Financial Crisis as a New *Genus* of Constitutional Emergency?

Elisa Bertolini

**Abstract** The focus of the chapter is the feasibility of the construction of the economic crisis that struck Europe in the last decade as a sort of new *genus* of constitutional emergency. Four main points have to be considered: first, the constitutional response to the economic emergency through the entrenchment of new emergency provisions (or by using already existing provisions) and their legitimacy; second, once the emergency concluded, the concrete possibility to restore, partially or completely, the *status ante*, in particular with respect to rights protection and, third, if this is not the case, how constitutionalism can react to the economic emergency; forth the theoretical possibility to equate economic crisis to the more traditional emergency situations and, if not, to face a sort of new *genus* of emergency with all its implications. The issue will be confronted at the EU and member states level.

I shall ask the Congress for the one remaining instrument to meet the crisis, broad executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.

Franklin Delano Roosevelt, *First Inaugural Address*, 4th March 1933.

1 Introduction

The recent financial and economic crisis, which affected Europe since 2010, put under a considerable strain the constitutional order of both the EU and the member states.

The crisis had turn to be two-faced, because it has affected not just the economic and financial spheres but also the constitutional order of the Eurozone. It is possible to argue that the constitutional crisis was not triggered by the debt crisis itself but simply brought to light. It is undoubted that the recent years are characterised by a
deep weakening of political institutions and a progressive detachment and distrust from the civil society towards the traditional political establishment.

The focus of this chapter is the feasibility of the construction of the present day economic crisis as a sort of new genus of constitutional emergency. Therefore, the claim is not that any economic crisis has to be framed as an emergency, but certain crisis Surely can be.

In particular, the analysis will focus on four main points:

1. the constitutional response to the economic emergency through the entrenchment of new emergency provisions (or by using already existing provisions) and their legitimacy (para 4.1–4.2);
2. once the emergency concluded, the concrete possibility to restore, partially or completely, the status ante, in particular with respect to rights protection (para 4.3);
3. if not, how constitutionalism can react to the economic emergency (para 4.4);
4. finally, the theoretical possibility to equate economic crisis to the more traditional emergency situations and, if not, to face a sort of new genus of emergency with all its implications (para 5).

From a methodological standpoint, following a normative approach, the issue will be confronted at two different layers of territorial governance, EU—that in certain cases has opted for an extra-EU intervention opening at the IMF and therefore at a third level (international)—and member states. Furthermore, it is not possible to examine the European level without focusing on its interaction with the member state counterparts.

However, the chapter examines the anti-crisis measures and instruments enacted at EU and international level as far as they are relevant to the analysis, namely from a more methodological standpoint in terms of emergency, focusing on the legitimacy of their adoption procedure, on the accountability for the measures enacted, on the fallout in terms of protection of rights and on the monitoring system.

The same approach will guide the analysis at the national level, where the primary focus is on the constitutional source and then on their fallout.

Thus, the chapter will be structured into three main parts: the first two parts are more descriptive—the EU level and the national level—whereas the third will be more constructive, trying to outline the critical issues emerging from the previous parts.

2 Critical Issues of the New EU Economic Governance

The EU was unprepared to face an economic crisis of such a proportion. The institutions have proved to be unfit to face effectively the economic emergency as well
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as the structure of the economic governance, founded on the Maastricht principles and their asymmetry. ¹

The crisis posed two main challenges: the response to it and the rethinking (rectius, reform) of the economic governance in a preventative perspective.

The situation has required a coordinated continental approach consisting of a series of measures, some based on the Treaties provisions, while others consisting of rescue packages and the establishment of new financial stability mechanisms—the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM). ²

The TFEU contains a certain number of provisions that have been the basis of the response to the crisis—such as the emergency provision at Article 122(2), the prohibition of central-bank financing at Article 123 TFEU, the no-bail out clause at Article 125(1) TFEU or the provisions on mutual surveillance procedure at Article 121 TFEU and excessive deficit procedure at Article 126 TFEU (Tuori 2012)—but it failed at envisaging the possibility of a sovereign debt crisis and insolvency not limited to a single member state but spreading in the whole Eurozone (Calliess 2011).

The rescue packages have an immediate goal, namely to provide assistance to the most hit countries and prevent contagion, while the reform of the economic governance should fill the gap of the Maastricht architecture.

The distinguishing feature of the crisis management has been the resort to inter-governmental agreements—outside the EU legal framework—some having a private law character (Greece rescue packages and the EFSF agreement) while others under public international law (ESM and TSCG Treaties).

One of the main differences of these mechanisms—which all have different legal form—is related to the legal status acquired by the states taking part to them: creditors in the Greek aid package of May 2010, guarantors in the EFSF, shareholders in the ESM, whereas in the EFSM their liability depends on their contributions to the EU budget.

However, the most serious concern is not connected to the states’ legal status, but involves the recipient states, namely the strict conditionality of financial assistance (mentioned also at Article 136(3) TFEU). Moreover, the MoUs ³ signed by these states, besides imposing cuts in public expenditures, determine their allocations, foster austerity, and market-liberally oriented structural reforms.

