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COMMENT ON ANDREA MORRONE'S "CONSTITUTIONAL COURTS AND ECONOMIC CRISIS"

COMENTÁRIO AO ARTIGO "TRIBUNAIS CONSTITUCIONAIS E CRISE ECONÓMICA" DE ANDREA MORRONE

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Abstract: When assessing constitutional courts decisions – concluding for their activist or non-activist nature –, the perspective should not be quantitative but qualitative. In this light, the fundamental question concerns the nature of the reasoning involved in the rulings, asking whether the same transcended the boundaries of admissible judicial reasoning and thus interfered in the political realm.

Resumo: Uma avaliação de decisões de jurisdições constitucionais que permita concluir pelo seu caráter ativista ou não deve desenvolver-se em perspetiva qualitativa e não quantitativa. Deste modo, a questão fundamental respeita à natureza da argumentação desenvolvida, determinando-se se a mesma transcendeu as fronteiras da argumentação jurídica e interferiu no domínio político.

Keywords: Austerity rulings, judicial activism, arguments of principle, arguments of policy, sovereignty;

Palavras-chave: Jurisprudência da crise, ativismo judicial, argumentos de princípio, argumentos políticos, soberania.

I. Regarding Andrea Morrone's paper, I would like to discuss:

- The overall assessment of the austerity rulings as non-activist or self-restrictive;

- The discussion on "crisis, emergency, necessity and constitutional justice".

II. According to Andrea Morrone, "Constitutional courts have generally adopted an attitude of self-restraint: only in extreme cases they have adopted decisions of unconstitutionality" (p. 3). The analysis proceeds by pointing out that "constitutional courts generally have upheld the anti-crisis legislation" and only in rare decisions, "have declared void" specific measures.

That may well be truth at the quantitative level. There were indeed many austerity solutions resisting the constitutional courts' scrutiny and, regarding those which didn't, the same courts were cautious as to the effects of unconstitutionality, widely restricting them in some cases.

I believe though that the decisive perspective when assessing constitutional courts decisions – concluding for their activist or non-activist nature – should not be quantitative but qualitative. In this light, the fundamental question concerns the nature of the reasoning involved in the rulings, asking whether the same transcended the boundaries of admissible judicial reasoning and thus interfered in the political realm.

When determining those boundaries, I will adopt here Ronald Dworkin's distinction between "arguments of principle" and "arguments of policy"[1]. The latter ones are those regarding the pursuit, or better pursuit, of public goals, not rights and the opposability of the same, taken as "trumps", to the legislator.

The interference of constitutional courts in policies, their use of arguments of policy, including economic policy, is highly problematic since, inevitably, the same aren't shared, and indeed they are divisive, in an atmosphere of pluralism. What is adequate from, say, a Keynesian perspective will not be so from, say, a Schumpeterian or a Monetarist perspective. The proper realm for the conflict to be adjudicated cannot be, therefore, the judicial realm, but the political one, in which different parties enjoying democratic legitimacy implement this or that program.

It is important to stress that constitutional decisions, at least those of the Portuguese constitutional court, have actually resorted to the latter kind of arguments, interfering pervasively in the non-neutral field of economic policy. They have done so, not in name of social rights, but in light of general principles, namely the "principle of reliance" (rulings 474/2013 and 862/2013[2]) and the

1. Cfr. Ronald Dworkin, *Taking Rights Seriously*, Cambridge MA, 1978, p. 92.

2. All Portuguese constitutional court's rulings can be found in www.tribunalconstitucional.pt.

"principle of proportional equality" (rulings 353/2012 and 187/2013).

The first rulings concern the dismissal of civil servants protected by a previous legislative rule excluding it (474/2013) and cuts in retirement pensions of former public sector workers (862/2013). In both cases, the decisive argument for invalidation was the following: "there are no public interest reasons justifying, when weighted against other reasons, the discontinuity in state conduct and thus the breaching of expectations" (in the first case, expectations in keeping one's public employment and, in the second, in keep receiving a retirement pension with the same amount).

