget steered a middle line between the alternatives of pay cuts in the public sector and taxation. The 2011 cuts were maintained and complemented by additional cuts on just one of the two benefits, structured along the lines of 2012. Moreover, the Government raised taxes to fund the increment in public expenditure relative to the 2012 budget. Nevertheless, the Court again held the pay cuts unconstitutional, repeating the 2012 argument that they were excessive, but casting it in a diachronic setting: as time progresses, argued the Court, the reason to target public sector employees grows weaker since the cumulative effect of three years of pay cuts increases the weight of the burden placed specifically on their shoulders while, on the other hand, the Government had plenty of time to find workable alternatives to reduce public expenditure.

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The constitutional basis invoked by the Court to justify the decision to strike down the pay cuts in the public sector in 2012 and 2013 was the principle of equality. At its most abstract, equality determines that everyone subject to public authority should be treated as having the same social worth or dignity, that the Government cannot bestow privileges on a class of citizens or treat another as inferior. All stand as equals in the enjoyment of the benefits and the sharing of the burdens of communal life. Two implications follow: (i) no law can discriminate arbitrarily among persons, e.g. subjecting the drivers of black cars to a specific speed limit on the highway or establishing segregated schools for white and black students; and (ii) differences of regime should be proportional to differences in the underlying reality, e.g. punishment for assault should be proportionately lower than that which is provided for aggravated assault and tax rates should reflect the relative ability of taxpayers to pay.

The equality issue raised by the pay cuts in the period of 2011-2013 was whether they operated an equal distribution of the economic burden created by austerity. The Court took the progressive income tax system as a benchmark for equality in this domain, and asked what reasons might justifying the alternative route of cutting the salaries of civil servants. The only reason it found was the pragmatic advantage of pay cuts vis-à-vis taxation in the effort to reduce the public deficit. This reason makes, of course, the case for pay cuts both contingent and weak, rendering intelligible the 2013 judgment that reduced considerably the margin of the Government to insist on this policy in the future. The Court was oblivious to at least three much more fundamental reasons of distributive fairness to uphold the measures.

The first concerns the wage differential in the public and private sectors. The Court rejected the Government’s argument that the average salary of a civil servant is higher than that of a private sector employee, invoking job description and level of instruction differences to uphold the proposition that the comparison is impossible and criticizing the use of crude averages as a yardstick. Although there are studies suggesting that even adjusting for occupational and educational differences Portuguese civil servants do enjoy a wage premium when compared with private sector employees, the Court’s argument on this point was, from the standpoint of fairness, not wholly deprived of merit. What the judges missed was that the relevant comparison is not synchronic but diachronic: it is not a question of civil servants earning more than private employees at a given point in time but of following the wage adjustment in the private sector during the crisis with equivalent pay cuts in the public sector. If, say, private employees lost on average 15% of their nominal income, it is only fair that the Government reduces the salaries of civil servants by the same percentage before it resorts to taxation. It is no good to argue that taxation (or, at any rate, an equitable tax system) is by definition fair because it affects individuals in proportion to their ability to pay. That conflates vertical equity — from each according to their ability — with horizontal equity — treating like persons alike. In other words, equity requires both that two individuals whose income differs pay taxes in proportion to their ability to pay and that two individuals performing the same job earn similar pay. It was the Court’s failure to appreciate this fundamental distinction that led it to the untenable position that pay cuts in the public sector tend to operate as disguised taxes. Finally, while it is true that in order to serve the goal of horizontal equity through a policy of salary adjustment in the public sector the Government has to rely on data about averages, for such data to be ‘crude’ one would have to posit very substantial and unlikely variation of wage reduction across sectors of the economy or income levels; moreover, the fact that our knowledge of reality is imperfect — based on ‘crude’ averages — is not a good reason to disregard it.

The second reason was advanced by the Government and addressed by the Court but the latter misunderstood its actual reach. It is the argument that civil servants should bear more of the fiscal burden of austerity than private employees because they benefit from greater job security. The Court attempted to neutralize that argument by claiming that it misses the target, since taxes address those who are currently employed in one sector or another; at most, according to the judges, the Government’s assertion implies that in virtue of the high rate of unemployment in the private sector, tax revenues from the former sector will diminish vis-à-vis those paid by public employees. But this misses the point entirely. What the Government argued, quite correctly, was that job security has an impact on the real wage of an employee: if two workers earn the same nominal income but one of them has twice the chance of being fired, his real income is lower. ow this argument does not support equal cuts within the public sector for temporary workers or even permanent employees subject to a regime close to that which governs private employment relations and civil servants who enjoy extensive immunities from dismissal. Yet it does justify special cuts on the latter’s income, whose weight on the state budget is very significant. ad the Court appreciated this argument, it would have, other things being equal, issued a decision of partial instead of full unconstitutionality of the 2012 and 2013 pay cuts.

