Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective

Antonia Baraggia

Abstract The chapter addresses the role of the judiciary during the 2008 economic crisis, which affected Europe and its Member States. In particular, the chapter compares the attitudes of national constitutional courts in judging austerity measures adopted under emergency circumstances, identifying three main justifications of the courts’ attitude during the crisis: 1. national supreme courts acted in order to safeguard the constitutional core values threatened by the extraordinary circumstances posed by the economic crisis; 2. they acted as institutions engaged in a kind of “institutional competition” with other constitutional actors; 3. they acted in order to affirm the self-standing nature of national constitutional order, with respect to supranational and international interference. The chapter explores how in the future the EU should improve the virtuous relationship between its political and judicial actors in order to avoid the flaws and legal contradictions that have characterized its response to the economic emergency so far.
1 Introduction

The economic crisis which, starting from 2008, affected Europe and its Member States had a wide impact not only on the economic and financial policies of the EU, but also on the balance of powers (both at national and European level), on the status of social rights protection and on the future developments of the EU integration process.

The crisis brought to a constitutional transformation, both at national and supranational level, prompting the emergence of a new European constitutional constellation, a new *Verfassungswirklichkeit*. One of the main features of this transformation has been the growing influence of international financial institutions (IFIs), rate agencies and other “technocratic” actors, whose legitimacy and accountability has still to be completely and properly assessed.

The “capture” of power by these new actors has been particularly evident during the crisis management, which showed the flaws of the Maastricht compromise and challenged the sustainability and the existence of the constitutional order in many countries in financial emergency. The EU institutions embraced Washington Consensus*-style measures, challenging the basic assumptions of the social-democratic state: the adoption of austerity measures—imposed or negotiated by the national governments and international financial institutions—brought to severe and unprecedented violations of constitutional fundamental rights, especially social rights, the most affected by the scarcity of financial resources.

In this scenario, dominated by the context of emergency and by the external constraints imposed to the national executives and parliaments by international and supranational institutions, the judiciary played a pivotal role in adjudicating austerity related measures and in safeguarding the core of social rights threatened by the economic emergency.

---

1The impact of the economic crisis both at national and supranational level has been described through the category of constitutional mutation or constitutional transformation, see Menendez A (2014) Editorial: An European Union in Constitutional Mutation?, European Law Journal, Vol. 20, no. 2:127–141; Martinico G (2014) EU crisis and constitutional mutations: a review article. Revista de Estudios Políticos (nueva época), n. 165:247–280. Against this narrative see de Witte B (2015) Euro crisis responses and the EU legal order: increased institutional variation or constitutional mutation? European Constitutional Law Review, Vol. 11, n. 3:434.

2Joerges C (2014) Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation. German Law Journal, 15 no. 5:1024.

3Böckenhörder E W (2010) Kennt die europäische Not kein Gebot? Neue Züricher Zeitung. As Böckenförde argues: “Die Krise der Europäischen Union hat ihren Grund in Widersprüchlichkeiten und Strukturfehlern des EU-Vertrags seit der Einführung der Währungsunion im Vertrag von Maastricht. Sie war vorhersehbar und ist nicht einfach vom Himmel gefallen”.

4Lütz S Kranke M (2014) The European rescue of the Washington Consensus? EU and IMF lending to Central and Eastern European countries. Review of International Political Economy, 21:2:310–338.

5Nolan A (ed) (2014) Economic and Social Rights after the Global Financial Crisis. CUP.

6On the role of Courts in adjudicating social rights see King J (2012) Judging Social Rights. CUP.
The judiciary intervention has been certainly triggered by the peculiar features of the crisis and by its impact on national constitutional orders. In light of the peculiar circumstances of the crisis, we argue that this phenomenon should not to be read within the classical understanding (and criticism) of judicial activism or “juristocracy”\(^7\): instead, it has to be considered as an intervention aimed to “restore” an imbalance of power that occurred both internally and internationally during the economic crisis and to protect constitutional fundamental rights, even in time of severe economic crisis.

In particular, this paper will compare the attitudes of national constitutional courts judging austerity measures adopted under emergency circumstances, identifying three main justifications of the courts’ attitude during the crisis\(^8\):

1. National supreme courts acted in order to safeguard the constitutional core values threatened by the extraordinary circumstances posed by the economic crisis.
2. National supreme courts acted as institutions engaged in a kind of “institutional competition” with other constitutional actors.
3. National supreme courts acted in order to affirm the self-standing nature of national order and power, with respect to supranational and international interference, especially in matters considered at the core of national prerogatives (sovereignty, social rights protection, budget rules).

These three justifications may help to read the case law of some of the so called “debtor countries” during the economic crisis (namely Portugal, Greece, Latvia and Romania).

The first part of this paper highlights the paradigmatic nature of the European economic crisis as a global crisis that involves national, supranational, and international settings. In fact, the crisis initially affected only some Member States (Greece, Portugal, Ireland, Latvia, Hungary, Cyprus), but, due to the strong connections of the EU legal framework, it then acquired a supranational dimension that involved other Member States and the EU as a whole. This fragmented nature of the crisis is reflected by the instruments adopted to tackle the emergency, which represent a hybrid category between EU law and international law, thereby casting doubts on their legitimacy.

The second part analyzes national courts’ decisions in cases dealing with the crisis and in particular in social rights adjudication (Portugal, Greece, Latvia and Romania). For each of these cases, the paper describes the legal reasoning and substantive outcomes of the courts. As the paper argues, in judging the crisis supreme courts adopted a case-by-case approach, swinging between the boundaries of the written constitutions and the contingent constraints of the economic crisis. The result of

\(^7\)Hirschl R (2007) Towards Juristocracy. The Origins and Consequences of the New Constitution-alism. Harvard University Press.

\(^8\)On the role of the judiciary in time of crisis from a theoretical perspective, see in this volume Kuo M S From Institutional Sovereignty to Constitutional Mindset: Rethinking the Domestication of the State of Exception in the Age of Normalization. In particular, the Author argues that “the judiciary may help domesticate the beast of emergency powers by focusing the public mind on our current situation with the constitutional mindset”.

such case law has been contradictory and not always coherent. However, national courts seemed to be perfectly aware of their role not only with respect to the national branches of government but also to the EU institutions and to the international financial actors.

Finally, the third part explores how in the future the EU should improve the virtuous relationship between its political and judicial actors in order to avoid the flaws and legal contradictions that have characterized its response to the economic emergency so far.