Well, the determination of those "public interest reasons" and the assessment of their concrete relevance is necessarily discussable in a context of pluralism. That becomes particularly evident when taking into account the precise arguments the court used when dismissing public interest justifications for the solutions under scrutiny. Regarding the cut in pensions, the court described it as "non-essential" for public interest since it did not amount to a "structural reform" and was "potentially unfair". One may thus say that the Court ruled that the solution was not pursuing the public interest in the best manner. However, suppositions as to what is "essential", "structurally reformist" or "potentially unfair" can be conceived very differently by participants in good faith in the political process within their distinct presuppositions, worldviews and circumstantial assessments, that being even more the case in a scenario of serious economic crisis.

The second aforementioned rulings (353/2012 and 187/2013) concern the principle of "proportional equality", and the inherent requirement of "proportionality of the differentiating measures". Within that formula, the court invalidated a cut in the annual salaries of civil servants (amounting to the traditional Christmas and Holiday installments) since it disproportionately differentiated public sector employees from private sector ones. When reaching that conclusion, the court relied on two "tests", the "dispensability test" and the "confinement within the limits of sacrifice test".

From where I stand, however, the concretization of such tests cannot pass a decisive test of inter-subjectivity in a context of pluralism. Indeed, it is impossible to determine what is "dispensable" or not or what confines within the "limits of sacrifice" independently of prognosis judgements and political-economic presuppositions which are necessarily unshared in such a context. That that is so is revealed in the court's own arguments which are pervasively political. The court even specified, not merely as an *obiter dictum*, that "macroeconomic factors related with the economic recession and unemployment growth" should be faced through "general economic and financial measures, and not through the increased penalization of those workers which don't endure, as to their employability, the recessive effects of the economic situation".

One could ask however: what if an increased penalization of workers as to their nominal salaries, necessarily resultant for the public sector from budgetary measures and for the private sector from market regulation – in both situations

within a scenario in which the automatic adjustment resulting from inflation is ruled out – is taken to be, within electorally sustained political-economic presuppositions, the best way to dissipate the economic recession and the least harmful option for workers and pensioners themselves, who would be more affected by the uncontrolled inflation that would fall upon them were the country outside the Eurozone? Is the latter option, after all defensible by participants in good faith in the political process, unconstitutional? Aren't we confusing political-economic disagreement with unconstitutionality? What constitutional diktat, other than the formula the court itself constructed and applied, imposes other "general economic and financial measures"? One should remember that the Court didn´t conclude for the breach of social rights – the judicial enforcement of the latter implying its own difficulties which are not relevant here –, resorting to formula of its own creation and applying them with wide discretion.

One other question must be asked. Is it inevitable for courts to resort to unshared political arguments? After all the general understanding in these last decades, at least in the European quadrant, is that constitutional courts are called to apply highly abstract principles, such as the rule of law, including the many formulas derived from it, such as proportionality. And one may eventually consider that it is impossible for a court to apply, say, the requirement of adequacy inherent to the principle of proportionality, or "proportional equality", without issuing prognosis judgments and adopting unshared presuppositions.

But shouldn't the lesson be different? Particularly in light of the experience of austerity rulings, shouldn't we be considering the over-development of what Robert Nagel[3] named as "formulaic constitutions" and the dangers for a pluralist democracy resulting from their "over-interpretation" by constitutional courts? And if we cannot escape the formulaic nature of our Constitutions, shouldn't we distinguish those formulas that can actually serve as parameters of control by courts from others, thus eventually recovering Ernst Forsthof distinction between "norms of action" – strictly destined to the legislator - and "norms of control" – in light of which courts may invalidate legislation?

I believe such questions must be placed. And a possible positive answer to the same doesn't mean to go back to political constitutionalism, but only to avoid extreme, and probably reckless, forms of "neoconstitutionalism". But going back to the point raised by the paper that is that the assessment of constitutional court's behavior cannot be quantitative and must be qualitative. Andrea Morrone is right in stating that only few decisions struck down austerity solutions, and many were left standing, but the sort of arguments and the type of reasoning involved in those few decisions are the problem.

