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A COMMENT ON MIGUEL POIARES MADURO’S “CRISIS BETWEEN CRISES”: THE PORTUGUESE CONSTITUTIONAL COURT’S JURISPRUDENCE OF CRISIS BETWEEN AUTARCHY AND SOVEREIGNTY

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Abstract: According to Miguel Maduro both creditor and debtor countries’ constitutional courts adopt an “autarchic” approach to legal argument that allows them to disregard the demands of EU law and endangers European integration. From the perspective of game theory one can say that in the strategic interaction between the different national courts each one is encouraged to adopt an “autarchic” approach to legal argument to the extent that it lacks any certainty that other courts will opt into a more dialogical attitude. The reason for this approach is possibly that the national constitutional courts do not acknowledge the presence of any institution at the Union level whose power is democratically legitimated and who is willing to adopt a distinctive political answer to the economic and financial crisis. Seen in this light national constitutional courts do not choose an “autarchic” approach to legal argument. Instead, they seem to be adopting a political sovereignty upholding jurisprudence. The problem they are confronted with it’s not so much the lack of dialogue between internal constitutional values and EU law principles, as the lack of a democratic response (as opposed to a merely technocratic one) to crisis at the European level to engage with.

Summary: 1. The case against an “autarchic” jurisprudence; 2. The case in favor of a sovereignty upholding jurisprudence; 3. Between “autarchy” and “sovereignty”.

Keywords: EU Law, Stability and Growth Pact, European economic governance system, Portuguese Constitutional Court, European Court of Justice, Jurisprudence of Crisis, legal pluralism, sovereignty.

Resumo: Segundo Miguel Maduro, os tribunais constitucionais dos países credores adotam, tal como os dos devedores, uma abordagem “autárquica” da argumentação jurídica que lhes permite desconsiderar as exigências do direito

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2. I thank J. P. Cardoso da Costa for his comments on a first draft of this text.

da União e coloca em perigo a integração Europeia. Na perspetiva da teoria dos jogos pode dizer-se que na interação estratégica entre os diferentes tribunais constitucionais nacionais cada um deles é encorajado a adotar uma abordagem “autárquica” da argumentação jurídica, porque carece de qualquer garantia que os restantes tribunais nacionais venham a adotar uma abordagem mais dialógica. A razão desta abordagem consiste muito possivelmente em os tribunais em causa não reconhecerem a presença de qualquer instituição no plano Europeu cujo poder seja democraticamente legitimado e se mostre disponível para adotar uma resposta especificamente política à crise económica e financeira. A esta luz os tribunais nacionais não optaram por uma abordagem “autárquica”, mas por uma abordagem que visa salvaguardar a soberania política da sua ordem jurídica. O problema com que se veem confrontados não consiste tanto na falta de diálogo entre jurisdições sobre os princípios constitucionais e os do direito da União, quanto na falta de uma resposta democrática (por oposição a uma resposta tecnocrática) à crise económica e financeira no plano Europeu.

Sumário: 1. O caso contra uma jurisprudência “autárquica”; 2. O caso a favor da soberania que sustenta a jurisprudência; 3. Entre “autarquia” e “soberania”.

Palavras-chave: Direito da União Europeia, Pacto de Estabilidade e Crescimento, sistema europeu de governança económica, Tribunal Constitucional Português, Tribunal Europeu de Justiça, jurisprudência da crise, pluralismo jurídico, soberania.

1. The case against an “autarchic” jurisprudence

According to Miguel Poiars Maduro the first and most conspicuous sin of the Portuguese Constitutional Court’s jurisprudence of crisis is the sin of autarchy, in the sense of insulation. This is particularly serious in a legal context, that of the EU Law, of growing interdependence and pluralism.

In the context of EU Law this autarchic approach overlooks the fact that large part of the legal instruments adopted in reaction to the Eurozone crisis were European or supranational in nature. Furthermore it endangers the project of building the identity of the EU legal order in common and excludes any effective contribution the national court could bring in shaping the interpretation of the obligations stemming from the European semester.

In short, “the approach followed by the Tribunal Constitucional is intended to make the national constitution’s interpretation fully immune to EU law; but, in this sense, it also makes EU law and its development fully immune to national constitutional principles and influences”.

The methodological approach of the autarchic jurisprudence is based on the goal vs. means distinction. According to this distinction the legal binding character of EU law is limited to the objectives or goals imposed on the Member States in the context of the excessive deficit procedure, leaving the Court free to control

the means chosen by the national legislature to pursue those goals exclusively in light of the Constitution. It allows the Court to operate as if the realm and interpretation of the national constitution was left untouched.

