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Constitutional courts and Economic Crisis

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## CONSTITUTIONAL COURTS AND ECONOMIC CRISIS

### TRIBUNAIS CONSTITUCIONAIS E CRISE ECONÓMICA

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**Abstract:** It analyses three case studies: 1) sovereignty conflicts in Europe; 2) conflicts concerning the national anti-crisis legislation's compliance with the Treaty of Nice; 3) internal conflicts over the constitutionality of the national anti-crisis legislation. It is argued that the constitutional jurisprudence, in hard cases, meets a "double fidelity" question: to choose between the *salus rei publicae* involved in the austerity measures adopted by the government (and eventually compressing the fundamental rights and the regional and local autonomy) and the protection of the constitutional principles and fundamental rights (thus conversely sacrificing the *salus rei publicae*).

**Resumo:** O ensaio discute a função dos Tribunais Constitucionais e Europeus durante a crise económica. Analisa três casos de estudo: 1) conflitos de soberania na Europa; 2) conflitos relativos à legislação nacional anticrise e ao cumprimento do Tratado de Nice; 3) conflitos internos sobre a constitucionalidade da legislação nacional anticrise. Defende-se que a jurisprudência constitucional, em casos difíceis, se depara com uma questão de "dupla fidelidade": escolher entre a *salus rei publicae* envolvida nas medidas de austeridade adotadas pelo governo (e eventualmente comprimir os direitos fundamentais e a autonomia regional e local) e a proteção dos princípios constitucionais e direitos fundamentais (assim, sacrificando a *salus rei publicae*).

**Summary:** 1. *Austerity measures and European constitutional context.* - 2. *Case Studies.* (a) *Sovereignty conflicts in Europe.* - 3. *Continuation:* (b) *Conflicts concerning the national anti-crisis legislation's compliance with the Treaty of Nice.* - 4. *Continuation:* (c) *Internal conflicts over the constitutionality of the national anti-crisis legislation. Portugal and Italy.* - 5. *Crises and constitutional justice: the "double fidelity" dilemma.* - 6. *Conclusion.* - *Post scriptum: Comment on the Luís Pereira Coutinho's comments.*

**Sumário:** 1. *Medidas de austeridade e contexto constitucional europeu.* - 2. *Estudos de Caso.* (a) *Conflitos de soberania na Europa.* - 3. *Continuação:* (b) *Conflitos relativos à conformidade da legislação nacional anti-crise com o Tratado de Nice.* - 4. *Continuação:* (c) *Conflitos internos sobre a*

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*constitucionalidade da legislação nacional anti-crise. Portugal e Itália.* – 5. *Crises e justiça constitucional: o dilema da “dupla fidelidade”.* – 6. *Conclusão.* – *Post scriptum: Comentário sobre os comentários de Luís Pereira Coutinho*

**Keywords:** Jurisprudence of crisis; constitutional courts; Euro-crisis law; adjudication of social rights

**Palavras-chave:** Jurisprudência da crise; tribunais constitucionais; direito da Euro-crise; controlo jurisdicional de direitos sociais

### **1. Austerity measures and European constitutional context**

*“Are the Portuguese Constitutional Court’s decisions on the austerity measures the appropriate judicial response to the economic and financial crisis?”*

This question may be addressed to any constitutional court and referred to any “*crisis*” affecting the constitutional state. In fact, far from being limited to Portugal, similar issues are common to many European States. Moreover, the same question could be asked at a European level, with reference to the European integration process.

The economic crisis has changed the functioning of political institutions: it has affected the form of government and the form of State<sup>2</sup>. The citizens’ electoral choices have been influenced by the problems connected to the crisis. In Greece, Portugal, Italy and Spain, the crisis has led to an increase in the instability of the government and of the political framework as a whole. In federal and regional systems, the crisis has served as a justification for centralist policies and constraints imposed on local authorities. Even claims of secession or independence advanced by some communities (namely Scotland and Catalonia) are due to the crisis. In Italy, the economic crisis has led to a broad constitutional reform in order to reduce the powers of the regions and municipalities and to strengthen the powers of the national government. The crisis has increased inequality: austerity policies have affected the welfare state, reducing the guarantee of social rights.

It is difficult to evaluate the contents and objectives of the anti-crisis legislation: according to the cases I have considered, it is possible to affirm that, luckily, the situations of serious violation of the principles relating to fundamental rights have been marginal or anyway limited to particular circumstances.