2 Governing the “Extra-Ordinary”: The Judicial “Dilemmas” in Adjudicating Crisis-Related Measures

One of the most debated issues of the anti-crisis mechanisms was that they were instituted outside of the legal framework of the EU through intergovernmental procedures and they were governed by a mix of public international law and private international law sources, resulting in a sort of ‘circumvention of Union law’ and thereby a potential threat to European democracy and to the rule of law. These flaws within the EU response to the economic crisis persisted even after the amendment of art. 136 TFEU, aimed to give the ESM an EU legal basis: the IMF was, in fact, still involved in the European crisis management and its neoliberal philosophy deeply influenced the content of the Memoranda of economic and financial policies.

In the light of these formal and substantial features of the crisis related measures, it is not surprisingly that many of the bailout conditions enacted during the crisis under the above mentioned mechanisms have been challenged in front of national supreme courts. Not only in Portugal—probably the most studied case—but even in Greece, Latvia and Romania there is abundant case law concerning the legitimacy of crisis-related measures with basic constitutional values, such as fundamental rights protection, and in particular the social rights dimension.

See Kilpatrick C (2015) Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry. 43 EUI Working Paper Law p 3.  
Namely the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM).  
On the different nature in the legal form of the mechanisms adopted, see Tuori K, Tuori K (2014) The Eurozone Crisis: A Constitutional Analysis. CUP, p 90.  
Tomkin J J (2013) Contradiction, Circumvention, and Conceptual Gymnastic: the Impact of the Adoption of the ESM Treaty on the State of European Democracy. German Law Journal 14:169.  
Ibid, 169.  
Somma A (2014) Legal Change and Sovereign Debt Crisis. The Clash Between Capitalism and Democracy in the Western Legal Tradition, Paulus C G (ed.), A Debt Restructuring Mechanism for Sovereigns. C.H. Beck, Hart, Nomos, p 176.  
See Brancati B (2015) Decidere sulla crisi: le Corti e l’allocazione delle risorse in tempi di “austerità” n. 16 Federalismi.it, available at www.federalismi.it.
However, this case law is extremely heterogeneous, and a meaningful comparison has to take into consideration the differences within the constitutional justice systems and within the constitutions (the presence of emergency clauses, social rights protection and justiciability). Moreover, while in Portugal, in Latvia and in Romania a constitutional court is present, that is not the case in Greece, where constitutional claims can be decided by different courts (i.e. the Council of State and the Court of Audit). Even by looking at the constitutional adjudication procedure, one sees that in Greece can complaints be directly brought to the court by the civil society; in Portugal the constitutional judgments have been mainly triggered both political institutions in a so-called “abstract” review; in Romania and Latvia constitutional challenges occurred through individual complaints or through institutional actors designated to triggered the constitutional proceeding.

Despite these differences, national courts ultimately have to face the same challenges: the review of austerity measures adopted by their respective national governments—often using emergency provisions—and negotiated with supranational institutions. In other words, they are called to play a pivotal role in counterbalancing the predominance of the executive power and international institutions. What could appear as typical judicial activism—juristocracy—in fact is not. As Kilpatrick argues, “juristocracy charges cannot be the same in times of EU sovereign debt”, since “during a bailout a wide range of national democratic choices become suspended as external lenders set the terms for loan disbursements”. Crisis-related measures suffer a democratic deficit: they are negotiated by supranational authorities, whose nature is executive or technical, and by national governments. The legislative branches, both at national and at EU level, are excluded from the decision-making process, and, even when there is a kind of involvement, either it is limited to informative duties or it lacks effectiveness. The ordinary legislative prerogatives are circumvented, and the triggering of emergency procedures leads to the derogation of the democratic rules operating in normalcy. In addition, austerity measures and their national implementations affect citizens’ fundamental and social rights. In this scenario, in which traditional democratic circuits have been circumvented, constitutional courts would seem to offer a crucial role in protecting fundamental rights enshrined in national constitutions that the legislation enacted to face the debt crisis violated. In the words of Kilpatrick, “hence, constitutional court judgments can become a new resource for governments in dealing with lenders to argue

16Despite in Portugal a constitutional complaint may be triggered also in a concrete proceeding (by citizens), in our analysis we will focus only on abstract review proceedings, which can be filed by several institutional actors: among them, the President of the Republic, the President of the Parliament, the Prime Minister and one-tenth of the Members of the Parliament.

17Kilpatrick C (2015) Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry. 43 EUI Working Paper Law p 17.

18Ibid, 19.

19Fasone C (2014) Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective. EUI MWP 2014/25 Working Paper.
for renegotiation of terms in order to maintain constitutionality”. As Kim Lane Scheppelle argues, “court decisions strongly supporting vulnerable populations may therefore give democratic governments engaged in ongoing negotiations with IFIs valuable bargaining leverage—a tool that may be necessary to fulfill promises previously made by government officials to their constituents. If this is the case, such court decisions would enhance rather than diminish the democratic responsiveness of elected institutions”.

Moreover, supreme courts’ aim seems to be, paradoxically, the protection of the national legislative institutions, by reopening the decision-making process under the guidance provided by the Courts as regards the respect of fundamental rights under the national constitution.

However, the price of the intervention of a national judiciary in striking down legislation implementing international financial commitments might be high, both in financial and in political terms. This is the reason why, at least at the very beginning of the assistance programs, national courts adopted a cautious approach in assessing the constitutionality of the austerity measures.

Supreme courts find themselves also in the delicate position of deciding on emergency provisions, tracing the boundaries between the fundamental constitutional principles that cannot be derogated without infringing the constitutional order and the need to face a state of emergency, capable of threatening the sustainability of the national order itself. This outcome has not to be given for granted: according to Dyson, “the delegation of discretionary powers to supranational institutions has rendered judicial review exceedingly difficult and thus weakened legal accountability structures since the authorities’ technocratic margin of appreciation has been extended to a degree which leaves little space for courts to challenge official decisions legally”.

The “national courts dilemmas” in judging austerity measures enacted in times of crisis clearly appears if one looks in a diachronic perspective to the case law of the courts involved in such a difficult task. Our research is focused on the case law of the Portuguese Constitutional Court, the Greek Supreme Courts, the Latvian and the Romanian Constitutional Courts. We will look at the court behavior following the three strategic attitude we have identified.

---

20 Kilpatrick C (2015) Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry. 43 EUI Working Paper Law p 20.
21 Lane Scheppelle K (2004) A Realpolitik Defense of Social Rights. Princeton Law and Public Affairs, Working Paper Series, Working Paper No. 05-004:9.
22 Cisotta C, Gallo D (2014) The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal, Kilpatrick C, de Witte B(eds) Social Rights in Times of Crisis in the Eurozone: the Role of Fundamental Rights’ Challenges. European University Institute LAW Working Paper 2014/05:94.
23 Dawson M (2015) The Legal and Political Accountability Structure of Post-Crisis EU Economic Governance. JMCS 53 5:986.
2.1 Protecting Constitutional Rights

National constitutional courts are vested with the task to protect the legality of the constitutional order and to assess the constitutional legitimacy of legislative acts.