The third and final reason concerns the absurd implications of the Court's insistence on taxes as the normal, and indeed the quasi-exclusive, mechanism to distribute the fiscal burdens of austerity policy. Imagine that an irresponsible Government on a electoral frenzy triples the salaries of civil servants and incurs unprecedented levels of public debt to fund the ensuing budget deficit. What can a future Government do to secure a measure of fiscal discipline and restore the financial credibility of the state? According to the case law of the Constitutional Court, the Government can only target the inflated salaries of state employees on a very thin basis; the bulk of the effort is to be supported by the taxpayers. What this means, of course, is that private sector employees are expected to subsidize excessive earnings in the public sector, whereas if a similar situation occurs in the marketplace the company will either go bankrupt or it will have to negotiate wage reductions with its employees instead of using taxpayers money to restore its finances.

Reductability

The judgment that the Court's decisions failed by the relevant standards of fairness, reflecting a faulty conception of equality, is a judgment of substance. A different flaw of the case law is formal in nature: its unpredictability.

When it struck down the provisions in the 2012 Budget Law that enabled the Government to suppress or reduce the civil servants' subsidies, the Court argued that although there was a legitimate reason to embrace pay cuts in the public sector in detriment of raising taxes, namely the differential fiscal and economic impact of the two policies, the pay cuts were disproportionately large. This line of reasoning can be traced back to the decision in the 2011 opinion that the pay cuts introduced then were unconstitutional not only because they were grounded in a legitimate reason but also because they were neither permanent nor excessive. The Government appears to have interpreted the Court's decision in 2012 to mean that it should not cut on both subsidies but rather diversify the incidence of austerity by combining pay cuts with tax raises. Yet the Court rejected that option as well in 2013, citing the cumulative effect of the measures adopted in the two previous years as an additional reason to hold the cuts excessive.

Illegitimacy

I argued above that the Court erred in its judgment of what equality requires with respect to the distribution of the burdens of austerity. I hope that my arguments were persuasive to some undecided people, but it would be either smug or naive of me to think them conclusive. What abstract and fundamental principles like equality, proportionality, reliance or freedom require is subject to deep, obdurate and reasonable disagreement in a democratic pluralist society. There is perhaps a narrow core of normative platitudes to which every citizen of good faith subscribes — I imagine that everyone agrees, and certainly everyone ought to agree, that life imprisonment is a disproportional sanction for late submissions of the income tax return. However, on issues such as whether abortion ought to be criminalized, whether gay couples should be banned from child adoption, whether the Government should subsidize or disallow this or that economic activity, or whether the current level of income redistribution through taxation is adequate a democratic polity is quite naturally divided. And of course the judges of the Portuguese or any other Constitutional Court, who are cut from the same cloth as the rest of the citizenry, disagree on these issues of principle as well. ow are such disagreements resolved very simply, in the exact terms in which disagreements in Parliament or in an election are settled: majority rule. The interpretation favored by more of the 13 judges of the Portuguese Constitutional Court is the last word on the issue to be decided.

There is a paradox here. Judicial review is often described as a counter-majoritarian force in a democracy, a derogation of the majority rule. In fact, as Jeremy Waldron has often emphasized, judges settle their disagreements through voting as well. ow why would a democratic constitution weaken a majority directly accountable before the demos — the majority in Parliament — to empower a majority of unelected and unaccountable judges? Why should democracy give way to juristocracy?

The answer is that democracy is not merely a form of government — the government of the many — but an ideal of Government, captured in Lincoln’s famous phrase: ‘government of the people, by the people, for the people’. There is a natural congruence between democratic ideal and form, since the government of the many is grounded in popular voting, which in a genuine democracy takes the form of universal suffrage. The fact that each citizen is empowered to cast one but only one vote, embodies the recognition of all citizens as political equals.