The sovereign debt crisis, especially in Ireland, Portugal, Greece, Spain and Italy, has pushed Europe to devise solutions outside of the European legal framework. The exceptional measures that have been adopted, *were necessary* to save at the same time the Member States and the European process itself. European institutions have put in place mechanisms aiming at ensuring stability (e.g. the

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2. See ANDREA MORRONE, *Crisi economica e diritti. Appunti per lo stato costituzionale in Europa*, *Quaderni costituzionali*, n. 1, 2014, pp. 79 ss.

*European Stability Mechanism*, ESM), have established budgetary constraints, have set up a European system of banking supervision, and have imposed structural reforms on Member States. With the so called Fiscal Compact, 25 States have agreed common rules aimed at introducing and implementing in the respective national legal systems the balanced budget rule. To this end, Spain and Italy have amended their Constitutions. In other countries the balanced budget rule has been enforced through ordinary legislation or through the annual budget law. The European Central Bank has expanded the boundaries of monetary policy, as provided for by the Treaties: the possibility to proceed to unlimited purchases of weaker European States' sovereign debt (the OMT) has reduced the risk of "sovereign default" and has stabilised financial markets. The reform of the banking system is currently trying to solve the problems connected to unlimited access to credit.

However it should be noted that even whit these solutions, the European project could be at risk to fail completely, because of new problems facing Europe, such as immigration and terrorism. Because of the economic and financial crisis, social conflicts have increased. The austerity legislation has been contested. Constitutional Courts have generally adopted an attitude of self-restraint: only in extreme cases they have adopted decisions of unconstitutionality, which, *although* not having solved the problems of the crisis, have surely triggered the public debate.

In my opinion, during the economic and financial crisis, as well as in ordinary circumstances, all political powers should act in a balanced and responsible way. Constitutional judges, in particular, cannot replace governments, but must instead ensure that national and European constitutional principles are complied with. However, these two functions are not always compatible with each other. Preserving the Constitution in times of crisis is no easy task.

## **2. Case Studies. (a) Sovereignty conflicts in Europe.**

It is possible to distinguish three groups of case studies that may be relevant for our analysis: (a) Sovereignty conflicts in Europe; (b) Conflicts concerning the national anti-crisis legislation's compliance with the Treaty of Nice; (c) Internal conflicts over the constitutionality of the national anti-crisis legislation.

The *European Stability Mechanism* (ESM), the Fiscal Compact and the *Outright Monetary Transactions* (OMT) have brought once again to the foreground the issue of democracy and sovereignty in Europe. The German Federal Constitutional Court (BVerfG) and the Court of Justice (ECJ) have both dealt with these issues. For the German judges, the States are the "masters of the Treaties" and it is solely for the German people to decide on any further step towards a "closer European Union". During the economic crisis, however, this BVerfG position seems to have changed.

In its decision of 12 September 2012<sup>3</sup>, by dismissing the applicants' claims, the German Federal Constitutional Court ruled on the constitutionality of the *European Stability Mechanism* (ESM), the Fiscal Compact and the amendment of art. 136 TFEU<sup>4</sup>. The European and national constraints on the State budget were deemed necessary to ensure the preservation, in a long-term perspective, of the democratic process. Although those constraints actually limit national sovereignty, they are considered necessary for the preservation of the future democratic public space. If compared to historical decisions such as the ones concerning the Maastricht Treaty and the Lisbon Treaty<sup>5</sup>, the BVerfG's defence of the principles of democracy and sovereignty, aimed at protecting the German people, has been consistently mitigated. The Constitutional Court reaffirms its role as guardian of the legitimacy of the next steps in the integration process. The only condition laid down for the European anti-crisis measures is securing the power of the Bundestag's Budget Committee to confirm every financial commitment accepted by Germany at the European level<sup>6</sup>.

Also the European Court of Justice dealt with the issue of the European competence to adopt anti-crisis measures. In "Pringle" the ECJ rejected the claim alleging the *ultra vires* nature of the *European Stability Mechanism* (ESM). The ECJ stated that the European rescue plan enjoys a specific legitimacy<sup>7</sup>. The no bail out clause (Article 125 TFEU) shall be interpreted consistently with the *European Stability Mechanism* (ESM): the purpose is to pursue "a higher objective", "namely maintaining the financial stability of the monetary union.". In fact, "the activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU, unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions". "However, Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.".

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3. BVerfGE, 2 BvR 1390/12, 12 September 2012, available at [www.bverfg.de](http://www.bverfg.de).

4. See European council Decision of 25 March 2011, *Amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro* (2011/199/EU). The new paragraph 3 establishes: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

5. BVerfG 89, 155, 184, 12 October 1993, *Maastricht*; BVerfG 123, 267, 340 ff, 30 June 2009, *Lissabon*.

6. The decision was finally upheld: see BVerfGE 18 March 2014 whereby the Constitutional Court declared that the German Bundestag has approved Germany's financial commitment to ESM, amounting to 190 billion euros and that, therefore, there was no conflict between the domestic law and *Grundgesetz*.