Playing this role in time of economic crisis, when political decision strongly affected social rights protection, may be very difficult.

However, in the case of the economic crisis, constitutional courts, comparatively speaking, were able to move on the thin line between constitutional emergency and legality, between normativity and contingency, using a progressive and an evolutionary approach. In all of these countries several measures affecting social rights were put in place following the conditions or just the “suggestions” of the “Troika”. In such a scenario, the judiciary intervention has been triggered, in order to assess the compatibility of the provisions affecting social rights with the national Constitutions. Comparing the case law of debtor countries we can identify a common trend: national supreme courts adopted, at the beginning of the crisis, a very cautious approach in assessing the constitutionality of the austerity measures with regard to social rights, which progressively changed in front of the persistency of the crisis and of the austerity-driven legislation. Indeed, during the first stages of the crisis, austerity measures have been declared admissible despite the fact that the domestic constitution expressly guarantees social rights (Greek Council of State) and also disregarding the role of ICESCR (again Greek Council of State); on the contrary, in a second phase of the crisis, Courts started to step in, declaring some of austerity measures in violation of constitutional provisions. However, even when Courts recognized the unconstitutionality of austerity measures, they did so almost exclusively on the basis of general constitutional principles (i.e. the principle of equality, proportionality, legitimate expectation, etc.), avoiding to rely on specific social rights, even where they were expressly protected by the national constitution.

This strategy of national courts should be considered in the light of the nature of social rights adjudication itself \(^{24}\) but in the case of the crisis case-law can also disclose the Courts’ awareness of the high price of the activism of a national judiciary in striking down legislation implementing international financial commitments both in financial and in political terms.

(a) The Portuguese supreme courts’ jurisprudence on austerity measures can be considered on the most emblematic example of the “route” taken by supreme court

---

\(^{24}\) The peculiar attitude shown by Court should also be connected to the nature of social rights. The classical narrative has identified a kind of dualism between social rights—considered as positive rights, requiring a certain degree of public intervention for their realization—and civil and political rights—considered as negative rights, directly enforceable without a positive commitment by the State. Although the boundaries between civil and social rights have become more and more blurred, the double-sided nature of the rights is the still dominating paradigm, affecting not only the theoretical comprehension of the nature of rights, but above all the issue related to their effectiveness and enforcement.
in dealing with the crisis\textsuperscript{25}: the court’s attitude moved from an initial deferential approach, which can be traced, for example, in decision n. 396/2011\textsuperscript{26} to a more challenging one, shown in the landmark cases n. 353/2012\textsuperscript{27} and n. 187/2013,\textsuperscript{28} in which the Court struck down the pay and pension cuts for public employees. In the very first decision concerning the crisis legislation, Acórdão n. 396/2011 of 21 September 2011, the Court maintained traditional self-restraint, upholding the provisions of the State Budget Law for 2011 on the cutback of public salaries. In this case, the Court dismissed the challenges to the Budget Law, ruling that there was no violation of the principles of equality, the principle of the protection of legitimate expectations or the principle of proportionality. According to the Court, the transitional nature of the measures challenged, due to the ‘\textit{conjuntura de absoluta excepcionalidade}’, justified the cuts to public salaries.\textsuperscript{29} However, a few months later, the attitude of the Court became more challenging: in Acórdão n. 353/2012, the Court declared several provisions of the State Budget Law for 2012 unconstitutional. In particular, according to the Court, the norms concerning the suspension of Christmas and holiday-month payments during 2012–2014 for public sector workers and retirees were unconstitutional because they violated the principle of equality, which requires the just distribution of public cost between all citizens in proportion to each one’s financial capacity. In particular, the Court ruled that the difference in the degree of sacrifice demanded from public sector workers and from every other individual in order reduce public debt cannot be unlimited and the justification for the pay cuts must be submitted to a proportionality review.\textsuperscript{30} In the case at stake the Court affirmed that “the difference of treatment was so big that it could not be justified on grounds of urgency or effectiveness of the measures to pursue certain public interests, and so it violated the principle of equality”.\textsuperscript{31} In particular the Court warned that “the extremely serious economic/financial situation and the need for the measures that are adopted to deal with it to be effective cannot serve as grounds for dispensing the legislator from being subject to the fundamental rights and key

\textsuperscript{25}Maduro M P, Frada A, Pierdominici L (2017) A Crisis Between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context. E-pública, vol. 4, n.1 available at www.e-publica.pt.

\textsuperscript{26}Acórdão no. 396/2011, 21 September 2011, available at www.tribunalconstitucional.pt.

\textsuperscript{27}Acórdão no. 353/2012, available at http://www.tribunalconstitucional.pt/tc/acordaos/20120353.html.

\textsuperscript{28}Acórdão no. 187/2013 available at http://www.tribunalconstitucional.pt/tc/acordaos/20120353.html.

\textsuperscript{29}The Court ruled that “these measures will last for several years, but that does not allow us to question their transitory character, bearing in mind the nature and objectives pursued, which consist in a normative answer to an exceptional situation that is supposed to be corrected, urgent and briefly, back to normal standards”, Decision 396/2011 (State Budget 2011). See Canotilho M, Violante T, Lanceiro R (2015) Austerity measures under judicial scrutiny: the Portuguese constitutional case-law. European Constitutional Law Review, 11:161.

\textsuperscript{30}Ibidem, 163.

\textsuperscript{31}Ibidem, 163.
Judging in Times of Economic Crisis: The Case Law …

structural principles of the state based on the rule of law, and this is true namely with
regard to parameters such as the principle of proportional equality”. 32

In the Court’s overturning of its precedents, a decisive aspect was the fact that the
cuts to remunerations and pensions lost their original ‘extraordinary and provisional’
nature due to the emergence of the economic crisis, and instead seemed destined to
endure for years, with terrible and persistent consequences on the levels of remunera-
tion for specific worker categories. What is, however, extremely meaningful in this
decision, is that the Court decided to suspend the effects of the declaration of uncon-
stitutionality, probably bearing in mind the international and the European financial
constraints negotiated by the Portuguese government.

After this ‘warning’, the Constitutional Court of Portugal, in subsequent case
law, adopted an even more ‘activist’ approach. The foremost case of this period
of jurisprudence was the aforementioned Acórdão n. 187/2013, of 5 April 2013,
in which the Court declared unconstitutional several provisions of the Budget Law
for 2013, 33 adopted in order to implement the conditions posed by the Financial
Assistance Program, agreed to by the Portuguese government and the Troika. In
this case, the Court recognized that the persistent and reiterated sacrifices imposed
upon public sector workers only, represented a violation of the principle of equality,
which cannot be justified in the light of the objective of reducing public expenditure.
Decision n. 187/2013 is even more interesting since, differently from the previous
decision on State Budget 2012, the Court did not suspend the consequences of the
declaration of unconstitutionality.