Maduro questions that the rules of the European semester and financial and economic governance of the Euro simply establish some deficit or debt objectives. On the contrary, he claims that 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 Stability and Growth Pact)³. But the crux of his analysis lies down elsewhere. The analysis of the crisis’ jurisprudence of other debtor countries (such as Greece, Cyprus, Latvia, and Romania) allows Miguel Maduro and his associates to identify “an overall tendency to remove the Constitution from possible constraints of international or EU obligations and an autarchic construction of legal arguments”.

This is also the case, they claim, with the jurisprudence of the creditor countries’ constitutional courts, especially Germany. According to Miguel Maduro “when we read creditor countries’ courts claiming that the scope of national budgetary powers is left untouched because the *means* through which their State participates in supranational programmes are controlled by the State itself, we face a similar approach to the *goals vs. means* distinction of the Portuguese Constitutional Court.”

The problem with the hermeneutics employed by both debtor and creditor countries is that although they are very similar, they are also incompatible. In fact, “if on the one hand debtor countries’ courts claim that they are bound by budget targets but are free on how to reach them, creditor countries’ courts make the financial assistance dependent on a concrete involvement on how those funds will be spent”. For Miguel Maduro, “this creates a potential if not the certainty for a legal crisis”.

The argument presented above, even if in a most compact way, can perhaps be characterized as a kind of a prisoner’s dilemma, the famous situation analyzed in game theory that shows why two “rational” individuals might not cooperate, even if it is in their best interests to do so. The basic facts of this strategic interaction are well known and I shall not describe them here⁴. It is sufficient to enunciate the three possible outcomes: if each of the two prisoners confesses the principal charge against both, each of them serves 6 years in prison; if one of the prisoners confesses and betrays the other on the principal charge but this other one remains silent, the betrayer prisoner will be set free and the silent one

3. To make this claim right it would be necessary, in my view, to confront the criticism of the EU law on the mechanisms and tools directed towards the prevention, monitoring and correction of economic and financial imbalances in the member states on the ground that it suppresses democracy. On this issue, particularly with regard to Regulation no. 1467/97, cf. GIUSEPPE GUARINO, *Cittadini Europei e Crisi dell’Euro*, Napoli, 2014, pp. 57 et seq.

4. See, for example, DOUGLAS G. BAIRD, ROBERT H. GERTNER and RANDAL C. PICKER, *Game Theory and the Law*, Cambridge, Massachusetts, 1994, p. 33.

will serve 10 years in prison; if the two prisoners remain silent, both of them will only serve 2 year in prison on a lesser charge. These options show clearly that no matter what the other prisoner does, a prisoner is better off confessing: by confessing the prisoner can avoid prison altogether, if the other remains silent, or at least get a smaller condemnation on the principal charge if the other also confesses. The better outcome, that is, 2 years in prison on the lesser charge, would only be possible if the two prisoners could reach an agreement. The prisoners, however, are each in his own cell and unable to communicate.

Now let's play a similar game, in which one of the prisoners is replaced by the constitutional courts of debtor countries and the other one is replaced by the creditors countries' constitutional courts. The courts are supposed to evaluate the relationship between EU growing powers on national budgetary matters and their own constitutional law. If both groups of courts assert the EU powers on national budgetary matters they can initiate a meaningful dialogue with EU institutions (especially the European Court of Justice) concerning the integration between EU Law principles and national fundamental legal values; furthermore the EU involvement in the financial assistance to the debtor countries is enhanced. If, on the other hand, both creditor and debtor countries stick to the goal vs. means distinction, as described by Miguel Maduro, not only the above mentioned dialogue turns out to be excluded but it is also the case that such an approach endangers the EU involvement in the financial assistance to the debtors countries. In fact an "autarchic" approach to the EU legal order, if generally adopted by European constitutional courts, "risks putting the constitutional commitments of different Member States under EU Law in conflict themselves". Finally, if debtor countries' courts engage in a jurisprudence based on the goals vs. means distinction and a dialogical attitude is instead adopted by the courts of creditors countries (or vice versa), the outcome is, once more, at least in the long run, the endangerment of an effective European integration. In this last situation we can also say that in the short term the national court adopting a more dialogical attitude would only make worse the situation of its own country, without any reassurance from other countries that they would eventually construe their national laws in a way more sensitive to EU Law.