7. See judgment of 27 November 2012 (reference for a preliminary ruling from the Supreme Court, Ireland) - *Thomas Pringle/Government of Ireland, Ireland and the Attorney General*, (C-370/12), in [www.curia.europa.eu](http://www.curia.europa.eu).

The issue of the *competence of competences* was examined once again in *Gauweiler*. A group of German citizens asked the Federal Constitutional Court whether the ECB's *Outright Monetary Transactions* (OMT), announced in a press release of 6 September 2012, may be considered *ultra vires*, violating European law and, therefore, the German Constitution. The Karlsruhe Court waived its jurisdiction in favour of the European Court of Justice, and therefore did not activate the "counter-limits", as it would have been possible after the Maastricht and Lisbon decisions. In the preliminary referral to the ECJ (the first in German history), the Constitutional Court affirmed the economic, rather than monetary, nature of the OMT. The unlimited purchase of sovereign debt on the secondary market would have financially overexposed the ECB and the Member States, without granting the prior control of the German Parliament and citizens<sup>8</sup>.

The European Court of Justice did not share this view<sup>9</sup>. Confirming Advocate General P. Cruz Villalón's opinion<sup>10</sup>, the European Court ruled that the OMT program: 1) falls within the "area of monetary policy", although it may have indirect effects on the "economic policy"; 2) the lack of quantitative limits is mitigated by the fact that the purchase is conditional to the operation of ESM and, therefore, to its selectivity; 3) it is not a direct purchase, as it does not entail a "measure granting financial assistance to a Member State", incompatible with article 123 TFEU, since the application of the program takes place after the release of bonds in the primary market and is anyway based on conditionality.

I do not have news concerning the implementation of this ruling. The ECJ decision in *Gauweiler* successfully passed the German and European public opinion test. According to this judgment, in the economic crisis, national sovereignty gives way to the "higher objective" represented by the necessity to achieve the fundamental value of responsible solidarity among all the States of the European Union.

### **3. Continuation: (b) Conflicts concerning the national anti-crisis legislation's compliance with the Treaty of Nice.**

So far, the European Court of Justice has not yet given any judgment on the national anti-crisis measures compatibility with respect to the Treaty of Nice. Although some cases dealt with such issue, all claims have been rejected *in limine litis*.

The first case is "*Sindicatos dos Bancários*", in which the ECJ declined its "jurisdiction" on the compatibility of Portugal's fiscal consolidation policies, adopted in compliance with European commitments, with Articles 20, 21.1, and

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8. See BVerfG, 2 BvR 2728/13, 14 January 2014, available at [www.bverfg.de](http://www.bverfg.de). See FILIPPO DONATI, La crisi dell'euro tra Corti costituzionali e Corte di giustizia, *Federalismi*, n. 17, 2014, 1 ss.

9. ECJ 16 June 2015, C-62/14.

10. 14 January 2015.

31.1 of the European Charter of Fundamental Rights<sup>11</sup>.

The ECJ has adopted a similar ruling in “*Sindicatos nacional dos Profissionais de Seguros*”<sup>12</sup>. The Court declared inadmissible the individual complaints against the European Commission, promoted by “*Anonati Dioikisi and others*” and contesting the legitimacy of the limitations resulting from the “conditionality” attached to the granting of European financial aid, requiring the adoption of national austerity measures<sup>13</sup>.

It is possible that similar issues will be submitted again to ECJ in the future, but their outcome remains hard to predict. The decision on the stabilization of temporary workers in the Italian education system made it clear. The ECJ stated that the Italian legislation on fixed-term contracts for teachers is not compatible with European law: “whilst budgetary considerations may underlie a Member State’s choice of social policy and influence the nature or scope of the measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and, therefore, cannot justify the lack of any measure preventing the misuse of successive fixed-term employment contracts as referred to in clause 5(1) of the Framework Agreement”<sup>14</sup>. The Italian government led by Matteo Renzi complied with the ECJ decision, by converting the fixed-term employment contracts of about 300,000 “precarious workers” into permanent ones.

#### **4. Continuation: (c) Internal conflicts over the constitutionality of the national anti-crisis legislation: Portugal and Italy.**

Domestic constitutional courts have ruled on many cases concerning the constitutionality of austerity measures. The outcomes are ambiguous: alternating self-restraint and judicial activism, constitutional courts generally have upheld the anti-crisis legislation. For this reason, I consider particularly important the rare decisions, which have declared void measures limiting citizens’ fundamental rights.