Following the path traced by the landmark decision n. 187/2013, the Portuguese
Constitutional Court, in subsequent rulings—Decisions n. 602/2013, n. 862/2013, n.
413/2014 and n. 574/2014—once more struck down provisions concerning labour
law (for example, legislative measures that would make it easier for the government to
dismiss civil servants, as well as cuts in public wages) and the public pension system’s
reform, thereby affecting its relationship with the government and the legislature.

What is remarkable in these last cases is that the state of emergency argument
disappeared from the Court’s reasoning, making the Court’s scrutiny stricter towards
any limitation or reduction of constitutional rights.

The most recent cases deserve a specific attention: what is remarkable is that
the Court, declaring the unconstitutionality of austerity measures based its review
on general principles of law, not on specific rights, such the principle of equality,
proportionality and legitimate expectations.

As it has been highlighted, such case law “surely confirms the Court’s resistance to
review the austerity measures on the basis of the constitutionally entrenched social

32 Kilpatrick C (2015) Constitutions, social rights and sovereign debt states in Europe: a challenging
new area of constitutional inquiry. 43 EUI Working Paper Law p 12.
33 The norm under scrutiny concerned the suspension of the additional holiday month of salary for
public administration staff (and also for teachers and researchers), the suspension of the holiday
month of pensions for public and private sector retirees and the duty imposed upon the beneficiaries
of unemployment subsidies to pay social security contributions of 6% instead of 5%, in violation
of the principles of equality and proportionality.
rights”. In fact, the right to a minimum of existence is construed by the Court, following previous decisions (most notably Judgment 509/2002), as directly based on the principle of human dignity and not in connection with constitutional social rights.

The use of the general principles of law in adjudicating such sensitive issues may be certainly due to the nature of social rights protection and the limits of social rights adjudication. However, it can be also read in the light of the highly controversial and divisive issues at stake: as it has been argues, “the protection of fundamental rights through general principles may also be regarded as the necessary means to accommodate the conflicting views of the judges. (...) It is fair to presume that on the matter of rights protection a consensus drawn from general principles is easier to reach than an agreement on the obligations imposed by the more specific provisions of the Constitution upon the legislature. This conclusion is reinforced if we take into account that the decisions on austerity measures have had more and more dissenting and concurrent opinions every time: as years go by, it seems that the differences in the reasoning between the judges have been exacerbated. Bearing this in mind, it seems that grounding the rulings on basic constitutional principles has proved a judicious way of reaching an agreement”.

(b) The same “evolutionary” approach in judging austerity measures can be traced also in the Greek crisis-related case law.

Indeed, even the Greek Council of State (CS) showed an initial deferential attitude towards the decisions taken to implement the conditions of the Memorandum of Understanding (MoUs), in particular in law n. 3845/2010. The Greek Council of State (CS) in Decisions n. 668/2012 and n. 1685/2013 upheld the measures prescribed in the first Memorandum, grounding its ruling on the state of exception, and on the compelling interest to enhance the financial credibility of Greece, with respect to the commitments assumed with the Troika. As it has been argued, in decision n. 668/2012, “the Council of State translated the emergency rhetoric used by the Government into legal terms. To this purpose the Court invoked a situation of ‘fiscal emergency’. This situation was to be identified exclusively by the legislator; the

---

34 Nogueira De Brito M (2014) Putting Social Rights in Brackets? The Portuguese Experience with Welfare Rights Challenges in Times of Crisis. Kilpatrick C and de Witte B (eds.) Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges. EUI WP 2014/05:87.
35 Kilpatrick C (2015) Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry. 43 EUI Working Paper Law p 12.
36 Canotilho M, Violante T, Lanceiro R (2015) Austerity measures under judicial scrutiny: the Portuguese constitutional case-law. European Constitutional Law Review, 11:183.
37 Law no. 3845/2010 “Measures for the implementation of the support mechanism for the Greek economy by the euro area Member States and the Internationa Monetary Fund”. The annex of the law was the first Memorandum of Understanding between Greece and creditors.
38 See Akrivopoulou C M (2013) Facing l’etat d’exception: the Greek Crisis Jurisprudence. Int’l J. Const. L. Blog www.iconnectblog.com/2013/07/facing-letat-dexpection-the-greek-crisis-jurisprudence accessed 30 June 2015.
judiciary would have no say in legislative evaluations in this respect”.39 Contrary to the previous case law, starting from decision 668/2012 the financial public interest has been considered as a compelling national interest.40

The same argumentative path was followed by decision n. 2307/2014, where the Council of State ruled on the legitimacy of the austerity measures provided by the second Memorandum with regard to the private sector. The applicants were several Greek trade Unions, claiming the unconstitutionality of the measures enacted by the Greek government on the basis of law n. 4046/2012 implementing the second Memorandum of Understanding. The Greek Court affirmed that such measures introduced a downgrading of workers’ rights, protected by the Greek Constitution. However, according to the Court, such measures were proportionate and were justified by the extreme conditions and the state of emergency that led to their adoption.41

Exactly as the Portuguese constitutional court, even the Greek Council of State, in the persistency of the crisis, started to play a more active role, scrutinizing the austerity legislation adopted by the legislative, in the light of constitutional principles such as equality and proportionality. In decision n. 2192/2014, on pension rights for members of the military and the police the Court ruled that in times of an economic crisis the legislator is allowed to limit public expenses and especially for those who are receiving a salary or a pension from the public. This possibility cannot be unlimited but it must respect the principle of proportionality, of equality, of the respect of human dignity. On the basis of these principles there should be an equality in bearing the weight of the adaptation of the public expenses.42 The general principle of “dignified living” as been deployed in other significant decisions of the CS. in decision n. 2193/2014 on the retroactive reduction in the salaries of the military and in decision n. 2287/2015 on limitations in pensions for employees in the private sector and self-employed. In the latter the Court affirmed that limitations in pensions must not violate the constitutional core of social rights, the right to pension which allows a dignified living, which assures the natural subsistence of the person but at the same time the participation of the person in social life in a way that is not very different from the circumstances of her working life”.