We have only to read Miguel Maduro's article to know what the actual outcome of the strategic interaction between the different national courts is. All national constitutional courts are encouraged to adopt an "autarchic" approach to legal argument because they lack any certainty that each one will opt into a more dialogical attitude regarding the European Court of Justice. But is this also rational? Like in the prisoner's dilemma the answer to this question depends upon the availability of the best option: can the prisoners enter a binding agreement to remain silent? Can each of the different national courts be reassured the other ones will be open to a dialogue between their constitutional values and EU legal principles? Can each national court be reassured that the European Court of Justice will dialogue with all national courts in the same way? Can there be a meaningful dialogue between judicial courts if their democratic standing is not similar?

The answer, in all cases, is most likely no. This is the point where Maduro's case against an "autarchic" jurisprudence of crisis reaches its limits. In fact the above parallel with the prisoner's dilemma is made possible by Maduro's comparison between the jurisprudence of the creditor countries' constitutional courts and the one of the debtor countries' courts. It would be possible to claim that there is no interaction whatsoever between debtor and creditor countries' constitutional courts; the only interaction taking place is the one between national courts and the Court of Justice.

But should we hold to this last assertion? Is it really the case that the only interaction taking place is the one between national courts and the Court of Justice? In a way this is true, as no legal contacts are established between different national courts. At the same time it's surely possible to view all European national courts as existing in a situation somewhat akin to a tragedy of the commons⁵, as each national court makes a choice for national gain or restraint.

2. The case in favor of a sovereignty upholding jurisprudence

The facts inherent in the above argument can be seen in a different light. Maduro speaks of the Constitutional Court's "autarchic" approach to legal argument, by which he means the "removal/repression of the interrelation of EU law and national constitutional law in the adjudication on the recent austerity measures". But wouldn't it be possible to speak instead, in this regard, of a sovereignty upholding jurisprudence of the various European constitutional courts?

Autarchy means the economic self-sufficiency of a political community and it's a condition certainly not possible today, if it ever was⁶; sovereignty means above all self-determination and there's no political community without it. Is this merely a question of words? In the present context an "autarchic" approach to legal argument presupposes the view that each jurisdiction is self-sufficient regarding the attainment of European deficit and debt goals. On the contrary, a sovereignty upholding approach is above all concerned that both means and goals are defined by an institution with democratic legitimacy.

This last approach appears to be adopted by some authors who have addressed the Portuguese jurisprudence of crisis. Roberto Cisotta and Daniele Gallo say that "the main problem revolves around the scope, extent and limits of democratic legitimacy, as well as the relationship with the principles, values and rights enshrined in national constitutions", adding that "in Portugal social sovereignty has been reaffirmed, rather than by its natural agent, by the Tribunal. In this way, the Portuguese Constitutional Court, relying on the principle of equality (and on its corollaries), seems to have urged the legislator to better exercise the competences and powers it seems to have given up in favour of international and

5. Cf. MATT RIDLEY, *The Origins of Virtue*, London, 1997, pp. 230-231.

6. Not by chance "autarchy" is a condition of ancient polities described by ARISTOTLE in *Politics* (1252b28) and in *Ethics to Nicomachean* (1134a26).

European constraints”⁷.

Reinforcing this point Cristina Fasone, in her commentary of the Constitutional Court’s jurisprudence of crisis, says that “the Portuguese Constitutional Court has placed itself in the position of the main guarantor ‘of the democratic state based on the rule of law’ (Article 2 Pt. Const.), also in the context of the present crisis. The Court has not hesitated to sanction – sometimes disputably and not always in cooperation with the legislator – the action of political institutions whenever they have overstepped the constitutional limits set in the case law. As the Court has recently claimed, the limits provided by the Constitution in this regard form part of the Portuguese national identity, which EU law is also bound to respect (Acórdão no. 575/2014)”⁸.

Some authors are even more incisive. For Blanco de Moraes the Constitutional Court has acted by means of its jurisprudence of crisis as “a last stronghold of sovereignty in a State submitted to international control”⁹. Reis Novais affirms that only the action of the Constitutional Court has avoided the transformation of the Portuguese Republic into a simple protectorate, during the years of the Economic and Financial Assistance Program and the Memorandum of Understanding¹⁰.