Furthermore, Directive 2011/85 marked new constraints to national fiscal sovereignty, requiring that ‘member states shall have in place numerical fiscal rules on the budget balance that implement in the national budgetary processes their

¹Where the principle of national fiscal liability means the principle of member state fiscal sovereignty.

²The establishment of the ESM was preceded by a Treaty amendment through the simplified procedure under Article 48(6) TEU that added to Article 136 TFEU the new para 3.

³The memoranda of understanding (MoUs) are agreements pertaining to states in receipt of so-called bailout packages with the Commission, European Central Bank and International Monetary Fund collectively acting as enforcers and compliance monitors. As states exit financial programmes MoUs will become defunct.
medium-term budgetary objective’ as well as that ‘such rules shall cover the general
government as a whole and be of binding, preferably constitutional, nature’.

Another key reform was the TSCG that imposed on the signatory states the duty
to implement budget rules into national legislation by January 2014.

3 Crisis-Related Measures as Emergency Provisions

Regardless to whether constitutions provide for emergency sections, they usually
provide for emergency instruments, such as the possibility for the executive power
to issue decrees with a faster adoption procedure with respect to the ordinary one.

Can this pattern be applied to an economic emergency? Can all the crisis-related
measures, adopted both at supranational and national level, be described as pure
and ‘classical’ emergency provisions? Are they transitory, as emergency provisions
should be? How are they adopted and through which instruments? In addition, to
what extent do they affect and infringe fundamental rights?

The possibility to consider an economic crisis similar to a constitutional emer-
geney is not new. Schmitt already examined the issue, positively answering the
question, equating economical and financial crises to armed insurrections thereby
for justifying executive recourse to emergency power. Moreover, if the defining trait
of an emergency is the needed for an immediate action, there is no doubt that the
sovereign debt crisis can be qualified as such. However, this is just a first step, since
what becomes relevant is the duration of the emergency and the restoration of the
status ante. Schmitt himself did not envisaged the state of exception as a permanent
condition; his justification of a ‘commissarial dictatorship’ was meant to overcome
the critical issue marking the departure from the rule of law and to regain the normal
constitutional order.

However, in my view, the core point is not whether an economic crisis can be
considered an emergency, but whether the crisis-related measures are compatible
with the usual traits of traditional emergency provisions. Did the prompt action
required followed a legitimate procedure, envisaged for emergencies, and how much
temporary is its effect? Furthermore, if the equation is not possible, what are we
facing?

We should try to examine the issue at both European and internal level.

3.1 Accountability Concerns at EU Level

As noted above, the EU provided for insufficient instruments to face a huge economic
crisis. Therefore, the need for emergency measures. However, the management of
the crisis at the EU level has arisen many constitutional concerns, mainly in terms of
legitimacy and accountability of the procedures providing for the new instruments,
mechanisms, and effects in the long term on the rights protection.
Considering the first point, concerns derive from the recourse to intergovernmental agreements allowing a sort of sidestepping of the procedure to amend the Treaties and to adopt secondary legislation.

These provisions grant the involvement of all EU institutions, the parliament in particular (considerably strengthened by the Treaty of Lisbon, which enshrined in Title III TEU the principles of democracy and transparency), and member states, whereas the intergovernmental agreement involves just the contracting parties, namely the executives and not the parliaments, of the contracting states.

The efforts to engage more actively the European and national parliaments have been irrelevant. With respect to the EU parliament, in particular, its role has been very peripheral, merely consisting in the right to receive information. The provisions in the six-pack and two-pack legislation requiring an economic dialogue between institutions and in case also with member states, seem rather weak and not fitted to plug the democratic and accountability gap. Still it is quite dubious that modest involvement of the EU parliament may be related to the fact that part of the new economic governance bounds not all the member states, which are actually represented in the parliament. However, it cannot be justified to exclude almost completely national parliaments in order to avoid that the unconcerned may intervene.

Going back to the choice for intergovernmental agreements, the reasons may be traced, for financial stability mechanisms in the lack of taxation power of the Union—leading to the impossibility to concretely maintain a financial stability—and, for the TSCG, to overcome the UK (and the Czech) veto that cut the way within in Union. In other words, the international level has proved to be more flexible then the EU framework for the purposes of the Union itself.

Moreover, since the intergovernmental agreements bind just the contracting parties, an EU at different speed is perpetuated, since it is like legitimising the strengthening of the cooperation between some member states (deepening disparities between Eurozone countries and non-Eurozone countries) without relying on the ordinary procedure provided for by the Treaties.

A further concern is related to the institutional side, since the agreements have led to the conferral of new competences to already existing EU institutions—the commission, the court and the ECB—as well as to the establishments of new institutions, thus creating a parallel institutional structure.