A few words deserve to be said on the Portuguese judicial saga, where the compromise-oriented approach followed by the Constitutional Court is evident<sup>15</sup>. On the one hand, decision n. 353/12 found the suspension of certain

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11. The referring judge had not proved that the Portuguese law was intended to implement the European law; see ECJ, order 7 March 2013, C-128/12.

12. See ECJ order 26 June 2012, C-264/12 and order 21 October 2014, C-665/13.

13. See ECJ, order 27 November 2012, T-215/11.

14. ECJ, *Mascolo e others v. Ministero Università*, judgement 26 November 2014, C-22/13, 61-63/13, 418/13, par. no. 110.

15. See ANTÓNIO MONTEIRO FERNANDES, L’austerità e l’“egualianza proporzionale”. Una sentenza della Corte costituzionale portoghese, *Lavoro e diritto*, n. 3, 2013, 339 ff; and TANIA ABBATE, Le Corti costituzionali dinnanzi alla crisi finanziaria: una soluzione di compromesso del Tribunale costituzionale portoghese, *Quaderni costituzionali*, n. 1, 2013, 146; Il Tribunale costituzionale portoghese al tempo della crisi: una nuova disciplina in materia di bilancio, *Quaderni costituzionali*, n. 2, 2013, 438. In general, see JÓNATAS E. M. MACHADO, The Sovereign Debt Crisis and the Constitution’s Negative Outlook: A Portuguese Preliminary Assessment,

social benefits for public sector employees (provided for by the 2012 budget) to be unconstitutional, without however declaring it void.<sup>16</sup> On the other hand, decision n. 187/13, upheld the limitations imposed on social rights, on the grounds of the economic and financial emergency, declaring unconstitutional only some measures for having violated the principle of “proportional equality”.

Cuts to civil servants’ salaries, in fact, were declared void for the infringement of the principle of proportionality, rather than for the unequal treatment between public and private sector workers<sup>17</sup>. Similarly, measures restricting retirement benefits were “saved” on the grounds of the distinction between the right to a pension (untouched by the law) and the amount of pension (which is instead not guaranteed by the Constitution). The “solidarity contribution”, imposed on public sector workers, has therefore been found to be... fully legitimate.<sup>18</sup>

For our purposes, the decision of the Portuguese Constitutional Court on the indexing of pensions and the temporary pay cuts for public sector employees, delivered following the President of the Republic’s application for prior review, are highly relevant.<sup>19</sup> The decision distinguishes between *European constraints*, which are binding on the State, and *national legislative measures*, which must comply with the Constitution. These judgments have probably played a role in Prime Minister Antonio Costa’s decision to approve an annual budget which disregards European commitments and recommendations.

In Italy the crisis-related measures have been left largely untouched by the constitutionality review<sup>20</sup>. The Constitutional Court has thus contributed to the

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XENOPHON CONTIADES (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Farnham, 2013, 219 ff.

16. See Portuguese Constitutional Court’s decision n. 353/12.

17. The limitation introduced by the law was justified precisely for the public nature of the employer.

18. See Portuguese Constitutional Court’s decision n. 187/13.

19. See Portuguese Constitutional Court’s decision n. 574/14 and 575/14.

20. For example, the Constitutional Court upheld: the reform of the judicial districts (decision n. 237/2013); the regional expenditure cuts, introduced by the so called *spending review*; the extension of the Court of Auditors’ control on local authorities of “autonomous regions” (i.e. regions which enjoy a high degree of autonomy provided for by the Constitution: decision n. 60/2013); the abolition of the provinces by means of ordinary law, despite their mention in the Constitution (decision n. 220/2013, which however found unconstitutional the reform of the provinces realized by way of a law decree, deemed to be an unsuitable means to realize a deep and structural reform). Many decisions declared void regional laws which were contrary to anti-crisis governmental measures or to the principle of equal treatment of citizens (decision n. 221/2013, quashing a law of the autonomous province of Bolzano, which was not consistent with the standards for external appointments and consulting defined by the State; decision n. 180/2013 cancelling a law of the region Campania that distracted funds from the regional health system debt recovery plan; decision n. 138/2013, declaring void a law adopted by the Molise region concerning the indefinite amount of residual assets, budgeted only to “embellish” the accounts; decision n. 78/2013, annulling the discipline of the regional register of cancers for its cost, which exceeded the regional health system debt recovery plan; decision n. 28/2013, cancelling a law of the Campania region, which had excluded from the internal stability pact expenses covered with revenues recovered from tax evasion; decision n. 222/2013, quashing a law of the region Friuli Venezia-Giulia which gave welfare benefits to people who had been residing in the region for 24 months, while requiring a 5 years residency for non-EU citizens

economic recovery of Italy and enabled it to respect its European commitments, upholding laws that reduced welfare-related expenditures and, above all, measures that have limited the financial autonomy of regional and local authorities. However, there were a few sensational decisions, which have given rise to a heated debate.