Even the CS, traditionally very deferential toward the legislative cannot avoid to assess the compatibility of austerity measures with supreme constitutional values

39Marketou A (2017) Greece: Constitutional Deconstruction and the Loss of National Sovereignty. T Beukers T, de Witte B, Kilpatrick C (eds.) Constitutional Change through Euro-Crisis Law, CUP, p 188.
40Ibidem, 189.
41About the approach the Courts in Greece during the crisis, see in this volume Tassopoulos I, Political Emergencies as Challenges to the Impartiality of Public Law. The author argues that “The Courts, as is well known, ratified the Memoranda reducing dramatically salaries and pensions, and cutting back the welfare state. The Courts invoked the law of necessity, and the paramount national interest of preventing the official default of the country”. See also, Psychogiopoulou E (2014) Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges. C Kilpatrick and B De Witte (eds.) Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges (2014) EUI WP 2014/05, p 12.
42Decision no. 2192/2014, par. 19.
and principle. In a context where the traditional separation of powers was subverted and even deconstructed by the procedure of the adoption of the austerity measure, Courts reveal themselves as the “last hope for the Constitution”.

(c) Moving now to the Eastern Europe bailout countries, Latvia and Romania, we can see a different approach to the crisis-related measures judged by supreme courts.

The Romanian Constitutional Court had to deal with several claims, both substantial and procedural, about the constitutionality of implementing measures required by the international financial assistance packages and the conditions settled in the Memorandum of Understanding (MOU).

The first set of cases decided by the Constitutional Court—decision n. 1414/2009 and n. 1415/2009—refers to the constitutionality of Law 329/2009, which provided among other things the reorganization of public authorities and institutions, and the rationalization of public expenditure; and Law 330/2009 on a unitary wage system. These laws were challenged by the Members of the Parliament, also on the basis of the procedure through which they were adopted, which is the so-called “engagement of responsibility of the Government” provided by Art. 114 of the Constitution. According to this procedure, the Government puts at stake its responsibility in front of the Parliament with regard to a bill, a program, etc. If the Parliament does not approve a motion of censure, within three days from its presentation the act is considered approved, avoiding a direct scrutiny by the Parliament. Since the eruption of the crisis, this extraordinary instrument—as well as the emergency ordinance of article 115 of the Constitution—has been used in order to approve crisis-related measures, mainly impinging on social rights. It is precisely on the legitimacy of the contested procedure that the Court used the argument of the state of emergency. The Parliament argued that the use of the engagement of responsibility by the Government represents a deprivation of the Parliamentary prerogatives within the legislative process. On the contrary, the Court affirmed that the recourse to the procedure provided by art. 114 Const., leading to the end of obstructionism and filibustering, was necessary in order to respond promptly to the requirements of the International Monetary Fund. Even though the Court did not abstain from declaring unconstitutional several other provisions of law, such as those concerning the prohibition of cumulating the salary, it upheld the provisions concerning the obligation of the public authorities to cut the personnel expenditure by 15.5%. Even in this case, the emergency situation provides the key argument of legal reasoning: indeed the Court recognized that the challenged provisions impinged on the constitutional rights of property; but at the same time, it justified the restriction of that right in the light of the “budgetary constraints generated by the economic crisis”.

Besides these aforementioned decisions, the Romanian Constitutional Court decided on a large number of cases dealing with austerity measures and social rights between 2009 and 2011, particularly concerning cuts in wages, pensions or

43Marketou A (2017) Greece: Constitutional Deconstruction and the Loss of National Sovereignty. T Beukers T, de Witte B, Kilpatrick C (eds.) Constitutional Change through Euro-Crisis Law, CUP, p 194.
44Ibidem, 194.
other benefits. In this case law, a key role was played by the notion of the public interest, which, when used, provided an easy path towards constitutionality. The recourse to the public interest argument was used as a sort of passe-partout in order to justify rights restrictions, even without a formal declaration of a state of emergency (provided by art. 93 of the Romanian Constitution). Even in the Romanian case, we can recognize the effort of the constitutional judge to find a fair balance between “the general interest of the community and the protection of the fundamental rights of the individual” in times of crisis.

Last but not least, in this brief comparative journey, we consider the Constitutional Court of Latvia, which ruled in several cases (eight between 2009 and 2010) on the constitutionality of crisis-driven measures. The cornerstone of the Latvian constitutional court’s reasoning in austerity measures is the principle of proportionality: “the constitutional court has already concluded that during economic recession or other extraordinary situations the principle of legal certainty requires the balancing of legal trust of persons with interests of the society. In a such a case, a decisive role is played by the fact whether the principle of proportionality has been observed”.47

The Latvian judges, as well as the Romanian, the Portuguese and the Greek ones, acted on the thin line between preserving the integrity of the constitutional order and admitting breaches in it justified by the emergency situation. Kilpatrick clearly observes that all these courts “found that the extremely serious economic/financial situation and the need for measures that are adopted to deal with it to be effective cannot serve as grounds for dispensing the legislator from being subject to the fundamental rights and key structural principles of the State based on the rule of law”.48

The reaction of constitutional courts to the austerity measures set to comply with international agreements is not only relevant for the domestic order, but also for the international and supranational context. Indeed, we cannot forget that the struggle that the courts were engaged in had an effect both on the balance of powers in the domestic domain, reshaping the relations between government and parliament, and on the supranational level, requiring ongoing negotiations of conditions among the actors involved. These are the two dimensions of the crisis jurisprudence we are going to debate in the following paragraphs.

45 Constitutional Court of Latvia, Case 2009-08-01; case 2009-43-01; case 2009-44-01; case 2009-76-01; case 2009-88-01; case 2009-11-01.
46 Constitutional Court of Latvia, case 2010-17-01; case 2010-21-01.
47 Rasnača Z, Latvia, Report in www.eurocrisislaw.eui.eu.
48 Kilpatrick C (2015) Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry. 43 EUI Working Paper Law p 12.
2.2 Institutional Competition Between Different Constitutional Actors

The jurisprudence of the crisis may be seen with the lens of “institutional competition” among different “powers” in the national constitutional arena, affecting the horizontal separation of powers.

As already mentioned, within the transnational global order we are witnessing a new model of separation of powers, which affects and changes the traditional concept of institutional balance in the domestic domain.

This phenomenon is not new: actors such as the IMF and the WB since the beginning of their mission, deeply influenced, through the use of conditionality, the internal sphere of public policy and of the separation of powers. The influence of the IMF and of the other financial institutions on national legal orders is key and it has been already assessed by the literature which has studied the role of the IMF in single countries or regions.\(^{49}\) The case of the role of the IMF (and in particular of conditionality) within the economic crisis in Europe, however, is quite unique for different reasons.

Firstly, the influence of the international financial institutions came together with the influence of the EU legal order on the national member states. The intersection between international and European constraints over the Member States has, on one side, created some uncertainty about the legal nature of austerity measures, and on the other has strengthened the constitutional impact at the national level of the euro-crisis related measures.