Yet such congruence between ideal and form is not always true. There are areas in public life in which a democratic power can degenerate into a tyranny of the many disregardful or even devoted to harm a minority. The history of democratic practice is a book with dark pages of, among other evils, racial segregation, religious persecution, moralist condemnation of peaceful choices, or ideological hysteria against certain groups. It is in these matters, in which there are good reasons supported by historical and sociological evidence to believe that the motivation behind voting is polluted by anti-democratic feelings of disrespect for the other, that the extensive interference with political decisions by an unaccountable judiciary — the judiciary — is justifiable. It because courts are infallible or judges better able than ordinary citizens or their representatives to determine what is fair, equal, proportional or sensible. It is the contrary, the persistence of judicial disagreement, which judges typically work hard to settle or mediate in order to preserve an aura of neutrality, furnishes all the evidence we need that judges are no different from the rest of us whom democracy regards as equals. Judges are indeed not called upon to interfere on account of their enlightenment but because they provide greater assurances of insulation from toxic material such as racism, bigotry, mysogenism, xenophobia, and fundamentalism.
one of this means that the constitution should be handed to the legislature on a silver platter, that the Court should flout its duty to enforce the fundamental law. It is worth recalling that a constitutional text contains both narrow provisions, so-called rules, and abstract principles the implications of which are contested. If the text provides that the death penalty is proscribed, it is evidently the duty of the judiciary to enforce it. But principles, which are open to rival interpretations, raise the question of how far a court may legitimately go in substituting its own views for those of democratically accountable actors. The argument is that in matters of principle a Constitutional Court should exercise self-restraint, striking down only those laws that are patently arbitrary or ill-conceived, unless the decision impacts the interests or choices of those groups that are the victims of the wrath or conceit of popular majorities. That is what the United States Supreme Court does when it distinguishes a general ‘rational basis’ test that every law must pass and a test of ‘strict scrutiny’ only applicable in particularly sensitive areas of public choice.

Is there any reason to subject pay cuts in the public sector to a test of ‘strict scrutiny’, which is what the Portuguese Constitutional Court did in 2012 and 2013 when it struck down the policy on account of being ‘excessive’? The answer must be unequivocally negative. Reducing the pay of civil servants could not be farther away from the area of political decision-making within which a democracy can easily degenerate into a tyranny of the majority. The measures in question are extremely controversial and unpopular, and have occasioned social anger and organized protest against the Government regularly displayed in the media. This is an area in which the political process — the normal way of forming collective decisions in a democracy — functions very well. If there is a danger in a democracy, it is the exact opposite: that populism will lead those in power to engross the ranks of the civil service in order to form an electoral clientele. The Court did a disservice to democracy when it took on an activist role against the austerity policies sponsored by the Government.

Insularity

I now turn to the last and perhaps most serious flaw in the Court’s case law on austerity: insularity. The Court has missed the regional or European context of the crisis and the fact that the political choices of the Government are not made in an ethereal realm of national sovereignty but within a strategic setting shared with other national players and regional actors such as the European Central Bank and the European Commission.

The crisis in Portugal is an aspect of a broader European crisis and its eventual overcoming is inextricably tied to the issue of the fate of Europe. The crisis opened a fissure within the eurozone between debtor and lender countries that has evolved into a friction between Southern and Northern Europe. The basic terms of this equation are fairly simple. Countries in the former area complain that the single currency does double harm to its economies: it derailed them from the paths of convergence and competitiveness and it deprives them of a proven method of remedying debt crises — currency devaluation. The later complain about how the fiscal profligacy of debtor countries placed them between the devil of serving as bondsmen of the latter’s sovereign debts and the deep blue sea of indifference towards the fate of the eurozone. The mediation of this tension, so serious that it jeopardizes the single currency and casts a dark cloud over the EU, requires concessions on both sides, including a more flexible monetary policy and greater fiscal discipline.

Constitutional courts have a role to play in this regional conundrum. The German Constitutional Court will soon decide whether the MT program of the ECB, which enables the Bank to buy sovereign debt in the secondary market, is consistent with the German Grundgesetz. The legal issue is as lackluster as it is intricate. At stake is whether the ECB is acting ultra vires or within the terms of its mandate. That is essentially a question of EU Law, although it does have domestic constitutional implications. The reasoning is that by increasing the liabilities of the Bank’s shareholders in proportion to their capital keys, the MT program indirectly burdens German taxpayers. If the program is outside of the mandate of the ECB, therefore, it may be understood to imply an unconscionable loss of fiscal sovereignty by the German people. The ECB itself is beyond the jurisdiction of the German Constitutional Court, but the latter retains various remedial options within its reach in the event that it finds the program unlawful, such as instructing the Bundesbank to stay out of it, compel the Government to sue the ECB in the European Court of Justice, or — in the most dramatic of scenarios — order Germany to leave the eurozone. Any such outcome would at the very least undermine the stability of the monetary union and could possibly seed the sows of its irreversible downfall.

