# "CRISIS, SHE SAID": THE PORTUGUESE CONSTITUTIONAL COURT'S JURISPRUDENCE OF CRISIS — A PANORAMIC VIEW

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**Absctract**: this article aims to provide a global view of the so-called "jurisprudence of crisis" of the Portuguese Constitutional Court, beginning by a brief presentation of the background of the crisis, then moving on to an appraisal of the main traits of the jurisprudence as a whole and finally analyzing the decisions individually.

**Keywords**: crisis; equality; protection of confidence; proportionality; unconstitutionality; principles.

## 1. BACKGROUND[1],[2]

The 2007 worldwide economic crisis, that began with the so-called "sub--prime" crisis in the United States of America, hit Portugal particularly hard. Public finances were, even before the onset of the recession, under considerable pressure[3]. Naturally, the global economic recession only added to these

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1 The following article corresponds, with some increase of depth, to the communication presented by the author at the "International Conference: Constitutional Courts: between the political and the juridical", which took place at the Portuguese Catholic University in Porto, on the 30th June 2017. Given that the purpose of the presentation was to provide an informative overview of the Portuguese Constitutional Court's crisis jurisprudence for the debate that followed, this is hardly an innovative piece, rather a "matter of fact" piece. However given the importance and significance of the issue, and the fact that very little has been published about it in English language, we believe that publication of the article was warranted, if only to make the issue accessible to a wider audience.

2 The author appreciates any comments and suggestions readers might have to the following email: psgpcoutinho@gmail.com.

3 For example, the annual deficit value for the years 2004, 2005 and 2006 was, respectively, 6,2%, 6,2% and 4,3% of the GDP. National debt for those same years measured at 62%, 67,4% and 69,2% of the GDP. (Statistic available at https://www.pordata.pt/Portugal/Administra%C3%A7%C3%B5es+P%C3%BAblicas+despesas++receitas+e+d%C3%A9fice+excedente+em+percentagem+do+PIB-2788-237187 and https://www.pordata.pt/Portugal/Administra%C3%A7%C3%B5es+P%C3%BAblicas+d%C3%ADvida+bruta+em+percentagem+do+PIB-2786).

troubles. It would, all in all, be fair to say that Portugal had a conjunctural economic crisis on top of a structural one, and the two combined to devastating effect.

With consecutive deficits, the highest one of them, in 2010, of 11,2% of the GDP and with public debt rising up to 96,2% of the GDP in that same year[4], things were looking grim. In 2011, Portugal was in a state of pre-bankruptcy, notwithstanding the fact that some austerity measures had already been put in place, which mainly took the form of tax increases.

Faced with the prospect of being unable to pay civil servants' salaries and given the chaotic state of its finances, the Portuguese government formally requested assistance from the International Monetary Fund (IMF) and from the European institutions.

Following negotiations, these culminated in the signing of two Memoranda of Understanding (MoU), one with the IMF and another with the European Commission and European Central Bank. The three institutions became collectively known as the *Troika*. The MoU were signed by the two major Portuguese political parties, PS (socialist party — then in power), PSD (social-democrats), as well as by CDS-PP ("conservative party").

The agreements established the amount of money that would be lent by those institutions to the Portuguese State and set times when this would be done, which depended on the fulfilment of the various targets set. Naturally this financial assistance came at a price, which was far more that the mere interest to be paid for the loans. The MoU established a series of targets to be achieved and measures to be taken, which ranged from the more abstract — such as keeping the deficit values under control —, to the more detailed and specific — such as amending certain provisions of the Public Contracts Code (point 7.22 and onwards of MoU) and the Labour Code (point 4.4). Many in Portugal considered the targets to be excessive, even draconian. Others, despite recognizing the harsh conditions imposed, took an "always look on the bright side of the life" approach: this was a chance to introduce "structural reforms" — an expression that has since then entered into our political jargon, in spite of being so vague that no one actually knows what it means.

Notwithstanding the fact that the MoU imposed some very concrete measures to be taken, it mostly set targets to be achieved, leaving the matter of how to achieve them in the hands of the national institutions. In other words, the MoU imposed obligations of result, as opposed to obligations of means[5].