Decisions n. 223/2012 and 116/2013 have faced a lot of criticism: the contested measures (the so-called “solidarity contribution”) aimed at cutting the salaries of some categories of public servants (such as members of the judiciary and public administration managers)<sup>21</sup>, as well as the highest retirement benefits<sup>22</sup>, and were declared unconstitutional on the grounds of their fiscal nature. The law in fact discriminated against some specific categories of taxpayers, in contrast with articles 3 and 53 of the Constitution<sup>23</sup>. In the case of the members of the judiciary, the law also violated the constitutional provisions on the autonomy and independence of the judiciary.

Although formally correct, these decisions subverted the Government’s choice to ask for a greater sacrifice from certain categories of civil servants in proportion to their incomes. The same treatment did not apply to the Italian universities’ teaching and research employees, in relation to whom the (quadrennial) block of the career and economic progression has been deemed constitutionally legitimate<sup>24</sup>.

In this case, the Court did not qualify the measure as “taxation”, acknowledging its validity in connection with the aim of promoting the reduction of public expenditure: implementing “a policy of balanced budget”, the Court said, requires “harsh sacrifices (...) that are justified by the economic crisis”.

With regards to the impact of the legislation on the State budget, certain decisions of 2015 assume a seminal importance. In decision n. 10/2015, the Constitutional Court annulled the so-called *Robin Hood Tax*<sup>25</sup> for having violated the constitutional principles of equality and contributory capacity (arts. 3 and 53 Const.); however, instead of annulling the measure retroactively (as it is normally the case), the Constitutional Court postponed the effects of its decision, which operates only *pro futuro*. The principle of balanced budget, included in art.

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to be eligible for the same benefit. However, there have also been decisions that declared the macroscopic violation of the principles of territorial autonomy (see decision n. 236/2013 on the illegitimacy of the automatism concerning the unification of instrumental public bodies of local governments; decision n. 229/2013 on the automatic choice, imposed to the regions, between dissolution and privatization of instrumental public bodies; decision n. 219/2013 on the so-called political failure of the regions).

21. See Decree-Law n. 78/2010.

22. See Decree-Law n. 98/2011.

23. «Against equal income, you must apply an equal burden», said the President of the Constitutional Court Gaetano Silvestri in the annual press conference (GAETANO SILVESTRI, *Relazione del Presidente sulla giurisprudenza costituzionale del 2014*, available at [www.cortecos-tituzionale.it](http://www.cortecos-tituzionale.it), 2014).

24. See Italian Constitutional Court’s decision n. 310/2031.

25. The Robin tax (which derives its name from the legendary hero Robin Hood) is a tax on “extra profits” obtained in during crisis by oil companies and distributors of oil products.

81 Const. pursuant to the *Fiscal compact* (constitutional law n. 1/2012), played a decisive role in this regard. The retroactive application of the decision would have led to “a serious violation of the fiscal balance”; the *pro futuro* effect, instead, avoided “the need for an additional revision of the annual budget” and prevented the violation of “parameters which Italy was obliged to respect at the European and international level”. If the Court had applied article 136 of the Constitution (which provides for the retroactive effect of the declarations of unconstitutionality), the Government would have had to find 6 billion euros, to return what it had illegally collected.

A few weeks later, the Constitutional Court annulled the block of the automatic indexing to the cost of living for all pensions exceeding 1217.00 euros per month, which the Government had established for two years, as an extraordinary measure needed to tackle the economic crisis, following specific guidelines from the European Union<sup>26</sup>. In this case, the balance between balanced budget rule and protection of social rights was resolved in favour of the latter. The retirement benefit has been conceived by the Court as a form of salary, which has to be proportional to the quality and quantity of work done and adequate to the needs of the worker’s life (articles 36 and 38.2 of the Constitution); it must therefore be respected by the legislature, on the grounds of solidarity and substantive equality (articles 2 and 3.2 of the Constitution). Unlike decision n. 10/2015, decision n. 70/2015 does not seem to have considered neither the aim of public spending reduction, nor the fact that the annulment of the law has determined a budget deficit of more than 20 billion euros.

These decisions opened a very lively discussion<sup>27</sup>. The heart of the debate is in the relationship between the protection of fundamental rights and the protection of balanced budget in times of crisis. More generally, as in the quarrel between Hans Kelsen and Carl Schmitt, this conflict touches the delicate relationship between the respective role of governments and of the guardians of the Constitution<sup>28</sup>.