That can only be avoided if the German judges liberate themselves from the enticements of literalism and insularity. Believers in the European project hope that they exhibit the broadmindedness to read the EU Treaties within context and to assess the mandate of the ECB in connection with its function as a currency stabilizer. They hope as well that the German judges are cosmopolitan enough to resist any subliminal völkisch temptation,[10] interpreting the Basic Law in light of Germany’s membership in what Rümen's abernas calls the ‘postnational constellation’.[11] But those hopes disguise hypocrisy and shortsightedness if they are not conjoined with a symmetric plea that constitutional judges in Portugal and other countries in Southern Europe read domestic constitutions with a liberal measure of cosmopolitan insight, allowing national Governments the margin to play their part in the complex and fragile concert of efforts required to rescue the promise of freedom and prosperity in Europe from the path of obliteration.

A pinch in time

Everyone’s eyes will be set on the Court in the near future as it passes judgment on two controversial laws of significant financial import. One, already lying on the judges’ desks, is the so-called ‘convergence bill’ that levels the social security benefits enjoyed by civil servants and private sector employees, subjecting the former to the less favorable regime applicable to the latter, a change that implies a 10% reduction of their pensions. The other is the Budget Law of 2014, which continues the policy of pay cuts in the public sector, with a magnitude bellow 2013 but significantly above the 2011 threshold. The positive side of the unpredictability generated by the Court’s case law is that it contains enough loopholes to enable a jurisprudential shift away from the current activist stance, although that is, according to most observers, unlikely to happen.

What is at stake is quite a bit more than the ability of the Government to honor the international commitments of Portugal and to avoid the appalling scenario of a second bailout. At stake is also the very future of the rule of law as practiced in the country, if the pressure exerted by foreign lenders on the domestic political mainstream to undermine the Court’s independence, either by reducing its constitutional powers or by corrupting the nomination process, proves insurmountable. It is one thing to be critical of judicial activism on issues of public finance or to commend the virtue of self-restraint in constitutional adjudication, and quite another to suggest the restriction of the Court’s jurisdiction to assess the validity of certain laws or to encourage the vile practice of packing it with opportunists, cynics or simpletons. There is a remote but worrying danger that the recent case law triggers a process of constitutional mutilation, somewhat similar to the sad spectacle that we
witnessed in Hungary but with the alarming difference that external actors will sponsor instead of rushing to thwart the domestic assault on the rule of law.

Students of constitutional history will experience these remarks with a feeling of déjà vu. They recall President Roosevelt's plan to enlarge the size of the Supreme Court from 10 to 15 justices in order to circumvent the majority's opposition to the new Deal. Shortly after Roosevelt's announcement of the legislative initiative, the Court upheld a Washington state minimum wage law in *West Coast Hotel Co. v. Parrish*. Justice Stephen Field, who had often sided with the conservative wing of the Court to strike down social legislation, shifted his allegiance to the progressive camp, effectively putting an end to four shameful decades of radically conservative judicial activism at the Supreme Court. Roberts unexpected change of heart is known as 'the switch in time that saved nine', although it is doubtful that it had anything to do with the President's court-packing plan. Issues of causation aside, the jurisprudential shift was an important factor protecting the Court from a campaign for its destruction and in the end it strengthened the legitimacy and credibility of the institution of judicial review of legislation. Let us hope that the judges of the Portuguese Constitutional Court are learned in constitutional history and perceive this famous episode as a cautionary tale.

**ootnotes**

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[1] I will use the term 'Government' to refer to a personification of the coordinated political agency of the legislative and executive branches. Although formally speaking the executive — the 'Government' in the narrowest sense of the term — answers before the legislature and it is the later that enacts the Budget Laws referred to it in this paper, the political choices adopted by the majority in Parliament are largely masterminded in the Council of Ministers, presided by the Prime Minister.