What shall we conclude? Is not the prompt action that has to be questioned, but the legitimacy of the chosen procedures. Member states, being confronted with a vacuum in the Treaties provisions on the economic governance, have opted for solutions established partly outside the EU legal order—meaning outside the checks and balances system of the EU institutional architecture—and partly within it. Nevertheless, also in this case, the amendment of the TFUE was carried out through the simplified procedure—which is has been harshly criticised by the BVerfG and the Czech constitutional court. Therefore, there is a serious violation of the democratic principle (amplifying the notorious European democratic deficit) and a basic lack of accountability in the adoption of these countermeasures that are all but temporary. Indeed, it is quite unlikely that, the emergency concluded, there would be a step back, meaning an attempt to frame the new economic governance within a more
accountable legal order where parliaments and courts can play a more concrete role in both the shaping of the provisions and in the monitoring of the new governance. What emerges is the lack of constitutional boundaries for the new economic emergency, deriving from the impossibility to equate this emergency to more traditional emergencies, as well as to the weakness of the controls that can be performed by both parliaments and courts (not only in the rights protection field but also in terms of accountability and infringement of the democratic principle).

This sort of extra ordinem approach has been justified in the name of the state of exception generated by the crisis as the BVerfG has argued in its first preliminary reference to the European Court of Justice (German Law Journal 2014). The preservation of the common currency has become the legal basis for the state of emergency and for the connected measures. Moreover, it has emerged the need to protect these measures from a possible failure if inserted in the ordinary democratic process. Therefore, we return to the problem of accountability. The complete lack of any political debate, both within and outside parliament in Italy (but not just here) that has characterised the entrenchment of the debt brake rule is probably one of the most prominent example of the attitude of the executive power.

Indeed Crum (2013) has outlined what can be defined as the EU trilemma, namely the impossibility to pursue a combination of autonomous nation-states, economic and monetary integration and democratic politics. More precisely, the trilemma lays in the fact that you can actually pursue just two of these targets, but at the expenses of the third. It is a matter of priorities. The present day situation can be considered as giving priority to the EMU and the autonomy of member states at the expenses of democracy. Indeed, it is possible, when looking at the recent reforms in the economic governance of the Eurozone, to identify a sort of authoritarian constitutionalism (Oberndorfer 2015; Streeck 2014).

Moreover, it still has to be proven that this empowerment of the executives can really foster the economic growth. The same concern goes for the austerity policies, upon whose effectiveness economists still debate (De Grauwe 2013; Blanchard et al. 2012).

### 3.2 Accountability Concerns at National Level

Coming to the national level, constitutions may or may not provide for an emergency section, and even for an explicit economic emergency. Some constitutions, as the Portuguese one (Articles 19 ff), mention cases posing a ’serious threat to or disturbance of constitutional democratic order’ and an economic crisis is interpreted as such. Moreover, the same provisions usually provide for the same pattern in the management of the emergency, namely broader power to the government, suspension of the exercise of some rights and freedoms. Furthermore, strict rules govern the declaration of the state of emergency, its grounding, the specification of the rights and freedom that can be suspended, the time extent, the respect of the principle of proportionality.
It is convenient to underline that none of the countries seriously affected by the crisis and having constitutional emergency provisions has resorted to them.

Regardless of the emergency section, any constitution provides for instruments at the disposal of the executive power whenever a peculiar situation of necessity, urgency or emergency occurs. Usually these instruments are decrees adopted by the government and immediately effective.

The main concern is their misuse in situations that lack a proper emergency nature and thus the following sidestepping of ordinary parliamentary procedure.

Italy is a perfect example of misuse of the decree power of the government.

The Italian constitution lacks an emergency section but Article 77 provides for the government adopting the so-called law decree in situations of extreme necessity and urgency (the word emergency is not mentioned). The decree immediately enters into force, and from this moment onwards, the parliament has a 60-day time to transpose it into an ordinary statute law, otherwise it loses all its effects *ab initio*. As a typically emergency instrument, the Italian law decree has a temporary nature and at the same time is scrutinised by parliament that has also to judge on the real existence of the necessity and urgency. If parliament does not convert and the emergency situation still stands, what can the government do? From a constitutional standpoint, re-issuing a new law decree whose text is identical to the one not converted and founded on the same emergency is not legitimate. Leaving aside the abuse of the instrument perpetrated by governments until the sanction of the constitutional court (decision no 360/1996), the question that arises is to what extent such an instrument can successfully handle an economic crisis? The constitution does not say much on law decrees; therefore it has been parliament that has intervened in setting some limits through the law no 400/1988 (in particular Article 15). Other limits have been set by the constitutional court. The court has stated the need for a focus on defined and specific interventions, characterised by immediate financial effect, thus excluding the possibility for more organic and comprehensive reforms that require an ordinary statute law passed by the parliament. The Monti Government (2011–2013) tried a global reform of the territorial organisation of the country, namely through the abolition of the provincial level in order to save more money and foster the economic recovery, and since the situation was believed to be of necessity and urgency, a law decree was issued. It was quashed by the court, because global reforms cannot be performed through an emergency instrument.

Therefore, it is quite unlikely that governments can resort to this kind of emergency instruments in order to manage the crisis. The ordinary legislative procedure remains the sole possible option. However, this leads to further concerns, in particular the extent of the freedom of action of national parliaments and governments (but also of courts, both ordinary and constitutional) in the concrete design of crisis-related measures, since the high level of intertwinement between the national and the EU level.

A key moment has been the implementation in almost all the Eurozone of the TSCG, mainly through constitutional entrenchment.