Secondly, the crisis erupted in a context characterized by a high level of interdependence among national states and this circumstance affected also the separation of powers in the domestic domain. In this context we witnessed the executive power in action in order to cope with the unexpected effects of the crisis and in order to comply with the conditions posed by the Troika; we have seen the judiciary stepping into the sphere of the political decision making, in order to sanction constitutional rights violations, being however aware of the constraints posed by the European context; last but not least, we have seen national parliaments been marginalized and called into question only to ratify decisions already taken by the executive power and international authorities.

In recipient countries, in particular, national parliaments remained in the penumbra of the decision-making process on financial programs and on conditionality. Negotiations of conditions are undertaken by governments, with parliaments confined to a role of the ratification of the decision taken in other fora, without the chance to assure democratic accountability control on their respective governments.

Certainly, according to the domestic rules of procedures, national parliaments are not prevented from exercising their legislative powers when called to adopt the national measures necessary to implement the conditions established in the MoUs

---

\(^{49}\)For an economic analysis of the role of the IMF and of its policies see Stiglitz J (2002) Globalization and its Discontents. W.W. Norton & Company. See also Dreher A (2009) IMF Conditionality: Theory and Evidence. Public Choice, 141, no. 1/2.
and in bailout programmes. However, the power of a national parliament to refuse to implement the conditions signed by its government remains only written on paper. On the one hand, the conditions of assistance have been already decided by the Troika and the executives: national parliaments have just to accept the deal or maybe ‘draw some broad red lines of accepted policies rather than making concrete decisions’. On the other hand, national parliaments are forced to accept the conditions settled in bailout programme, since they are under a sword of Damocles with respect to the possibility of losing economic assistance.

As Somma sharply argues: “the way of restructuring sovereign debt with assistance of the International Monetary Fund does not presume a formal instauration of the state of exception, nevertheless the latter may describe the position of parliaments towards governments involved in the implementation of the related structural adjustments. If all this does not directly lead to non-democracy, then it witnesses at least a big step towards it, which we may define in terms of post-democracy: a situation where democratic rules are formally in force, but also progressively limited in their effectiveness by governmental practices violating those rules. This is the main outcome of the technical governments who are called to follow the instructions coming from the International Monetary Fund, in a way that politics is reduced to economics”.

In this scenario the role of the judiciary is key; indeed supreme courts acted in order to restore this unbalance of powers: “the extremely serious economic/financial situation and the need for measures that are adopted to deal with it to be effective cannot serve as grounds for dispensing the legislator from being subject to the fundamental rights and key structural principles of the State based on the rule of law”. The Portuguese Constitutional Court in declaring the unconstitutionality of several provisions affecting labor law and pensions, (Acordao no. 602/2013, no. 862/2013, no. 413/2014 and no. 575/2014) “seems to have urged the legislator to better exercise the competences and powers it seems to have given up in favor of international and European constraints”. The Court seems to properly interpret the role of the judiciary when the allocation of financial resources is at stake, as “a ‘policy partner’ in ongoing bargaining about how a state should use its scarce resources while under financial stress”.

---

50 Ioannidis M (2016) Europe’s new transformations: how the EU Economic Constitution changed during the Eurozone Crisis. Common Market Law Review 53:43.
51 Somma A (2014) Legal Change and Sovereign Debt Crisis. The Clash Between Capitalism and Democracy in the Western Legal Tradition, Paulus C G (ed.), A Debt Restructuring Mechanism for Sovereigns. C.H. Beck, Hart, Nomos, p 177.
52 Kilpatrick C (2015) Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry. 43 EUI Working Paper Law p 12.
53 Cisotta C, Gallo D (2014) The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal, Kilpatrick C, de Witte B (eds) Social Rights in Times of Crisis in the Eurozone: the Role of Fundamental Rights’ Challenges. European University Institute LAW Working Paper 2014/05/93.
54 Lane Scheppel K (2004) A Realpolitik Defense of Social Rights. Princeton Law and Public Affairs, Working Paper Series, Working Paper No. 05-004:14.
Some scholars have argued against this narrative of the role of courts in time of crisis: as Ribeiro\textsuperscript{55} affirmed, the Constitutional Court of Portugal acted wrongly, by making decisions on public issues which had been decided through democratically elected parties engaged in the political process. Moreover, Ribeiro stressed that the Court did a “disservice”, failing to exercise self-restraint by punishing the government when it made tough decisions. This kind of “juristocracy” according this narrative has been even exacerbated given that at the global level, the autonomy and accountability of governments is becoming blurred, and it is this context which is encouraging courts to encroach into politics.\textsuperscript{56}

While dissenting on this narrative of the separation of powers during the crisis, we agree—paradoxically, with Ribeiro’s latest conclusions: since the national executive power is under pressure in the supranational arena, the role of national courts become even more fundamental. Courts, indeed, can “nudge policy in the direction of greater constitutional accountability even though they cannot dictate the end point of that policy”.\textsuperscript{57} In particular, “when a court says that a state must have some plan to deal with the economically desperate, the needs of the poor are brought onto the political agenda and have to be a feature of the resulting bargain”.\textsuperscript{58}

Within this understanding, “constitutional court judgments can become a new resource for governments in dealing with lenders to argue for renegotiations of terms in order to maintain constitutionality”.\textsuperscript{59} and, ultimately, in order to defend the most vulnerable groups of the population.

### 2.3 The “Autarchy” of National Supreme Courts

A third significant dimension of the economic crisis has occurred within the “vertical” relationship between national legal orders and the EU legal framework.

This argument should be properly assessed in the light of the pluralistic and multi-level nature of the EU itself. The economic crisis has been, in other words, a new field of confrontation between different competing sources of power. The interdependency of Member States’ economies, societies, and institutions has emerged as an incontrovertible fact of the EU space: as Christian Joerges has observed, European societies now sense that “they are not or are no longer in a position to ensure responses to their concerns autonomously, but instead depend on transnational cooperation”.\textsuperscript{60}

---

\textsuperscript{55}Ribeiro G A (2013) Judicial Activism Against Austerity in Portugal, Int’l J. Const. L. Blog. Dec. 3, 2013.

\textsuperscript{56}Ibidem.

\textsuperscript{57}Lane Scheppele K (2004) A Realpolitik Defense of Social Rights. Princeton Law and Public Affairs, Working Paper Series, Working Paper No. 05-004:14.

\textsuperscript{58}Ibidem.

\textsuperscript{59}Kilpatrick C (2015) Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry. 43 EUI Working Paper Law p 20.