3. See Robert Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review*, Berkeley/Los Angeles, 1989, p. 121 ff.

III. Regarding the discussion on "crisis, emergency, necessity and constitutional justice", according to Andrea Morrone, during circumstances of crisis – to be distinguished from traditional "states of emergency" – «constitutional judges need to face a (…) problem: the "double fidelity" dilemma. In hard cases, Constitutional courts are bound to choose between the *salus rei publicae* (and eventually compressing rights and local authorities) and the protection of the constitutional principles and fundamental rights (thus conversely sacrificing the *salus rei publicae*)".

My question is the following; when eventually choosing for the *salus rei publicae* aren't constitutional courts actually admitting the political nature in a strong sense of the corresponding questions, thus acknowledging themselves as passive sovereigns[4]? Isn't this dilemma one between the tradition of "political right" (a tradition in which sovereignty as "capacity", and thus a "prerogative", is conceivable) and the tradition of strict rule of law (in which sovereignty is suppressed)?

Differently, for Andrea Morrone, the dilemma at stake is still a proper constitutional dilemma, being *salus rei publicae* to be acknowledged as a constitutional principle (and not as a "political right" principle) to be weighted, as any principle, with other constitutional principles.

I believe there are difficulties involved in the latter configuration of the dilemma. *Salus rei publicae* was modernly accepted, in the Hobbesian way, as a principle of political right[5]. Within that system, the concept of sovereignty implies the "prerogative", i.e., the capacity to face the exception eventually in derogation of otherwise applicable norms. Well, the basic intention of a system of constitutionality was to replace a normative system of political right by a normative system in which strict constitutionality cannot be challenged, with the traditional concept of sovereignty being "negated" or "radically repressed"[6]. If that is so, when before a dilemma between *salus rei publicae* and constitutional principles, we are not before a proper constitutional dilemma, which takes place within a *single* normative system (a system of constitutionality) and doesn't involve claims deriving from an incommensurable normative system (a system of political right).

For sure, a depiction of the dilemma as a proper constitutional dilemma diminishes the risks of arbitrariness involved in acknowledging that we are before an outright derogation of the rule of law. That seems to be Andrea Morrone's argument. But, besides the theoretical difficulty involved in accepting *salus rei publicae* and sovereignty as capacity as internal to contemporary constitutional law, there is an opposite risk to the weighed. Indeed, to conceive the said dilemma as a mere constitutional dilemma may well mean to pay "judicial lip service" to the rule of

4. For further developments, see ours The Passive Sovereignty of the Constitutional Judge, in *Judicial Activism*, Cham, p. 119-133.

5. See Martin Loughlin, *The Idea of Public Law*, Oxford, 2009, p. 7-8.

6. See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, transl. George Schwab, Chicago, 2005, p. 21.

law, with counterproductive effects. As pointed out by David Dyzenhaus[7]:

> "Judicial lip service to the rule of law in exceptional situations has consequences for the way judges deal with ordinary situations. One finds that judges begin to be content with less substance in the rule of law in situations which are not part of any emergency regime, all the while claiming that the rule of law is well maintained. Second, the law that addresses the emergency situation starts to look less exceptional as judges interpret statutes that deal with ordinary situations in the same fashion. As a package, these concerns seem to show that once the exceptional or emergency situation is normalized, that is, addressed by ordinary statutes and treated by judges as part of a 'business as usual', rule-of-law regime, so the exception starts to seep into other parts of the law."

The same point is swiftly made by Oren Gross[8] in a context closer to one's own:

> "[The] statement that the Constitution is the same in times of war as in times of peace is in danger of being reversed, so that the Constitution will be the same in times of peace as in times of war."

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7. See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge, 2006, p. 35 ff.

8. See Oren Gross, Chaos and Rule: Should Responses to Violent Crises Always be Constitutional, *Yale Law Journal*, 112/4, 2003, p. 1046.