A common feature of these constitutional amendment processes has been the extreme speed and the absence of a real political debate within the parliament and
the lack of an adequate information of the public opinion. The executive power played
the leading role, surely shielding behind the emergency situation and the *lit-motiv*
that the amendment was requested by the EU and essential to exit the crisis (Luciani
2013a, b; Groppi 2012; Giupponi 2014; Morrone 2014).

Besides the common decision of Eurozone countries to entrench the debt brake
rule, when considering the freedom of action of national parliaments, governments
and courts, we have to mention the peculiar situation of the Eurozone countries that
have entered the MoUs and that, in doing so, are bound to promote a series of market
reforms and cuts to the welfare in order to be granted financial assistance by the
commission, the ECB and the IMF. Even though these reforms have been carried
out not through emergency instruments but ordinary statute laws, serious concerns
persist, since parliaments were basically stripped of the freedom of discussion and
proposal of amendments and thus reduced to institutions merely ratifying decisions
made elsewhere, not under the scrutiny of any elected body and that have to be abode
also by national governments.

Another key point is whether it should be considered to be within the constitutional
framework an amendment process performed under such pressure from forces clearly
set outside the democratic circuit, even though these amendments followed the lawful
procedure. It is not uncommon the case of unconstitutional constitutional amendment
(Roznai 2017).

It seems that parliaments and governments enjoy a narrow freedom of action when
implementing crisis-related measures. Does the same go for courts? Depending on the
constitutional justice model, statute laws and international treaties can be reviewed,
abstractly or concretely, preventatively or repressively. Therefore, a possible active
stance of courts may counterbalance the narrow action of national parliaments and
governments. The Portuguese and the Italian constitutional courts can provide good
eamples.

When considering the former, the first striking element is that the decisions dealing
with the austerity laws have been issued within an abstract review.¹ Moreover, the
court has raised no argument related to EU law.

The attitude of the Portuguese court has been quite ambivalent, shifting from cases
of deference toward the legislature to striking down provisions of the budgetary laws.
The shift has been marked starting from 2011, when the rescue package was adopted.
The implementation of the rescue programme led to a dramatic cut to a wide range
of welfare entitlements such as rights to housing, health, education, food, and social
assistance. Such changes include reductions in financial benefits or benefits in kind,
the exclusion of categories of persons from certain social benefits as well as the state’s
general withdrawal from its activities relating to the accomplishment of constitutional
entrenched social rights.

From this moment onwards, we witness a clear change in the interpretation of
the parameter represented by social rights. Indeed, if in the decision no 396/2011 a

¹The abstract proceeding can only be initiated by the president of the Republic, the prime minister,
the ombudsman, the general prosecutor and a certain number of members of parliament (Articles
278 and 281).
limitation of these rights was justified from the standpoint of the implementation of the Growth and Stability Pact, the same limitation was not justifiable anymore once the new budgetary laws started to be implemented. This was related in particular to the 2012 and 2013 budgetary laws enabling the government to temporarily implement pensions and wages cuts in the public sector. Moreover, the court struck down the public pensions system’s reform (decision no 862/2013) for violation of the principle of protection of legitimate expectations.

The court grounded its new activist approach on the violation of general constitutional principles, such as equality (between public and private workers), proportionality and protection of legitimate expectations. This is important because this activist stance was not based on the wide catalogue of social rights, despite the wideness of the constitutional catalogue of social rights (Articles 63–72). It is indeed convenient to point neither out that this constitutional commitment to social rights has not given rise neither to a culture of judicial enforcement of social rights nor to a reduction of socioeconomic inequality (Nogueira de Brito 2014), maybe because of the ‘clientelist’ model of social policy-making, with a significant diversion of social benefits from the most needed (Vasconcelos Ferreira 2005).

Surely, in shaping the approach of the court has been fundamental the lack of the balanced budget rule in the constitution, allowing the court to perform a balance test between social rights and fiscal and financial sustainability in favour of the first.

What emerges from the case law is that the court does not question the necessity of austerity programmes, but only their fair application, namely in the burden share between public and private workers and pensioners.

However, this activist stance of the court was subject to some criticism. The first critical point involves the application of the equality principle, which has been deemed to be too flexible, in order to achieve pre-determined objectives, as if the court were a legislator (Coelho and De Sousa 2013). The second concerns the intrusion in an allegedly exclusive competence of the national legislator, since the legislator should be granted a particularly wide margin of discretion in economic policy choices (Iannella 2016). A third major concern may be related to whether should be given a margin of intervention to constitutional judges on budget laws that implement international obligations. Should they be allowed to strike down, through declarations on unconstitutionality, measures agreed at international level by the Portuguese government and the troika?

The Italian constitutional court has shown a less active stance. Due to the design of the constitutional review model, the Italian court cannot review the constitutionality EU and international Euro-crisis law, as well it is not possible an ex ante review of international agreements.

The court had to face a massive challenged both by regions and by ordinary courts and what emerged is a general attitude based on the view that the legislative choices following the economic crisis, despite their severe cuts of public expenses, still seem to fit a welfare model compatible with the one designed by the Italian constitution.

