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The 'judicialization' of emergency: the case of the Eurozone Crisis*

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1. *The Eurozone crisis: from constitutional to supranational emergency*

The theory of emergency powers traditionally has been studied in constitutional systems, being deeply intertwined with the concepts of sovereignty and of the ultimate detention of power[1].

Although the state of emergency is quite a recurrent feature in the course of constitutional history, it is still a blurry and controversial concept in theory. In particular, it appears to be contradictory, being at the same time beyond the normativity of the legal system and at its root [2]: it represents a breach of a legal order but also a source of a new one, according to the Latin formula "*e facto ius oritur*". In other words, "a state of emergency is a lawless void, a legal black hole in which the state acts unconstrained by law"[3].

Who has the power to decide in an emergency? Does an emergency legitimate fundamental rights violation? How can we define a state of emergency? Are there constitutional provisions to govern emergency?

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[1] J. Ferejohn, P. Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, in *Int. J. Const. L.* 2/2004, pp. 210-239.

[2] See G. Agamben, *Stato di Eccezione,* Bollati, Milano, 2003.

[3] D. Dyzenhaus, *Schmitt v. Dicey: are States of Emergency inside or outside the Legal Order?*, in *Cardozo Law Review*, 27, 2006, p. 5.

While these questions are still open and debated in constitutional systems, with an enormous variation in comparative perspectives, they have been taken on very rarely with regard to supranational systems, such as the European Union.

In the latter, given the lack of an ultimate authority, emergency powers lie in a sort of limbo, in a grey zone where no clear rule applies. If it is true that "necessity knows no law"[4], this is even truer with regard to the EU legal framework. The hybrid and composite nature of the European Union, which is still in between an international organization and a federal state, prevents one from identifying an ultimate source of legitimation for emergency powers: in this regard, as Dyson pointed out, "an examination of normative legal and political theory opens up the prospect of reframing the Euro-Area as an arena of multiple, mutually incompatible, orders. Each offers its own distinctive justification for exceptional measures, and each is available for mobilization in crises"[5].

In fact, if we look at the EU response to the Eurozone crisis, we can see that it has been "dissolved" into several mechanisms, heterogeneous in their nature, without a unique legitimate supranational authority.

We have witnessed on one hand the rise of the intergovernmental model, based on the classical, Westphalian relationship among national states, and on the other hand the growing influence of technocratic institutions whose transparency and legitimacy are still contested (such as the Troika and the European Central Bank (ECB)).

Even the EU legal basis for emergency measures is debatable. Treaties did not contain any emergency provision; therefore, the eruption of the debt crisis caught the EU institutions completely unprepared, and they adopted an experimental approach, trying to tailor their institutional instruments to the exceptional circumstances determined by the crisis.

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[4] The Latin formula is: "*Necessitas legem non habet*". It was used for the first time in the "*Decretum Gratiani*", a collection of Canon law compiled and written in the 12th century as a legal textbook: "*si propter necessitatem aliquid fit, illud licite fit: quia quod non est licitum in lege, necessitas facit licitum. Item necessitas legem non habet*", part. I, dist. 48.

[5] K. Dyson, *Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency*, in *Journal of European Integration*, 35 2012, p. 212.

On the other hand, an analysis of the national constitutional response to the Eurozone crisis depicts a completely different picture: in those countries experiencing severe financial troubles, we witness a more classic paradigm of emergency response, dominated by the role of the executive branch, while the legislative branch is limited to the ratification of decisions taken elsewhere by the executive branch.

Within such a scattered scenario, just briefly described above, this paper aims to assess the role of the judiciary during the Eurozone crisis, at both the EU and national levels.

Starting from Dyzenhaus's assertion[6] that courts play a fundamental role in counteracting executive predominance in times of emergency, this paper will compare the attitudes of national constitutional courts and the Court of Justice of the European Union (CJEU) in judging austerity measures adopted under emergency circumstances. While the former have played a fundamental role in counterbalancing the executive power in adopting austerity measures, the latter avoided – until the *Ledra Advertising* case[7] - judging the bailout measures, which therefore represent a sort of "enclave" in the EU legal framework and a breach of the rule of law. I will explain the CJEU's reticence in light of the new paradigm of governance developed during the crisis. According to Dyson, "the delegation of discretionary powers to supranational institutions has rendered judicial review exceedingly difficult and thus weakened legal accountability structures since the authorities' technocratic margin of appreciation has been extended to a degree which leaves little space for courts to challenge official decisions legally"[8].

Through case law analysis, I argue that while the CJEU has been quite reluctant to invalidate emergency measures, national supreme courts have played a key role in fundamental rights protection, trying to safeguard the constitutional order's core values in moments of extraordinary circumstances.