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These figures serve merely to illustrate how the State's finances were in bad condition, and had been so for many years (it is no coincidence that a popular saying states that Portugal has been in a crisis since 1143 — our independence year).

4 See above-mentioned links.

5 This idea that the MoU set targets rather than measures and ends rather than means was assumed by Constitutional Court (TC) itself. It is, however, highly questionable and questioned by some, largely on the basis that concrete obligations stem from European Union Law. The issue, though, is very complex and its implications so deep that it is not possible to address it in a panoramic view such as this one. For a detailed analysis of, amongst others, the

So, both the Government and Parliament set about introducing a series of austerity measures, some even before the signing of the memoranda, designed to better the country's finances and comply with the requirements of the *Troika*. Some of these austerity measures were challenged before the Constitutional Court, with the ensuing decisions becoming collectively known as the "jurisprudence of crisis"[6].

## 2. THE JURISPRUDENCE GLOBALLY CONSIDERED

Before we enter into the analysis of specific rulings by the Constitutional Court, it is worthwhile to have a look at the jurisprudence of crisis as whole, firstly in order to perceive how the Court's approach or tolerance evolved; and secondly as there are some marked traits that are present in most, if not all, of the decisions.

### *a. The different phases of the jurisprudence*

Even a superficial analysis of the jurisprudence referred allows us to draw the conclusion that the flexibility and tolerance of the Constitutional Court towards the legislator's actions was not the same throughout the considered time frame. So, it is possible to establish different "phases" of the jurisprudence.

The first phase would be the tolerant phase. In it, the Court accepted the legislator's arguments (some would say that it succumbed to them, sometimes too easily[7]) that the on-going financial and economic crisis justified exceptional

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question of measures *versus* goals, *vide* Miguel Poiares Maduro, António Frada and Leonardo Pierdominici, *A crisis between crises: placing the Portuguese Constitutional jurisprudence of crisis in context*, Revista Eletrónica de Direito Público, Vol. 4, Num. 1, 2017. For example: "The rules of the European semester and financial and economic governance of the Euro do not simply establish some deficit or debt objectives. Indeed, the Union law also imposes obligations as to how, specifically, these deficit targets should be guaranteed by the States in the "preventive" and, particularly, in the excessive deficit procedure (the "corrective" arm of the SGP)." pg. 24 and "Council Recommendations adopted in the context of the SGP Regulations, and namely those addressed to member States under the EDP, are EU legal acts which are not deprived of legal effects for the Member States to whom they are addressed. To the contrary, they are sui generis recommendations, with a binding force derived from the Treaty and EU regulations' provisions which (under the threat of sanctions) mandate Member States to comply with those Recommendations and put them in practice." pgs. 28 and 29, *inter alia*.

6 The specific decisions which we will look at (Rulings 399/2010, 396/2011, 353/2012, 187/2013, 474/2013 and 862/2013) are all considered to be an integrant part of said jurisprudence, but not the whole of it. Other decisions were taken by the Court regarding austerity measures. These, however, became the more paradigmatic decisions.

7 *Vide* Maria Benedita Urbano, *A jurisprudência da crise no divã. Diagnóstico: bipolaridade?*, in Gonçalo de Almeida Ribeiro and Luís Pereira Coutinho (coord.), *O Tribunal Constitucional e a Crise*, Coimbra, Almedina, 2014: "(...) it is possible to conclude that, sometimes, it [the Court] surrendered too quickly to the legislator's arguments, opting for a decision in which it did not

measures that would otherwise be considered inadmissible, including greater tax increases, pensions and salary cuts and so on. For example, in Ruling 399/2010 the Court stated that the laws at stake "aimed to respond to the financial conjuncture, addressing the urgency of deficit and cost of accumulated public debt reduction, through the obtaining of greater tax revenue", as well as stating that "given the international economical-financial conjuncture, including the situation of international markets, the evaluation of the Portuguese financial situation by international entities, namely by the IMF and the OECD, as well as the measures taken in European Union member-states in identical situations, as was the case in Greece and Spain, it would not be reasonable to think that Portugal would remain immune to this tendency [that of tax increase]." Likewise, in Ruling 396/2011, the Court affirmed that "[i]t cannot be ignored, however, that we are manifestly crossing a conjuncture of absolute exceptionality, from the point of view of financial management of public resources. The budgetary imbalance has generated a strong pressure on Portuguese sovereign debt, with a progressive scaling of interest, placing the Portuguese State and the national economy in serious financing difficulties".