However, the court, relying on the fundamental decision no 349 of 1985, stressed that restrictive measures due to economic necessity are legitimate unless they are able to prevent differences in treatment among categories of workers.
When coming to the relationship between social rights and available resources, the court recalls another of its fundamental decisions (decision no 455/1990), stating the importance to perform the bilanciamento (balancing test), preserving legislative discretion on the distribution of public resources (Romeo 2013).

The court has also dealt with the type of legal source apt to introduce crisis-related measures. Since they are mainly adopted by the government, and therefore through law decrees, the court has stated the need for a focus on defined and specific interventions, characterised by immediate financial effect, thus excluding the possibility for more organic and comprehensive reforms that require an ordinary statute law passed by parliament.

Another important aspect that the court had to examine is how to conceal the economic crisis laws with the financial autonomy of the regions. The latter, despite being legitimate from a constitutional perspective, should be characterised by a transitory character and therefore, not being permanent (decision no 193/2012).

As the Portuguese court, the Italian one too grounds its reasoning on the core constitutional principles of proportionality and reasonableness. Moreover, another core foundation of the court’s decisions is the need for a systematic interpretation of the constitution.

The court approach is a case-by-case one, taking into account its specific features and effects. The main reason is that it cannot be said in advance that the principles of efficiency and economy have to automatically prevail over the others.

Again, even at a national level, it is possible to detect the same concerns with respect to the lack of accountability and the infringement of the democratic and proportionality principles that characterise the new European economic governance.

### 3.3 Rights Infringements

The lack of accountability and the infringement of the democratic principle do not exhaust the concerns, where the most remarkable is the one related to the infringements of fundamental rights due to the progressive dismantling of the welfare rights (See in this volume Baraggia, Economic Crisis and Fundamental Rights Protection: The Case Law on Austerity Measures in Comparative Perspective).

The erosion of the welfare national model is not anew. In the EU, the subordination of the social to the economic constitution was never in doubt. In social policy, division of tasks and competences between the community and the member states followed the guidelines adopted in economic policy, meaning states’ sovereignty. However, the Maastricht economic architecture introduced further constraints to states’ sovereignty due to the strict intertwinemment of social policy with fiscal policy. Moreover, the economic crisis has introduced serious and further constraints to both, since social spending is the major victim of the austerity programmes, which the recipient states have been forced to accept as a price of assistance. Indeed, if one examines the MoUs as well as the Council decisions ex Article 126 TFEU no reference is found neither to the European social charter nor to the solidarity title of the
EU charter of fundamental rights. It may be surprising, since the former binds the member states and is explicitly invoked at Article 151 TFEU and has been included by the CJEU in the common European constitutional tradition defining fundamental rights as general principles of EU law, while the latter has legal effect under the Treaty of Lisbon. The commission should monitor, when coming to the European Semester, the possible infringements of such rights deriving from the new economic governance. EU institutions and member States, when acting under the European semester, are not out of the scope of the charter. However, if we closely look at the strategy on the charter of 2010, the enforcement mechanism is quite defective, mainly for two reasons. The first one is that this strategy is based on a community method of policy-making that is not used anymore in the economic governance, which, on the contrary, relies on a high complex mechanism of EU and extra-EU legislation. The second is the poorness of the CJEU case law on social rights and this is relevant since the Commission’s engagements toward rights is strictly intertwined to the CJEU case law (based on the proportionality principle).

Nevertheless, the Treaty of Lisbon stresses the EU commitment to social rights. The horizontal clause at Article 9 requires that all EU actions have to take into account ‘the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’. This provision has to be interpreted in the light of an integration between social policies on the one hand and macroeconomic and budgetary policies on the other.

Moreover the Council of Europe, through the European committee of social rights (ECSR), shows a far greater commitment in the protection of social rights. It is therefore possible to argue that, in order to respect the proportionality test, a distinction should be introduced between policies that may breach ECSR minimum standards and policies explicitly contrary to the ideal standards: the former should be prohibited while the latter should require a well-grounded justification (Pye and Parker 2016).

Emergency provisions always lead to possible rights infringement or suspension. Therefore, here the question is whether there is any difference in terms of rights infringement/suspension between traditional emergency provisions and the crisis-related measures adopted within the EU and at national level. A possible answer is that they usually differ with respect to the subjective effect—more general, affecting major segments of the population in case of economic emergency—as well as to the categories of rights affected. Moreover, is the external conditionality itself requiring measures that probably will violate rights or is the way these measures are nationally implementing leading to such violations?

The IMF has indirectly considered the issue by stating that any country has the primary responsibility for selecting, drafting and implementing the policies that will meet the IMF requirements to make the IMF programmes successful.

However, here another problem arises: the extent of the freedom of action that is left to national governments and parliaments when coming to the adoption of the measures. In addition, if the extent of freedom is almost inexistent, who should be held responsible? According to the Greek argument, since Greece relinquished her sovereignty to international institutions, she cannot be held responsible for the
austerity policies linked to the conditionality to get external support. The ILO had claimed, back in 2011, that the Greek government was completely powerless in front of the *troika*. No preventative assessment of the impact of the measures was conducted.