As we can see, the fact that the Constitutional Court has repeatedly acted against the will of the democratically elected parliament appears to have not impeded its characterization by the above mentioned authors as the last stronghold of national sovereignty. The reason for this strange reversal of roles – the Court, not the Parliament, as the true bearer of popular sovereignty – is possibly that the Court does not acknowledge the presence of any institution at the Union level whose power is democratically legitimated and who is willing to adopt a distinctive political answer to the economic and financial crisis¹¹.

Maduro’s efforts at demonstrating the legal relevance of Council recommendations are quite symptomatic of his position in face of the so-called “democratic deficit” issue. According to Maduro “national constitutional jurisdictions should undertake an interpretation and application of the Constitution in accordance with Union law, in order to minimize as much as possible the risks of conflicts between national and EU law and also, of course, the risks of exposing the

7. Cf. ROBERTO CISOTTA and DANIELE GALLO, The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal, in CLAIRE KILPATRICK and BRUNO DE WITTE (eds.), Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges, *EUI Working Papers*, 2014/05, pp. 92-93.

8. Cf. CRISTINA FASONE, Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective, *EUI Working Paper MWP 2014/25*, p. 51.

9. Cf. CARLOS BLANCO DE MORAIS, *Curso de Direito Constitucional: Teoria da Constituição em Tempo de Crise do Estado Social*, Tomo II, Vol. 2, Coimbra, 2014, p. 774.

10. Cf. JORGE REIS NOVAIS, *Em Defesa do Tribunal Constitucional: Resposta aos Críticos*, Coimbra, 2014, p. 190.

11. Cf. MIGUEL NOGUEIRA DE BRITO, Putting Social Rights in Brackets? The Portuguese Experience with Welfare Rights Challenges in Times of Crisis, *European Journal of Social Law*, n. 1-2, januari-juni 2014, p. 100; IDEM, La Jurisprudencia de la «Crisis» del Tribunal Constitucional Portugués, *Teoría y Realidad Constitucional*, núm. 38, 2016, pp. 599-602.

Member States to sanctions possibly adopted in case of non-compliance with the EU Council Recommendations”. Another way of confronting this issue would be to say that especially regarding Council Recommendations adopted in the context of the Stability Growth Pact Regulations one sees how the members of the national executive branches, assembled in the Council, have seized the opportunity to by-pass national constraints through transnational cooperation¹². Even if this was not the case, the complexity of the legal demonstration undertaken by Miguel Maduro is sufficient confirmation of a simple fact: EU law on financial crisis is inaccessible and very difficult to understand by any average law abiding European citizen.

Seen in this light any contradiction between the jurisprudence of the creditor countries’ constitutional courts and the ones from debtor countries seems to disappear. Creditor countries’ courts want to preserve the democratic authority of their national parliaments. But the constitutional courts of the debtor countries also want to preserve the democratic constitutional values their national executive and legislative bodies have been allegedly unable to respect, tied as they were by the commitment to the austerity demands of the guardians of the international and European economic constitutional order. The problem ceases to be the lack of dialogue between internal constitutional values and EU law principles, but the lack of a democratic response (as opposed to a merely technocratic one) to crisis at the European level to engage with.

The euro crisis has only deepened the tension between two contradictory forces of integration: the endurance of national democratic and constitutional legitimacy as the basis of the European system of governance and the increasingly denationalized regulatory power as its core impulse¹³. The European Union is perceived by a growing number of people as a kind of technocratic reenactment of old Europe’s constitutional monarchies in which democratic legitimacy had to coexist with the autonomous executive power of the monarchs. It is even possible to assert that one of the causes of populism is the bureaucratization of public affairs¹⁴, a phenomenon certainly manifest at the European level. In this context is it strange that national courts prefer to locate the law of crisis on the firm ground of institutions whose statements can lay claim to democratic legitimacy rather than on the mere parlance arising out of a legal dialogue?

From this point of view it could be argued that the lack of a meaningful dialogue between national courts and the European Court of Justice is the direct consequence of the lack of an institution endowed with democratic legitimacy dealing with economic crisis at the European level. Democratic legitimacy is perhaps the sole solid basis for such a dialogue.

12. Cf. ALEXANDER SOMAREK, *Individualism: An Essay on the Authority of the European Union*, Oxford, 31; J. H. H. WEILER, *The Constitution of Europe*, Cambridge, 1999, pp. 37-38.

13. Cf. PETER L. LINDSETH, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford, 2010, p. 23.

14. Cf. CATHERINE COLLIOT-THÉLÈNE, *Quel Est le Peuple du Populisme?*, in CATHERINE COLLIOT-THÉLÈNE and FLORENT GUÉNARD (eds.), *Peuples et Populisme*, Paris, 2014, p. 22.