In the second phase, the semi-tolerant phase, the Court still showed some leniency towards the legislator's measures, reaffirming that the exceptional situation called for exceptional measures. The Court began, however, showing a yellow card to the legislator by stating that this circumstance did not provide it with a blank cheque that allowed for all kinds of measures on behalf of the MoU and necessary budgetary constraints. This was particularly evident in Ruling 353/2012 where the Court began talking about the cumulative effect of the successive austerity measures[8], determined that the measures *sub judice* were in breach of the principle of equality and accordingly deemed them unconstitutional, but, being sensitive to the crisis situation and budgetary targets, determined that the ruling would only become effective at the beginning of the following year.

In the last phase, however, it seemed the patience of the TC for austerity measures had run out, as it considered a great number of proposed measures to be in violation of the Constitution.

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expand to its maximum, as usual, the range of the constitutional norms in favour of a more *rights friendly reading* (...)". Pg. 17.

8 For example: "This compression is cumulated with previous reductions already imposed during the previous year" and "These measures will have a duration of three years (2012 to 2014), which will determine the production of cumulative and continued effects of the sacrifices over this period, on top of the freezing of public sector salaries and pensions, during the years 2010, 2011 and 2012, the maintenance of which was foreseen in the memoranda that make up the EFAP for the following years, which, conjugated with the inflation phenomena, results in a real reduction of these salaries and pensions equivalent to the inflation rate existent in all those years."

### *b. The consideration of the economical and financial crisis*

As we have seen, the background scenario of the jurisprudence, including the fact that Portugal was under an economical and financial assistance program and legally bound to certain specific measures as well as general targets is crucial to understand the jurisprudence itself. The Court, naturally, took into consideration this background in its rulings.

In spite of the fact that the Portuguese Constitution does not contain legal grounds for an economical and financial state of emergency, the exceptional circumstances of economic recession, deficit and huge public debt, as well as the State's international commitments, could not simply be ignored.

So the Court took the following approach: "[t]he consideration of the crisis is inserted in the usual judgement of ponderation, typical of the resolution of constitutional norms (…)"[9]. This meant, at least in theory, that, when reviewing whether a certain measure was necessary, adequate and proportionate, the Court always had in mind the context and the "big picture".

The Court then used the context of crisis to in several, albeit divergent, ways.

Firstly, it used it to ponder people's legitimate expectations (and the protection warranted to it) *versus* the necessity of salary cuts (for civil servants) and tax increases derived from the economic context as a whole as well as from the obligations assumed by the Portuguese State to reduce its deficit.

Secondly, the Court affirmed that the context of crisis, particularly the urgent need to cut expenditure, justified a differentiated treatment of those employed by the State, which allowed for cuts in their salaries, provided that they had a "transitional and transitory character"[10]. The Court recalled, *inter alia*, that civil servants were particularly bound to the prosecution of public interest.

Thirdly, and now in a divergent way, the Court also took into consideration the crisis, in order to affirm that it did not put the Constitution on hold, and that the sole invocation of the crisis was not susceptible of allowing a free restriction of fundamental rights and principles.

### *c. The principle-based approach*

When looking at the Court's decisions, it is possible to affirm that they were taken through the use of principles rather than rules[11]. More specifically,

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9 Maria Benedita Urbano, *op. cit.*, pg. 15.

10 Ana Maria Guerra Martins, *Constitutional Judge, Social Rights and Public Debt Crisis - The Portuguese Constitutional Case Law*, Maastricht Journal of European and Comparative Law, Volume 22, Num. 5, 2015, pg. 688. The idea that, in coherence with the fact that they were only acceptable because of the exceptional circumstances, the measures had to be of said transitional and transitory character was a transversal point of the whole case law of the crisis.