Being the IMF far beyond the reach of international obligations concerning rights, the same cannot be said when coming to the other actors, all EU institutions and therefore bound to fundamental rights obligations under the EU charter (Article 51(1)). Here the key question is represented by the fact that part of the governance of the crisis is handled outside the EU; the ESM is an international organisation created by the then 17 Eurozone countries under a non-EU intergovernmental treaty. Therefore, since neither the EU member states nor the ESM are implementing Union law, none seems to be bound to the EU Charter. Despite this was contested in *Pringle*, the CJEU upheld the mechanism and its being out of the scope of the Charter (Bertolini 2013b).

The result is a paradox, because it seems allowing EU institutions to do outside the EU something that they are defended to do within the EU. The CJEU has not really confronted the issue, preferring to avoid a potentially explosive controversy. However, always in *Pringle*, according to the interpretation of Article 51(1) by AG Kokott, EU institutions are always bound to the Charter; the same conclusion has been reached by the committee of constitutional affair of the parliament.

Therefore, when considering the member state taking part to ESM, where does the responsibility actually lay? Namely, is the ESM responsible or the State participating in the mechanism? Under Article 61 International Law Commission’s (ILC) Draft Articles on the responsibility of international organizations (DARIO) the international organisation cannot ignore other international obligations that the states have all subscribed. Therefore, it is possible to derive a sort of joint responsibility of the ESM and the member states by saying that the mechanism has general obligation to respect fundamental rights and that such obligation is founded on the member states obligations. The same goes for the IMF.

Moreover, what strikes in all this emergency governance is that every actor seems to have forgotten the obligation toward the principle of non-retrogression deriving from the signature of the ICESCR (Article 2). Do we have to consider it as an absolute principle or as a principle that can be curtailed in times of emergency? Moreover, in this second case, how does the present day economic emergency distinguish itself from traditional emergency? Do we have a different degree of retrogression? Furthermore, how long does the retrogression last in the two emergencies?

Any measure carrying suspensions or infringements of rights will lead to a certain degree of retrogression. The core point is how to interpret retrogression: as an instrument preventing any flexible intervention to respond to the economic crisis or as a guiding principle combining anti-crisis measures and protection of rights?

However, the key difference between the two emergencies is that crisis-related measures have a wider range of effects than possible suspension or infringement

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5Case 370/12 Thomas Pringle v Government of Ireland, Ireland and The Attorney General [2012] ECR 2012-00000.
of rights following a traditional emergency. We have short-term, medium-term and long-term effects and besides, it is not always possible to assess the effect in the long-term. Therefore, the guiding principle should be the one of proportionality as the sole viable way to counterbalance retrogressive measures. In all cases of emergency long-term effects have to be expected; however, they differ in nature, since in natural disaster or war, the effects aim at preventing further damages, whereas in economic crisis the aim is at making up for previous damages.

As the CESCR has pointed out, whenever a government takes a retrogressive measure it has to prove: first that all possible alternatives have been examined but were not viable, and second, that the chosen anti-crisis measures are always the less restrictive of rights.

Therefore, what emerges, is not a total ban of non-retrogression, rather, a proper application of this principle, combined with the principle of proportionality and the primacy of rights. However, if in theory the issue of non-retrogression seems sound, it is defective on the side of the enforcement.

If we look at the crisis-related measures implemented in the member states subject to the strict conditionality, it cannot be denied that austerity measures had a retrogressive and in the most cases—Greece—disproportionate impact on social and economic rights. Besides, the real impact of austerity is yet to be properly evaluated in the long run, in both perspectives, positive and negative. Austerity has deepen inequality not just within the Eurozone, but also between regions (as in Spain), thus creating serious discrepancies in the enjoyment of social and economic rights, which is not equal anymore (Garcia Pedrazza 2014). Moreover, the negative effects of austerity measures in terms of rights infringements have boosted the importance of accountability, transparency and non-discrimination. austerity measures are a sort of breach of the relationship that there should be between representation and accountability, as a key democratic value.

Therefore, the question that should be asked is not on the effectiveness of austerity, rather, whether austerity was the sole possible option or whether it was a deliberate ideological choice. Up to now, austerity has been presented as a necessity and it has been prioritized over other choices and alternatives. Others that could increase the amount of available resources were proposed, and there are serious doubts that there is a reasonable justification for the implementation of austerity measures. If this is the case, austerity seems to be a deliberate ideological choice that is strengthening neoliberal economy and weakening the welfare state. If we accept this interpretation, the fact that austerity measures have been adopted without the involvement of the affected groups and that no human rights-based approach to the economic reform has been implemented so far becomes even more critical. Serious assessments of the effects of austerity programmes on social and economic rights in the long-term have not been carried out, it is still impossible to have a clear idea on the viability of the re-establishment of the level of protection of such rights before austerity, and on how long would it take.
3.4 The Role of Courts

The last point is related to how constitutionalism can react to the concerns raised by the crisis-related measures—by both the adoption procedures and the content. Namely, whether in the narrow freedom of action that is left to member states—and in particular to those entered in the MoUs—it is possible to identify instruments or bodies that can uphold the principles of accountability, proportionality, transparency, non-discrimination and supremacy of rights.