3. Between “autarchy” and “sovereignty”

In a coauthored article Bruce Ackerman and Miguel Maduro have criticized the German Constitutional Court decision of June 19, 2012 concerning the ESM Treaty and the Euro-Plus-Pact. According to their opinion the decision “imposes clear limits on technocratic solutions, but fails to define a pathway through which the European project can be saved by popular decision”¹⁵. It remains to be seen, however, if this is really a job for a Constitutional Court of a particular member state.

In another article the same authors propose that “Europe should follow the example of South Africa’s successful three-stage experiment in constitutional creation. During the first stage, participants simply tried to hammer out a statement of basic principles. Only later did they follow through with a long legalistic text elaborating the new social contract. Finally, it was up to South Africa’s constitutional court to confirm that the long-form legalisms conformed to the initial principles”¹⁶. Transposing this experience to Europe they propose, at the first stage, that a convention representing national and European parliaments and the European commission could formulate constitutional principles to be revised by an intergovernmental conference. These principles would then be submitted to vote by national parliaments or national referendums, depending on the particular constitution. Stage two would involve a second convention composed of national representatives chosen by citizens of all member states. The convention would be in charge of writing the final text of the European constitution. Finally, at stage three, a court containing the presiding judge of the highest court of each of the member states and presided by the president of the European court of justice would review the final text, guaranteeing its conformity with the initial constitutional principles.

What is most striking in this proposal is the disconnection between substantial principles of a European constitution and the procedural concern with the legitimacy of its enactment. The authors focus their attention on this last point, as if it could be severed from the substantial political question: in the name of what self-evident truths is political power to be instituted at the European level, if at all?

As the above mentioned articles show Maduro is surely not unacquainted with the political problem of the European Union, that is, the problem presented by the gap between European institutions and the peoples of Europe. But he seems to envisage this problem as one of discovering how to best and most successfully manufacture the people’s consent. The question of legitimacy is ancillary to

15. Cf. BRUCE ACKERMAN and MIGUEL MADURO, Broken Bond, *Foreign Policy*, 17 September 2012.

16. Cf. BRUCE ACKERMAN and MIGUEL MADURO, How to Make a European Constitution for the 21st Century, *The Guardian*, available at <https://www.theguardian.com/commentis-free/2012/oct/03/european-constitution-21st-century>, last access February 16, 2017.

the real nature and novelty of the European legal order which is, according to Maduro, constitutional pluralism.

This shows, at least to my mind, that in the end the real issue is not between “autarchy” and judicial cooperation and dialogue or, in other words, legal pluralism. The real issue is, unsurprisingly, the one between legal pluralism and sovereignty¹⁷. Miguel Maduro conceives the European Union as an attempt at evading sovereignty, understood in the sense of a framework that gives a hierarchical solution to normative conflicts between the European legal order and legal orders of the member states. Instead of this hierarchical solution Maduro perceptively proposes an alternative which is based in mutual adjustment and recognition of EU legal order and the national legal orders. I don’t have any quarrel with this view of pluralism. But is it enough? Apparently Miguel Maduro also conceives the European Union as a project that evades sovereignty as the expression of a political relation between a people and an instituted power¹⁸. The national constitutional courts’ jurisprudence of crisis is perhaps the refusal to accept the evasion of political sovereignty, even if in the process it also ends by refusing, wrongly in my view, legal pluralism as the mutual adjustment between EU and national legal orders.

Concerning this last point Maduro’s analysis is surely correct: national courts must assume themselves, in a way, also as European courts. I only have doubts concerning the political embedding of the European Court of Justice.

17. See on this issue the different views of HANS LINDAHL, *Sovereignty and Representation in the European Union*, p. 105 and note 25, and MIGUEL MADURO, *Contrapunctual Law: Europe’s Constitutional Pluralism in Action*, pp. 535-536, both in NEIL WALKER, *Sovereignty in Transition: Essays in European Law*, Oxford, 2006.

18. This is all the more surprisingly since Miguel Maduro carefully distinguishes between legal sovereignty as the question of ultimate authority to solve conflicts between two different legal orders, and political sovereignty as the autonomy of a political community to determine its policies and to define political participation and representation (cf. MIGUEL MADURO, *Contrapunctual Law: Europe’s Constitutional Pluralism in Action*, pp. 501-502).