### **5. Crises and constitutional justice: the “double fidelity” dilemma.**

The case studies I have examined above, confirm that the role of Constitutional courts in the context of the economic crisis, and of the crises of constitutional states in general, is a very difficult one. Dworkin’s idea of Judge Hercules is indeed appropriate<sup>29</sup>. Many problems descend from the difficulty inherent in the definition of what is a “crisis”. To begin with, situations of “crisis” should be distinguished from similar phenomena, such as “states of emergency” and “states of necessity.” Notwithstanding the conceptual differences among them, all these

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26. Italian Constitutional Court’s decision n. 70/2015.

27. See ANDREA MORRONE, *Le conseguenze finanziarie della giustizia costituzionale*, *Quaderni costituzionali*, n. 3, 2015, pp. 575 ss.

28. See HANS KELSEN, *La giustizia costituzionale*, Milano, 1981; CARL SCHMITT, *Il custo de della costituzione*, Milano, 1981.

29. See RONALD DWORKIN, *Law’s Empire*, Cambridge, 1986, p. 354.

situations share a common feature: (1) the sudden and unforeseen shift from a situation which is known, to one which is unknown, (2) the destabilization of a pre-existing balance<sup>30</sup>, (3) a transformation leading to something new, (4) the establishment of a new regime, and, finally, (5) the passage from an ordinary legal framework to an extraordinary or exceptional one.

Crisis, emergency and necessity call for decision-making and normative will. Who decides in a crisis? How is it decided? And for which reasons? These are the essential questions.

Carl Schmitt defines the “sovereign” as he “who decides in the exception”<sup>31</sup>; Hermann Heller, on the other hand, defines the “sovereign” as he “who decides on the normal situation in accordance with the written or unwritten constitution.”<sup>32</sup>. These two theories represent the extremes of a spectrum which poses many constitutionally relevant issues.

Firstly, decision-making in situations of crisis, emergency and necessity directly calls into question the issue of “sovereignty”. This arose in the first group of cases considered. Decisions in times of crisis touch the fundamental principles: the guarantee of rights, the preservation of order, and the proper functioning of constitutional powers. Extreme cases can even trigger arguments of “*salus rei publicae*”, and thus of the survival of the constitutional state itself, as it has been the case at the European level. Experience shows that in times of crisis, emergency or necessity, the need to preserve the constitutional order can enter into conflict with the guarantee of fundamental rights, so that protecting the former may imply sacrificing the latter<sup>33</sup>. How to decide? The problem thus becomes how to concretely strike a balance between equally fundamental values.

Secondly, notwithstanding the attempts at regulating *ex ante* emergency situations, it has to be kept in mind, that “the precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case”, so that “the precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited”<sup>34</sup>. Does this mean that in times of crisis no limits are imposed upon decision-makers? If in principle it might be true that the indeterminacy of the factual situation may require similarly undetermined powers, it is equally true that in emergency situations it is of utmost importance not to give up the protection of constitutional states’ fundamental principles. Although preserving the *salus rei publicae* is an essential aim, it cannot justify the conferral of unlimited powers.

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30. See MARIO GALIZIA, Crisi di Gabinetto, *Enciclopedia del diritto*, Milano, 1962, p. 367.

31. See CARL SCHMITT, Teologia politica. Quattro capitoli sulla teoria della sovranità, CARL SCHMITT, *Le categorie del ‘politico’*, Bologna, 1972, p. 33.

32. See HERMANN HELLER, *La sovranità. Contributo alla teoria del diritto dello Stato e del diritto internazionale*, trad. it., *Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechts* (1927), a cura di P. Pasquino, Milano, Giuffrè 1987 p. 176.

33. See PIETRO GIUSEPPE GRASSO, Necessità (stato di), *Enciclopedia del diritto*, Milano, 1977, p. 867.

34. See CARL SCHMITT, Teologia, p. 34.

Thirdly, as cases show, in times of crises it can often occur that political decision-makers and judges switch roles, both using the constitution in order to justify the legitimacy of their decisions. Also in emergency situations it is necessary to preserve the separation of powers, and therefore of the respective roles of political and judicial actors, the former endowed with the task of “adjudicating the concrete case”, the latter with that of “composing interests and rights according to broad policy aims”.

Fourthly, the amplitude of constitutional powers, in managing the crisis, depends on the relevant legal context. The legitimacy of emergency decision-making has different meanings, depending on whether they are the expression of a sovereign State, or whether they are the result of an agreement among states and/or of a supranational or international legal system. Due to the European integration process, crises which originate in one single State are no longer its exclusive problem, but are, instead, a problem of the other Member States and of the Union as a whole.