Governments have opted for a sort of *extra ordinem* constitutionalism, shielding behind the EU obligations in order to enforce austerity measures or have completely or partly abdicated their sovereignty to the *troika* (the Greek argument mentioned above), while parliaments have been progressively stripped of their traditional power of decision in fiscal and budgetary matters and at the same time cannot even concretely exercise their monitoring power on the executive.

The most viable reaction of constitutionalism seems to be the one centred on constitutional courts performing their traditional role of guardians of the constitution. Besides, another way, by far less effective, could be to strengthen the involvement of national parliaments through the right to be informed, as stated by the BVerG in the series of decisions delivered on the core crisis-related measures adopted at the European level since 2011.6

I shall firstly examine the role that can be played by courts.

Their distinguishing feature of being non-majoritarian institutions of constitutional democracies and their composition and selection procedure are in favour of their character of non-partisanship. Moreover, they enjoy a great authority, which is built upon a sort of Weberian legitimacy (Everson and Joerges 2013).

On this basis, constitutional courts at a national level and the CJEU at EU level can play a key role. However, this solution is not free of concerns at both levels. The first striking one is related to the CJEU and to the fact that has overruled national law in countless cases, but has hardly ever found European legal acts to be at fault. Moreover, the CJEU is known for not being a rights court as constitutional courts within member states are. Therefore, the CJEU would certainly be an unsatisfying guardian.

Moving to the national level, the most relevant concern is connected to the separation of powers and thus to the extent of their intervention in order to uphold the principles of proportionality, accountability, transparency and rights protection.

The new European economic governance has been transposed into national law by the Eurozone member states and the same goes for the compulsory reforms introduced by the states receiving the financial assistance by the *troika*. Regardless of the debated freedom of action of governments and parliaments in this stage, what matters now is that they were implementing international obligations resulting from

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6Griechenland-Hilfe Urteil, BVerG, 2 BvR 987/10, 7 September 2011 (Verfassungsbeschwerde); Sondergremium Urteil, BVerG, 2 BvR 8/11, 28 February 2012 (Organstreitverfahren); BVerG, 2 BvR 4/11, 19 June 2012 (Organstreitverfahren); BVerG, 2 BvR 1390/12, 12 September 2012 (Verfassungsbeschwerde e Organstreitverfahren).
political decisions of utmost importance. The political sphere relays on the competence of the executive power, not of a constitutional court. However, at the same time, a constitutional court may be given the power to review international treaties, but surely has the power to review primary sources implementing them. Therefore, is it concretely viable for a constitutional court to be an effective guardian of the constitution when facing such fundamental political decisions and when a declaration of unconstitutionality may lead the state not to comply with international obligations? The answer here depends on the stance of the single constitutional court. I have previously mentioned the active stance of the Portuguese court that has quashed budget law provisions implementing international obligations contracted by the Portuguese government. Can this be interpreted as a violation of the separation of powers and as an overstepping of the court, going far beyond its scope? Nevertheless, whenever a constitutional court protects the core principles of a given legal system can be really said to perform something beyond its reach? A constitutional court should deliver balanced decisions, combining the protection of fundamental principles with the respect of the separation of powers.

The BVerfG in the series of decisions delivered on the core crisis-related measures adopted at the European level since 2011 has been able to reach a quite a fair balance (Bertolini 2013a). The court has upheld the budgetary power of the Bundestag since it is a democratic essential, protected by the Ewigkeitklausel (eternity clause) of the Grundgesetz (GG) without undermining the new economic architecture that was still a work in progress in that moment. Moreover, the BVerfG was well aware of the need to respect the separation of powers and that the Bundestag enjoys quite a wide power that the judiciary must respect. The main aim of the BVerfG is then to reshape this power of the Bundestag by restoring, as far as it is possible, his traditional central role in financial and budgetary matters. In order to do so, the BVerfG gives the Bundestag rights to be exercised in a proceduralising mode: it must be adequately informed, enabled to deliberate, and prevented from delegating its evaluation (so-called Informationsrechte). This is perfectly in line with the Lisabon Urteil7 and his principle of integration responsibility.

The most relevant outcome is that the BVerfG proves that the fundamental principles of the German legal system have to be protected by the constitutional court, but that very same protection cannot overcome the boundaries deriving from the separation of powers. The court is not an all-powerful guardian; on the contrary, it needs to practise self-restraint. Moreover, when the competence of the court has to stop, it will be relieved by another guardian, the parliament. Therefore, no single guardian but two. However, for parliament to be an effective guardian, he has to be given more monitoring powers in order to still be somehow responsible in budgetary matters.

The construct of the BVerfG is not free of criticism, since it is centred on the German economic philosophy—the EMU as a stability community (Stabilitätsgemeinschaft) (Saitto 2012)—that tends to privilege the democratic rights of German citizens. Moreover, the court’s reasoning boosts the links between economic stability

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7BVerfG, 2 BvE 2/08, 30 June 2009.
and social austerity, regardless to the concerns raised by austerity in the countries subject to the strict conditionality.

The more viable conclusion seems to be that no single guardian is possible and suitable, since none of the proposed solutions is completely free of constitutional concerns. A combination between a balanced review power of constitutional courts and a responsible involvement of parliaments in the decision-making phase at the European level has to be preferred.