\textsuperscript{60}Joerges C, Glinski C (eds) (2014) The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance. Hart Publishing, p 32.
What makes the economic crisis analysis interesting in a multilevel perspective is that the interaction between national and supranational orders happened not in ordinary circumstances, as it usually have occurred, but in context of crisis, which took the shape, in certain member states, of a constitutional emergency. The EU legal framework was itself unprepared to deal with the risk of default of one of its member states, and it lacked effective legal tools to govern the economic crisis. This legal uncertainty was particularly determined by the original sin of the definition of competences in the field of economic and monetary policies within the Maastricht Treaty.61

In this scenario, which caught the EU legal framework completely unprepared to tackle the risk of default of one of its member states, the European response to the crisis has been a substantial use of international law when establishing economic mechanisms in order to sustain the economies of the Member States in difficulties, and, as it is well known, these decisions have been made even outside of the framework of the treaties.

Even the legal nature of most significant sources of austerity measures, the Memorandum of Understanding is debatable. Some scholars have argued that they constitute “simplified agreements”, in the sense of Article V statute IMF, with no binding value nor restricting national sovereignty.62 According to this reasoning, they are just political programmes, containing programmatic provisions.

In contrast, others recognize MoUs as international law treaties having binding force. This interpretation is based on International Court of Justice (ICJ) case law, which does not exclude an agreement not having the traditional form of a treaty from being considered as an international law treaty.63 The Constitutional Court of Portugal, seems to agree with the latter view, having underlined the binding effect of MoUs in its Acórdão n. 187/2013. Conversely, the Greek Council of State denied the categorization of international treaty to MoUs, designating them instead as political programmes, “setting targets to be achieved and policies to be implemented in due time”.64 Finally, still other scholars consider MoUs as sui generis acts, not being formally international treaties but having, however, their binding effects.

The unresolved issue of the nature of MoUs also impacts on their status within EU law, and, in particular, on the question of whether or not they represent an

61 See Fabbrini F (2016) Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges. Oxford University Press.
62 See Marketou A I, Dekastros M (2014) Constitutional Change through Euro Crisis Law: A Multi-Level Legal Analysis—Greece, Department of Law, European University Institute, p 101.
63 Qatar v Bahrain (1994) ICJ Reports, quoted by Fischer-Lescano A (2014) Human Rights in Times of Austerity Policy. The EU institutions and the conclusion of Memoranda of Understanding. Legal opinion commissioned by the Chamber of Labour, Vienna, p 33.
64 Contiades X, Tassopoulos IA (2013) The Impact of the Financial Crisis on the Greek Constitution. X. Contiades X (ed) Constitutions in the Global Financial Crisis: A Comparative Analysis. Ashgate, p 203.
65 Fischer-Lescano A (2014) Human Rights in Times of Austerity Policy. The EU institutions and the conclusion of Memoranda of Understanding. Legal opinion commissioned by the Chamber of Labour, Vienna, p 34.
implementation on EU law, and therefore if they are justiciable in the light of the EUCFR. According to ECJ case law, MoUs do not constitute an implementation of EU law.

Constitutional Courts had to move in this uncertain and new terrain. The response to this ambiguity of the legal framework of austerity measures, has led apex courts to develop, in some cases, a sort of “autarchy” with respect to the EU legal system. Indeed, it had been argued that many courts of the so called “debtor countries” exercised a kind of autarchism, “played by the removal/repression of the interrelation of the EU law and national constitutional law in the adjudication on recent austerity measures”.66

According to this view, “the hermeneutics of national constitutionalism are “protected” from any impact from EU Law. Such practice could be classified as a removal since it aims at avoiding that different competing interpretations on the same matters may find their space in the multilevel/plural judicial architecture and need to be reconciled”.67 This is quite clear looking at the legal reasoning deployed by courts: the unconstitutionality of austerity measures has been often grounded on the violation of well-established constitutional principles, which are interpreted without any hermeneutical reference to the EU law, common both to the national and to the European legal frameworks (equality, proportionality, legitimate expectation), and not on the violation of specific fundamental rights (mainly social rights). As it has been argued, this strategy is part of an overall tendency to “remove the Constitution from possible constraints of international or EU obligations and an autarchic construction of legal arguments”.68

This kind of insulation—which can be find, implicitly or explicitly in different national case law dealing with the crisis—appears quite problematic, especially if it is read in light of the current moment of the EU integration: a context characterized by a growing narrative challenging the EU authority, often seen as a constraint over the expression of national sovereignty and identity. These tensions, which to a certain extent can be considered inherent in the nature of the multitier, pluralistic and composite system, become more evident in times of emergency, often characterized by the rise of constitutional dissent and conflict between local, national and supranational actors.

66Maduro M P, Frada A, Pierdominici L (2017) A Crisis Between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context. E-pública, vol. 4, n.1:31.
67Idem.
68Ibidem.
3 Conclusions

An economic emergency within the EU legal framework represents a sui-generis\textsuperscript{69} case: while within the constitutional state, emergency is often tackled by strengthening the executive power, at the EU level we have witnessed the flourishing of different institutions with the specific task of governing the crisis. Economic emergencies have been addressed with a sort of legal improvisation that has led to the circumvention of EU law. The legitimacy of crisis related measures is still controversial and debated. In such a scenario dominated by legal uncertainty and by the "elusiveness and obscurity" of the state of emergency, “due to the dispersal of the decisions on emergency measures”\textsuperscript{70} Courts acquired a pivotal, even though not univocal role. Paradoxically, it is the nature of the EU response to the Eurozone crisis and the lack of emergency provisions within the EU legal framework that have triggered the judicial intervention in highly controversial issues.

In comparing the case law of national supreme courts, we have noticed a common attitude: all of them—with their specific features—engaged in the sensitive and double-sided task of accommodating on one side the protection of core constitutional values and individuals’ fundamental rights, and on the other side the contingent necessities caused by the economic crisis and the public interest of the State.

At the national level, even if the different courts showed diverse attitudes, different degrees of deference towards the national legislative branch and the use of different arguments and standards, they acted with a great awareness of the impact of their decisions in times of economic crisis with regard to the social rights protection and to the separation of powers.

In times of normalcy, probably national courts’ approach would have been defined as case of judicial activism or juristocracy, i.e. the interference of the judiciary within the democratic and legitimate choices of other institutional actors within the State. But in times of crisis, as we have already pointed out, juristocracy charges have to take into account that the democratic process is so to speak challenged by the influence of the international actors, and by the use of emergency procedures, usually expanding the executive power and shortcutting parliamentary prerogatives. In such a scenario, the role of the judiciary has to be reconsidered: “Constitutional courts need not be seen as obstacles to democratic decision-making; rather, constitutional courts may emerge under this analysis as the very institutions that allow democratically elected politicians to support the needs of their constituents at the most difficult moments. More generally, constitutional theorists should also rethink the role of courts in constitutional democracies. Before immediately concluding that courts interfere with democratic processes, one should first examine how much self-determination fragile

\textsuperscript{69}See in this volume Bertolini E Financial Crisis as a New Genus of Constitutional Emergency?.