In other words:

(i) Those presented by crises and emergencies are naturally political problems, concerning the government’s policy. A different issue is that of the justiciability of these political decisions.

(ii) The *context* (i.e. the situation of crisis of emergency) plays a central role in the management of the crisis itself: the indeterminacy of the context can be reflected in the indeterminacy and unpredictability of the powers that can be practically deployed. However, in a constitutional state, such powers are always subordinated to the constitutional principles.

(iii) In crises and emergencies political decision-making is the rule, while judicial decision-making is marginal and subsidiary.<sup>35</sup>

(iv) The secondary role played by constitutional courts is rooted in the limits inherent to the judiciary: judges’ decisions are “*partial*”<sup>36</sup>, “*post eventum*”, somehow “*without a sanction*” and devoid of binding effect towards politically accountable bodies.

(v) Constitutional judges need to face a further problem: the “double fidelity”

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35. See the case-law of the US Supreme Court during the civil war and during the post 9/11 terrorist emergency: in both cases the SC has widely upheld governmental measures.

36. On the obvious lack of proportion between the case *sub iudice* and the context: the Italian constitutional court’s decision n. 70/2015 concerned the situation of retired workers, but the governmental measure under review was aimed at the restoration of the budget, thus benefiting all citizens and not only the retired workers directly concerned by the measure. As a result, the government has applied the judgment only partially, awarding the restitution of the relevant amounts only to a limited extent and proportionally to the retirement wage. See Decree-Law 65/2015, converted in Law 109/2015.

dilemma. In hard cases, Constitutional courts are bound to choose between the *salus rei publicae* (and eventually compressing rights and local authorities) and the protection of the constitutional principles and fundamental rights (thus conversely sacrificing the *salus rei publicae*).

(vi) In the European *multilevel constitutionalism*, furthermore, the ambiguities inherent to the European integration process and the absence of a *competence of competences*, the dialogue between constitutional courts and the Court of Justice is inevitably polemic.

The risk of politicization incumbent on the judiciary is heightened in the crisis, due to the political surplus value inherent to the crisis-management decisions. For these reasons we cannot expect constitutional courts to respond to the crisis, but merely to control the decisions adopted by political actors. May judges legitimately substitute themselves to politicians, in the exercise of a sort of subsidiary function? In order to try and outline a reply to these issues, it is necessary to consider the difference between the constitutional adjudication of a political issue and the guarantee of fundamental principles, although being aware that such a difference tends to blur in the individual case. The European level appears to be the most problematic in these respects: the ambiguities of the European integration process are reflected in the role of the “guardians of the constitution”. Which constitution are the national constitutional courts and the Court of Justice protecting?<sup>37</sup> Which space is left to national constitutional courts in protecting national Constitutions? Which reactions are necessary in order to address the problems posed by today’s emergencies, including the economic crisis, migrations and international terrorism? Should they be merely national, or rather European and/or international? Should they be political in nature, or instead technocratic?

Taken together, these considerations provide a framework to try and explain why Constitutional courts have largely upheld the “political” decisions adopted by both European institutions and national governments, why the judgments quashing anti-crisis measures have been limited, and in any case confined to cases of plain violation of “great” principles (equality, fundamental rights, principles related to local autonomy), and in general to provide an explanation for the judicial shift from self restraint to judicial activism, once crisis and emergencies are solved and “normalcy” re-expands<sup>38</sup>.

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37. The criticism according to which in Europe there is “a constitution without a guardian” (CHRISTIAN JOERGES/ STEFANO GIUBBONI, *Diritto e politica nella crisi europea – Recht und Politik in der Krise Europas*, available at [https://www.jura.uni-bremen.de/lib/download.php?file=f1036e21e1.pdf&filename=6\\_2013\\_2013](https://www.jura.uni-bremen.de/lib/download.php?file=f1036e21e1.pdf&filename=6_2013_2013)) seems to be misplaced: the problem should be re-framed, since the presence of a guardian presupposes that of a constitution; there is no guardian also because instead of a constitution there are several “constitutional orders”.

38. The gradual change in the US Supreme Court’s attitude, which has accompanied the attenuation of the threats posed by international terrorism, is again emblematic: see *Hamdi v. Rumsfeld*, 542 U.S. 507, 28 June 2004, *Rasul v. Bush*, 542 U.S. 466, 28 June 2004, *Hamdam v. Rumsfeld*, 548 U.S. 557, 29 June 2006, *Boumediene v. Bush*, 128 U.S. 723, 12 June 2008.