Besides, another possible solution seems to be the one to entrust the role of guardian of the constitution to the constitution itself. This option can be performed following two different paths.

The first may be to entrench in the constitution further limits to the constitutional amendment procedure, in order to narrow the possibility that undue, external pressure in a moment of crisis or emergency leads to entrench provisions that can actually put implicitly under jeopardy some core principles of the state.

The second may be to narrow the possible negative fallout of economic emergency-related measures by inserting in the constitution either an emergency section including the economic one or, whenever such section is already provided for, listing the economic one as a further possible case. In doing so, it will be the constitution itself to frame the freedom of action of the government within precise constitutional boundaries. Such a solution, however, should be evaluate on an opportunity base, namely whether it should be recommended to insert to much detailed provisions in the constitution. Moreover, even though such limits are introduced, their concrete operation may still be questionable, because governments can decide not to invoke the economic emergency section and therefore, handle the situation outside this precise constitutional framework, as recently happened.

4 Conclusion

The chapter has outlined the most relevant concerns raised by the complex architecture of intertwined crisis-related measures issued by the combined action of international and European institutions and national governments in order to determine whether it is possible to draw some parallelism between the handling of the economic crisis and a more traditional emergency situation.

The seriousness of the crisis and the risk of contagion across the whole EU have revealed the lacunae of the Maastricht economic governance, the differences in economic philosophy between the member states as well as the weaknesses of the countries that had requested the financial assistance of the troika.

Indeed, what has emerged from the crisis is actually a misalignment from several standpoints: first, the euro is the common currency but government debt is national; second, the European system is neither federal nor national; third, international institutions, such as the IMF, that have flanked the EU, are empowered to make many decisions that impact on well-being but are not systematically accountable towards
the people that actually are affected by these decisions. All the key players were unprepared.

The extraordinary character of the crisis is enough to qualify the economic crisis as an emergency situation, analogous to the ones usually envisaged by constitutions? The answer should be no. The economic crisis has therefore to be considered as a new \textit{genus} of emergency that has put the constitutional order under considerable strain.

It is due to such a strain that the present situation can be considered as a new \textit{genus} of constitutional emergency. To get to such a qualification, is not relevant whether a constitution already provides for an emergency section or lists among the possible emergencies the economic one. On the contrary, it is the verification that a deep economic crisis may lead to constitutional infringements that urges further guarantees.

The fact that none of the countries seriously affected by the crisis invoked the emergency is not a relevant point in favour of my conclusion from a legal standpoint.

The resort to new countermeasures, in particular at European level, since the ones provided for by the Treaties were considered unsuited, has been carried out mainly outside the EU legal order, where accountability and transparency are scarce, and even when the path has been within the EU legal order—a Treaty amendment—the procedure had all the same generated concerns on its legitimacy.

Moreover, the key elements of traditional emergencies are mainly two: a temporary prominent role of the executive power over the legislative and measures that temporary infringe or suspend rights and freedoms. Therefore, temporariness is the core word, since the emergency character of the situation requires a deviation from the constitutional legal order; moreover, since the ultimate aim is the restoration of the constitutional legal order, the deviation cannot be temporary.

It is the requirement of temporariness that is completely lacking in this crisis management both on the side of the prominence of governments over parliaments and on the side of rights protection. The shift in the balance of powers between the two most relevant constitutional bodies and the retrogression with respect to social and economic rights have not properly been assessed in advance and it is not possible to foresee a restoration of the \textit{status ante} in the short-term.

Another peculiarity resulting from this economic emergency is related to the role played by the executive power. Besides its prominence—as in traditional emergency situations—and the dubious restoration of a more balanced relationship with parliament within a short time, what strikes is that actually, in particular in the member states benefitting of the financial assistance, governments freedom of action is very narrow. While they seem all-powerful in the inner front, they are far less powerful when contracting financial support at EU and international level. Therefore, the shift of power in financial and budgetary matters is not just from national parliaments to national governments, but from national governments to international or European institutions. This is anything but temporary. The violation of the democratic principle, of the principles of proportionality, accountability, transparency, non-discrimination and of the protection of rights is far more serious since mechanisms for accountability towards international and EU institutions are scarce and ineffective.
A partial restoration of the traditional central role of parliaments through the right to be informed and to monitor is surely a starting point, something that may be viable in any situation, regardless of emergency situation. Besides, relay just on constitutional courts as guardian of the constitutions is not enough, since this solution seems to neglect the boundaries deriving from the separation of powers that courts are compelled to comply with. The margin of discretion of governments and parliaments in making political decisions cannot, or should not, be reviewed by the courts.

Therefore, the traditional emergency pattern cannot be applied to the present day economic crisis. Surely, this is an emergency but the traditional model does not fit. Since different concerns arise, different constitutional solutions have to be provided for. A new constitutional design—within the EU as well as within the member states—has to be drafted in order to adequately meet the challenges of a globalised economy, mainly based on investments and finance. This new constitutional design should be carried out either through the entrenchment of new provisions—better introducing monitoring and accountability mechanisms and a more suitable system of enforcement of an adequate standard of protection of social and economic rights rather than an ad hoc economic emergency section—or constitutional interpretation.

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