11 Gonçalo de Almeida Ribeiro, *O Constitucionalismo dos Princípios*, in Gonçalo de Almeida Ribeiro and Luís Pereira Coutinho (coord.), *op. cit.*, pg. 81.

it is fair to say that most of the examined measures that were deemed to be unconstitutional succumbed to a sort "Bermuda triangle" formed by the principles of equality, proportionality and protection of confidence or principles derived from them (such as the principle of proportionate equality).

Most of the structural principles of any constitution are almost unanimous: hardly anyone would disagree with the principle of equality, with the principle of proportionality, with the principle of protection of confidence, and so on. The problem, however, is determining precisely just what is the reach of any given principle. Due to their open and flexible nature, principles are, with the exception of situations deemed almost unanimously to be in manifest defiance of them, subject to (sometimes radically) different interpretations[12]. Because this is the case, constitutional judges should be particularly careful when adopting principle-based decision. Gonçalo de Almeida Ribeiro, an academic highly critical of the TC's crisis jurisprudence, points out that in such circumstances, judges should have 5 cardinal virtues: 1) reasonableness of adopted solutions; 2) predictability of the decisions; 3) functional adequacy of judgements; 4) legitimacy of counter-majority intervention and 5) cosmopolitan openness to legal pluralism. He then goes on to point out that the Court exhibited the exact five opposite faults: 1) unreasonableness; 2) unpredictability; 3) inadequacy; 4) illegitimacy and 5) insularity[13]. In short, he affirmed than in the cases under analysis, principles should not have been used or had been used in a wrong way.

This critical view of the principle-based approach was not shared by everyone. Ana Maria Guerra Martins (at the time of the jurisprudence, a judge of the Constitutional Court) wrote, in direct reply, "[i]t is necessary to interpret both the rules and the principles. One can obviously disagree with that interpretation, but that cannot mean that unconstitutionality should not be based on principles.", as well as "one may question the point of departure of the Constitutional Court (...) but we can hardly understand the exclusion of the principles of equality, proportionality and legal certainty as the appropriate constitutional parameters to invalidate a norm restricting fundamental rights"[14]. Another counter-critic was Jorge Reis Novais who, literally, came in defence of the Court, affirming that it has done exactly what it should: "The constitutional judge only has to verify if the law violated norms, rules or constitutional principles. A law may be good or bad (in a political sense), may be politically criticisable or worthy of applause, but none of that matters to the constitutionality judgment"[15].

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12 *Vide* Jorge Reis Novais, *Em defesa do Tribunal Constitucional*, Coimbra, Almedina, 2014, pg. 83.

13 Gonçalo de Almeida Ribeiro*, op. cit.*, pgs. 82 and onward.

14 Ana Maria Guerra Martins, *op. cit.*, pgs. 697 and 698.

15 Jorge Reis Novais, *op. cit.*, pg 93. The idea of that the TC acted as it should, is defended *passim*, for example: "When the question is so placed [was the constitutional court meddling in politics], the answer can only be: yes, it is meddling in politics and is doing so rightly. To be even clearer, the Constitutional Court's function when it inspects the constitutionality of

### d. Criticism from within: dissenting opinions of the Court's judges

The Court's Jurisprudence in this instance triggered a far-reaching debate that was not confined to the realms of legal scholarship and political discussion, but that affected the whole of society. It would be unfair to say, however, that this debate took place solely outside the Court, with many decisions being controversial even with the Court, as is evidenced by the number, and sometimes diversity of the dissenting opinions:

- Maria Lúcia Amaral; José Borges Soeiro; Carlos Pamplona de Oliveira; João Cura Mariano; Rui Moura Ramos (Ruling 399/2010)
- Carlos Pamplona de Oliveira; J. Cunha Barbosa; João Cura Mariano (Ruling 396/2011)
- Catarina Sarmento e Castro; Carlos Pamplona de Oliveira; J. Cunha Barbosa; Vítor Gomes; Maria Lúcia Amaral; Rui Moura Ramos (Ruling 353/2012)
- 10 judges (187/2013)
- Maria Lúcia Amaral; José da Cunha Barbosa (Ruling 474/2013)
- Maria de Fátima Mata-Mouros; Maria José Rangel de Mesquita (Ruling 862/2013)

Although this is not the place to go into detail about the dissenting opinions, it must be said that there was divergence amongst the divergent. The dissenting opinions were, many times, regarding specific points of the ruling and not necessarily the ruling as a whole[16]. Were it not so, Ruling 187/2013, for example, would have failed, as it had 10 dissenting opinions. What happened, however, was that these dissenting opinions were regarding different points of the decision and therefore, a majority of the judges were in favour of each "sub-point" of the decision. The large number of dissenting opinions serves here to show just how unclear many matters were, which, we believe, relates to the openness of principles and the subjectiveness of their interpretation.