## 6. Conclusion.

The ideas developed so far should not be read as wanting to annul the role of constitutional courts. On the contrary, what I want to restate is the utmost essential function of constitutional adjudication in situations of crisis and emergency. Constitutional courts are the highest safeguard provided to constitutional principles and values. When facing a crisis, decisions transforming the Constitution need to be distinguished from decisions implementing it<sup>39</sup>. In my opinion, the powers deployed during crises must not create new law, but should instead find in the existing law, and especially in fundamental principles, the rules that have to be applied to situations which the legal system may not have foreseen<sup>40</sup>.

Constitutional justice is the guarantee of the Constitution and of its effectiveness. Also during crises, all individual decisions should safeguard fundamental principles. The meaning and scope of this overall objective changes when it is applied to political decision-makers on the one hand, and to the guardians of the Constitution, on the other. The former enjoy a wide political discretion, but are subject to the control exerted by the latter: the laws must respect the fundamental principles and the criteria of proportionality, reasonableness and temporary nature of the legal measures. Constitutional judges, on the other hand, are excluded from reviewing the existence or not of a crisis and from finding practical solutions. Instead, they are endowed with the review of the manifest arbitrariness of political and legislative choices, against the standard represented by fundamental principles and means-ends consistency.

As long as we confide in the law, we shall confide in that constitutional principles will always prevail, notwithstanding the adaptations or even the dramatic suspensions they can undergo in order to respond to a crisis. Constitutional courts should pursue this aim. If not them, who else should do it?

### **Post scriptum: Comment on the Luís Pereira Coutinho's comments**

I think that Luís Pereira Coutinho's opinion is founded on a traditional point of view on constitutional theory. First, in his opinion social rights aren't fundamental rights, but they are merely "public goals", only the objectives of the public choices. Social rights are the matter only for the democratic and pluralistic process. In Luis's words: "The proper realm for the conflict to be adjudicated cannot be... the judicial realm, but the political one...". Second, the "*salus rei publicae*" is a constitutional principle, "not a political right principle". (But, at the same time, the decisions of the governments to save the State in the crises are

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39. However, such a task is far from being free from difficulties and contradictions: C.J. Friedrich recalls that the fight against internal subversion may bring to the limitation of freedom and equality for some citizens by the sovereign people: reported by PIETRO GIUSEPPE GRASSO, *Necessità*, p. 876.

40. See ANDREA MORRONE, *Diritti Principi e Fonti del diritto*, Bologna, 2015, pp. 181 ff.

“political questions”.)

For these reasons, the “double fidelity dilemma” (protecting “*salus rei publicae*” may be in contrast with the guarantee of social rights) contradicts my conclusion (The Constitutional courts must protect fundamental principles in normal and in exceptional situations). It’s correct, in Luis’s opinion, that the Constitutional courts check only the constitutional principles, but, not political questions, like the decisions on the implementation on social rights.

Luis’s opinion is an expression of the political constitutionalism theory. Like the new constitutionalism, political constitutionalism is an extreme constitutional theory. I think that in the constitutional integration process we cannot use a black or white point of view. In front of the Constitution, it is impossible to distinguish between political and legal content, arguments of policy and arguments of principle (I think that the Dworkin’s doctrine is wrong).

In fact, the Constitution is a political and normative system of values. The Government institution’s role is to implement the Constitution: to protect the “*salus rei publicae*” and fundamental rights. These are constitutional aims. Opposite to Luis’s thought, in my opinion social rights are fundamental rights. The most important difference, between social rights and other constitutional values, is that, social rights need both public resources and legislative decisions. Constitutional Courts must guarantee also the implementation of social rights (like other constitutional rights). The balancing test, as usual, is the method of judicial review of legislation in these cases.

It is true: a balancing test is a political test. But, this is a consequence of the reality that the Constitutional courts are “political institutions”, and aren’t simply judges, because the Constitution is a “political decision”.

The boundaries are the problem: the boundaries between public policy and the Constitution, not between political and legal questions (if the Constitution – like I assume – is a political decision, all constitutional controversies are political conflicts). Also in times of crisis it is necessary to consider the reasons of both public policies and of the Constitution. The content of the Constitution is to guarantee fundamental rights and “*salus rei publicae*”. But, like I tried to demonstrate in my paper, it has a different meaning for the government institutions and the constitutional courts; and, then (I tried) to demonstrate that it is no easy task.

Every political solution and every judicial decision is always partial or insufficient. The problem isn’t to limit the guardians of the Constitutions. In fact, both legislative powers and constitutional courts have a concurring aim: how to realize the possibility of the constitutional integration process in normal situations and in times of crises. In the matter of the Constitution, the problem

is to guarantee both an open and free legislative process of implementation and, also, the increase effectiveness of the constitutional principles. There are no general solutions: how to do this depends on the social, economic and political contest.

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