\textsuperscript{70}See in this volume Kuo M S From Institutional Sovereignty to Constitutional Mindset: Rethinking the Domestication of the State of Exception in the Age of Normalization.
governments actually have. In the new world financial order, courts—and the constitutional vision they bring to tough problems of poverty and economic restructuring—may be the only institutions that can balance market fundamentalism with a concern for democracy, constitutionalism and human rights”.71

References

Akrivopoulou CM (2013) Facing l’etat d’exception: the Greek crisis jurisprudence. Int J Const L
Bertolini E. Financial Crisis as a New Genus of Constitutional Emergency? in this volume
Brancati B (2015) Decidere sulla crisi: le Corti e l’allocazione delle risorse in tempi di “austerità”
n. 16 Federalismi.it. www.federalismi.it
Böckenförde EW (2010) Kennt die europäische Not kein Gebot? Neue Züricher Zeitung
Canotilho M, Violante T, Lanceiro R (2015) Austerity measures under judicial scrutiny: the
Portuguese constitutional case-law. Eur Const Law Rev 11
Cisotta C, Gallo D (2014) The Portuguese constitutional court case law on austerity measures.
Reappraisal A, Kilpatrick C, de Witte B (eds) Social rights in times of crisis in the eurozone: the
role of fundamental rights’ challenges. European University Institute LAW Working Paper 05
2014
Contiades X, Tassopoulos IA (2013) The impact of the financial crisis on the Greek constitution.
Contiades X (ed) Constitutions in the global financial crisis: a comparative analysis. Ashgate
Dawson M (2015) The legal and political accountability structure of post-crisis EU economic
governance. JMCS 53:5
De Witte B (2015) Euro crisis responses and the EU legal order: increased institutional variation or
constitutional mutation?. Eur Const Law Rev 11(3)
Dreher A (2009) IMF conditionality: theory and evidence. public choice, 141(1/2)
Fabbrini F (2016) Economic governance in Europe: comparative paradoxes and constitutional
challenges. Oxford University Press
Fasone C (2014) Constitutional courts facing the euro crisis: Italy, Portugal and Spain in a
comparative perspective. EUI MWP 25 2014 Working Paper
Fischer-Lescano A (2014) Human Rights in Times of Austerity Policy. The EU institutions and
the conclusion of memoranda of understanding. Legal opinion commissioned by the chamber of
labour, Vienna
Hirschl R (2007) Towards Juristocracy: the origins and consequences of the new constitutionalism.
Harvard University Press
Ioannidis M (2016) Europe’s new transformations: how the EU economic constitution changed
during the eurozone crisis. Common Mark Law Rev 53
Joerges C (2014) Europe’s economic constitution in crisis and the emergence of a new constitutional
constellation. Ger Law J 15(5)
Joerges C, Glinski C (eds) (2014) The european crisis and the transformation of transnational
governance: authoritarian managerialism versus democratic governance. Hart Publishing
Kilpatrick C (2015a) Are the bailout measures immune to EU social challenge because they are not
EU law? Eur Const Law Rev 10:03
Kilpatrick C (2015b) Constitutions, social rights and sovereign debt states in Europe: a challenging
new area of constitutional inquiry. 43 EUI Working Paper Law
King J (2012) judging social rights. CUP

71Lane Scheppelle K (2004) A Realpolitik Defense of Social Rights. Princeton Law and Public
Affairs, Working Paper Series, Working Paper No. 05-004:40.
Judging in Times of Economic Crisis: The Case Law …

Kuo MS (2019) From institutional sovereignty to constitutional mindset: rethinking the domestication of the state of exception in the age of normalization, in this volume

Lütz S, Kranke M (2014) The European rescue of the Washington Consensus? EU and IMF lending to Central and Eastern European countries. Rev Int Polit Econ 21(2):310–338

Maduro MP, Frada A, Pierdominici L (2017) A crisis between crises: placing the portuguese constitutional jurisprudence of crisis in context. E-pública 4(1)

Marketou A (2017) Greece: constitutional deconstruction and the loss of national sovereignty. Beukers T, de Witte B, Kilpatrick C (eds) Constitutional change through Euro-crisis law, CUP

Marketou AI, Dekastros M (2014) Constitutional change through euro crisis law: a multi-level legal analysis—Greece, department of law. European University Institute

Martínico G (2014) EU crisis and constitutional mutations: a review article. Revista de Estudios Políticos (nueva época) 165:247–280

Menendez A (2014) Editorial: an European union in constitutional mutation?. Eur Law J 20(2)

Nogueira De Brito M (2014) Putting social rights in brackets? The portuguese experience with welfare rights challenges in times of crisis. Kilpatrick C, de Witte B (eds) Social rights in times of crisis in the eurozone: the role of fundamental rights’ challenges. EUI WP 05 2014

Nolan A (ed) (2014) Economic and social rights after the global financial crisis. CUP

Psychogiopoulou E (2014) Welfare rights in crisis in Greece: the role of fundamental rights challenges. In: Kilpatrick C, De Witte B (eds) Social rights in times of crisis in the eurozone: the role of fundamental rights’ challenges (2014). EUI WP 05 2014

Rasnača Z, Latvia, Report in www.eurocrisislaw.eui.eu

Ribeiro GA (2013) Judicial activism against austerity in Portugal. Int'l J. Const. L. Blog. Dec. 3, 2013.

Scheppel KL (2004) A realpolitik defense of social rights. princeton law and public affairs, Working Paper Series, Working Paper No. 05-004

Somma A (2014) Legal change and sovereign debt crisis. the clash between capitalism and democracy in the western legal tradition. In: Paulus CG (ed) A debt restructuring mechanism for sovereigns. C. H. Beck, Hart, Nomos

Stiglitz J (2002) Globalization and its discontents. Norton & Company, W.W

Tassopoulos I, Political emergencies as challenges to the impartiality of public law. In this volume

Tomkin JJ (2013) Contradiction, circumvention, and conceptual gymnastic: the impact of the adoption of the ESM treaty on the state of European Democracy. Ger Law J 14

Tuori K, Tuori K (2014) The eurozone crisis: a constitutional analysis. CUP

Antonia Baraggia is Assistant Professor of Comparative Law at the University of Milan, Department of National and Supranational Public Law. She is Principal Investigator of the project CONFEDERAL on fiscal federalism and social rights, awarded by the Cariplo Fundation. She holds a Ph.d. in Public Law from University of Turin. In 2019 she has been Visiting Fellow at the Max Planck Institute for the Study of Religious and Ethnic Diversity in Goettingen (Germany). She serves as Chair of the Executive Board of the Younger Comparativists Committee (YCC), American Society of Comparative Law. Her research interests include the role of courts, conditionality in the EU, economic and financial crisis, socio-economic rights and fiscal federalism considered in a comparative perspective.