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laws forces it to meddle in politics, for the very simple reason that, in a Rule of Law democratic state, law is politics, law is the expression, by nature, of the options and political programs of Government and Parliament, that is, of the democratic legislator. Therefore, there is no inspection of the constitutionality of laws that doesn't force the Constitutional Court to meddle in politics." (pg. 82); "(...) constitutional norms, all of them, without exception, prevail over the law, are resistant to the legislator, if the law attacks them, they resist." (pg. 145); and "[the critics of the Constitutional Court] systematically conclude that the ponderation was adequate whenever the Court did not declare the unconstitutionality of the austerity measures, but that it had failed the spirit of re-reading the constitution whenever the ponderation's result was that of unconstitutionality." (pg. 168), amongst many others.

16 As we will se further ahead, many of these rulings, particularly the ones regarding the control of the State Budget laws, addressed a large number of issues.

## 3. SOME SPECIFIC RULINGS

### *a. Ruling 399/2010*

In this first Ruling, dated from before the signing of the MoU, the issues at stake were two: a generalized increased of the tax rates of the personal income tax (IRS) and the creation of a new tier of the same tax, for tax-payers with higher incomes. These measures were challenged on the grounds of the constitutional prohibition of retroactive effect of tax laws (article 103/3 of the CRP/76).

The Court reiterated its past jurisprudence, and stated that the only form of retroactive effect prohibited by the Constitution was the so-called proper retroactivity and not the improper retroactivity[17], which the Court believed was at stake.

The dissenting opinions in this case included: 1) those of judges that believed that improper retroactivity was also prohibited by the Constitution; and 2) those of judges that believed that while improper retroactivity was not wholly forbidden, that would have to be evaluated in each specific case, by resorting to a ponderation with other constitutional values, namely those of protection of confidence and proportionality.

### *b. Ruling 396/2011*

In Ruling 396/2011, the Court had to analyse a proposed salary reduction to the generality of civil servants. The pay cuts were in violation, according to the group of Members of Parliament (MP's) that challenged their constitutionality, of constitutional and legal norms and principles: 1) they violated the principle of protection of confidence; 2) they violated the principle of equality; 3) they violated the fundamental right to the non-reduction of salary; and 4) labourer-representing entities were not consulted, and there was an obligation to do so[18].

What the Court said, in a nutshell, was, firstly, that there was no fundamental right to the non-reduction of salary, but merely a guarantee against the "arbitrary reduction of the quantitative of retribution, without adequate normative support". Under the specific background of the economical and financial

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17 The difference between the two concepts can briefly be explained as follows: proper retroactivity refers to situations where a new law intends to be applicable to facts that have already occurred and that have already produced their legal effects (e.g. my income for a particular year has already been determined, and the tax owed on account of that income as well); Improper retroactivity, on the other hand, refers to situations where a new law intends to be applicable to facts that have already occurred but that have not yet produced their legal effects (e.g. my income for a particular year has already been determined, but the tax due on account of that income has not).

18 This last issue will not be addressed here.

crisis, this reduction could hardly be said to be arbitrary. Importantly, the Court also said, *obiter dicta*, that taxes were more equality-friendly than expenditure cuts of this nature.

### *c. Ruling 353/2012*

In this ruling, the Court had to examine the suspension, for the duration of the on-going Economical and Financial Assistance Program, of payment of holiday and Christmas subsidies, a measure included in the SBL for 2012, to civil servants and pensioners of the CGA (Caixa Geral de Aposentações — pension system for civil servants). The measure was challenged by MP's, alleging a violation of the principles of protection of confidence, equality and proportionality.

The Court did indeed consider that the measure was unconstitutional, due to a violation of the principle of equality (is its derivative sub-principle of "proportionate equality"), by over-burdening civil servants. The Court took specifically into account the cumulative effect of the previous austerity measures shouldered by civil servants.

Crucially, however, the Court used, for the first time in its history, the prerogative granted to it by article 282/4 of the Portuguese Constitution, which allows the Court, in situations of exceptional public interest, to defer the production of effects of the declaration of unconstitutionality, in this case only beginning on January 1st 2013. Taking into account the fact that almost half of the year 2012 had elapsed, the TC considered that an unconstitutionality decision with its full retroactive effects would be disastrous for the (mandatory) deficit and budget targets, especially as there was little time to consider and introduce alternative measures. Unconstitutional, but...

In this particular case, the dissenting opinions were of two kinds. Some of the dissenting judges believed that, under the exceptional circumstances, the differentiated treatment between civil servants and the remaining citizens, although harsh, still fell within the boundaries of the acceptable. Other dissenting judges were in disagreement with the determining of effects of the unconstitutionality decision, believing it should, as usual, determine the non-production of effects *ab initio*.

### *d. Ruling 187/2013*

Ruling 187/2013 addressed a large number of issues, all concerning measures introduced in the SBL for 2013, and challenged by the President, MP's and the Ombudsman. The issues at stake were the following: 1) suspension of holiday subsidy for active civil servants; 2) suspension of 90% of holiday subsidy for pensioners; 3) Extraordinary Solidarity Contribution (an extra percentage to be paid by pensioners, based on the value of the pension);

4) a percentage to be paid of the values received as unemployment and sickness subsidies; 5) maintenance of civil service pay cuts; 6) reduction of the number of personal income tax tiers and tax allowances, as well as the introduction of an Additional Solidarity Tax Rate.

The Court analysed these measures by using the "usual suspects", the principles of equality, proportionality and protection of confidence. Regarding measure number 1), the TC considered the suspension of holiday subsidy for civil servants to be a violation of the principle of equality, considering that they were already burdened by the salary reduction for the third year, and that the argument that cutting expenditure through civil servant's wages was the most efficient way was losing effectiveness, as we entered the third year of those measures. The legislator had, it affirmed, an obligation to find alternative measures, as these sort of measures were only admissible because they were transitory: "When a reduction of public sector salaries, under the pretext of the exceptionality of the economic situation, should be accompanied by alternative solutions of public debt reduction, it is today no justification for the suppression of one of the subsidies that integrate civil servants' retribution, parallel to the reduction of monthly salary, that that still be the only measure that presents sure and immediate effects on the reduction of the deficit and the only option — as it is stated in the Report of the SB for 2013 — to guarantee the prosecution of the established goal."

Likewise, the suspension of holiday subsidy for pensioners was considered to be violating the principle of equality (by not taking into account the real economic capacity), as well as the principle of protection of confidence and prohibition of excess.

As far as the Extraordinary Solidarity Contribution was concerned, the Court considered that it was an "atypical figure" (that is, susceptible of being configured as integrating either a reduction of expenditure or an increase of income) and therefore decided that the principles governing personal income tax were not applicable. So, the Contribution was judged as admissible.

Regarding the measure set out in 4), the Court affirmed its unconstitutionality, as it did not respect the principle of proportionality, particularly by not safeguarding the minimum for a dignified existence.

Lastly, regarding the measures mentioned in 5) and 6), they were deemed to be in conformity with the Constitution, in the case of the former due to the exceptional economic situation and in the case of the latter because it was considered to be a decision taken by the Legislator with the boundaries of its discretionary powers.

Given the large number of issues at stake, it is natural that this Ruling was particularly controversial. As we have seen above, 10 judges issued dissenting opinions (or, in one case, a voting declaration). Of these, some believed, for example, that the ESC should be considered unconstitutional by violation of the principles applicable to personal income tax. Others, adhering to some of the previous points, also stated that the elimination of tax allowances was in violation of the principle of contributive capacity.

### *e. Ruling 474/2013*

Ruling 474/2013 concerned two issues. The first one was the objective widening of the grounds on which civil servants could be dismissed. The second one was the removal of a norm that safeguarded from dismissal rules, civil servants that, prior to the 2008 reform, had a legal relation with the administration based on a nomination rather than a contract.

With regards to the first measure, the Court considered that such an objective widening of the grounds for dismissal was contrary to the constitutional guarantee against arbitrary dismissal, as well as a violation of the principle of proportionality.

The second measure too was considered to be unconstitutional, as the removal of the safeguard was deemed by the Court to be a violation of the principle of protection of confidence.

### *f. Ruling 862/2013*

In Ruling 862/2013, the Court addressed the issue of the so-called Pension Convergence (the unification of the CGA — the pension system for civil servants, with a more beneficial regime — with the general pensions system).

The questioned measures established that CGA pensions granted prior to the entry into force of this new law would, simultaneously, be recalculated and suffer a 10% cut.

The Court was thus faced with two questions: 1) were the principles that governed the creation of taxes applicable, and if so, had they been breached? (in a situation not unlike that of the ESC); 2) were the measures in question violating the principles of protection of confidence and proportionality?

As it had done in the case of the ESC, the Court stated that this was an ambivalent measure and that as such, the specific principles governing the creation of taxes were no applicable. Apart from this, the TC recognized that the need for pension convergence resulted directly from the Constitution and that the Legislator had been moving gradually towards it. Notwithstanding, it was considered that all steps taken towards the convergence had always been respectful of acquired rights and legitimate expectations, a criterion that this measure failed to fulfil, therefore violating the principle of protection of confidence. Additionally, the Court considered that this measure did not consubstantiate a real convergence of pensions, and was merely aimed at cutting expenditure.

## 4. CONCLUSIONS

It would be unfair to conclude without saying that the Court did its best under extremely difficult circumstances, pressured on one side by political entities to allow measures regarded as essential for the fulfilment of financial

targets and pressured on the other side by its duty to uphold the Constitution as well as by the people who saw there rights diminished and restricted. The Court had to navigate the highly turbulent waters of ensuring Constitutionally protected rights were maintained while at the same time not being alienated and autistic from the exceptional situation and international commitments.

The highly political nature of many of the issues also led, at the time, to accusations made against judges of voting decisions aligned with the political parties that had indicated them to the Court[19]. This accusation was categorically refuted in a study conducted by a reputable Portuguese newspaper.

It should also be said that, as a result of the principle-based approach described above, it is it is natural that decisions are subject to criticism and different interpretations. In general, it is difficult to say, whether agreeing or disagreeing, that a decision should clearly have been this way or another. Notwithstanding, and precisely because of the adoption of this principle-based approach, as well the on-going situation of financial emergency, the Court should perhaps have restrained its control, and restricted it to situations that were manifestly in breach of said principles.

Also worthy of note is the diverging movement that was observed: as we have seen above, the Court's tolerance, while initially generous, diminished substantially as time went by. At the same time, the need for budget control was increasing to the progressively more challenging targets set by the MoU. Perhaps the Court should have been tolerant for a wider period of time, particularly in what concerned the temporary nature of some measures — an aspect that was, it should be recalled, crucial to the Court in not considering some measures unconstitutional. Can it really be said, as the Court did, that measures being implemented over a 4 or 5 year period are not temporary, given the scale of the debt, the required reform of the State, and the fact that Portugal was more-or-less already in a crisis even before the world-wide economical a financial crisis?

Lastly, it must be said that the Court did not always resist the temptation of guiding the Legislator, either by affirming (Ruling 396/2011) that the increase of taxes was a more equality friendly measure and pondering whether there were alternative measures (when perhaps it should have limited itself to the stating whether those concrete measures were in breach of the Constitution) or, more explicitly, proclaiming that the fight against "macroeconomic factors related to the economic recession and increase of unemployment" would have to be solved through "measures of economical and financial policy of a general nature, and not by a greater burdening of the workers who, in terms of employment, don't bear, or don't bear in equal terms, the recessive effect of the economic juncture" (Ruling 187/2013).

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19 In Portugal, the majority of the judges of the TC are elected by parliament. The need for a 2/3 majority and the election by means of a list has meant, in practice, that the two major parties reach a consensus where they equitably distribute the 10 seats between them, proportionally to their representation.