The first part of this paper highlights the paradigmatic nature of the Euro crisis as a global crisis that involves national, supranational,

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[6] D. Dyzenhaus, *Schmitt v. Dicey: are States of Emergency inside or outside the Legal Order?*, cit., p. 5. A different approach is expressed by B. Ackerman, *The Emergency Constitution*, in *Yale L. J.* 113, 2004, p. 1029.

[7] Joined Cases C-8/15 P, C-9/15 P and C-10/15 P. Ledra Advertising Ltd v. European Commission and European Central Bank.

[8] M. Dawson, *The Legal and Political Accountability Structure of Post-Crisis EU Economic Governance* in *JMCS*, n. 53 5, 2015, p. 986.

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

The second part analyzes national courts' decisions in cases dealing with the crisis, through case studies representing two categories of countries: Member States that received financial assistance (Portugal, Greece, Latvia and Romania) and Member States that, even if they are not proper debtors, dealt with a serious economic crisis (Italy). For each of these cases, the paper describes the legal reasoning and substantive outcomes of the courts, looking in particular at the use of the category of emergency in courts' rulings. As the paper argues, in judging the crisis supreme courts adopted a case-by-case approach, swinging between the boundaries of the written constitutions and the contingent constraints of the economic crisis. The result of such case law has been contradictory (see for example decisions n. 10/2015 and 70/2015 of the Italian Constitutional Court) and not always coherent. However, national courts seemed to be perfectly aware of their role not only with respect to the national branches of government but also to the EU institutions[9].

The third part concerns the role of the CJEU in the adjudication of crisis-related measures. The CJEU case law will be divided into two categories: case law regarding the legality of the assistance mechanisms (the European Stability Mechanism (ESM) and Outright Monetary Transactions) and jurisprudence regarding the compatibility of national measures taken under the conditionality of the EU Charter of Fundamental Rights. This overview highlights the Court's self-restraint in judging bailout measures and its avoidance of using the category of emergency in order to legitimize the circumvention of the treaties, which characterizes the EU's crisis management.

Finally, the fourth part explores how in the future the EU should improve the virtuous relationship between its political and judicial

[9] See C. Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry*, in *EUI Working Paper Law*, n. 43, 2015, p. 3.

actors in order to avoid the flaws and legal contradictions that have characterized its response to the economic emergency so far.

2. Governing the emergency: the anti-crisis mechanisms and their legitimacy

One of the most debated issues of the anti-crisis mechanisms was that they were instituted outside of the legal framework of the EU, but through intergovernmental procedures, resulting in a sort of 'circumvention of Union law'[10] and thereby a potential threat to European democracy and to the rule of law.[11]

Since the first Greek rescue programme and then with the establishment of the different crisis mechanisms, the EFSF[12], the EFSM[13] and the ESM[14], the Euro crisis was governed by public

[10] J. Tomkin, *Contradiction, Circumvention, and Conceptual Gymnastic: the Impact of the Adoption of the ESM Treaty on the State of European Democracy*, in *German Law Journal*, n. 14/2013, p. 169.

[11] Ibid, p. 169.

[12] The European Financial Stability Facility (EFSF) was created as a temporary crisis resolution mechanism by the Euro-area Member States in June 2010. The EFSF has provided financial assistance to Ireland, Portugal and Greece. The assistance was financed by the EFSF through the issuance of bonds and other debt instruments on capital markets.

[13] The European Financial Stabilisation Mechanism (EFSM) reproduces for the EU the basic mechanics of the existing Balance of Payments Regulation for non-Euro-area Member States. Through the EFSM, the Commission is allowed to borrow up to a total of € 60 billion in financial markets on behalf of the Union under an implicit EU budget guarantee. It has been used to provide short-term assistance (bridge loan) of € 7.16 billion to Greece in 2015. See http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm.

[14] The European Stability Mechanism (ESM) is an intergovernmental organization under public international law that was first introduced by the European Council in 2010 (but that only entered into force in September 2012) as a permanent financial assistance programme to replace the temporary EFSF and EFSM funds. Article 3 of the Consolidated Version of the Treaty establishing the European Stability Mechanism (ESM Treaty) affirms that the purpose of the ESM 'shall be to mobilize and provide stability support under strict conditionality' in favor of ESM members that experience or are threatened by severe financial problems.

international law or private international law[15] sources rather than EU law.

We do not ignore the reasons for this almost-exclusive use of measures outside of the EU legal framework. The use of purely international instruments was prompted by a number of factors: the extraordinary circumstances of the debt crisis eruption, the need for an immediate response to such events and the need for flexibility rather than rigid constraints on which the EMU has been built.[16] Moreover, a key piece of the puzzle is the fact that only Member States, and not the Union, possessed the necessary fiscal means for rescue operations.[17] In other words, the flaws of the European economic governance paved the way for the circumvention of EU law in crisis management. However, such a choice had a deep, transformative and long-lasting impact on the EU legal sphere, leading to a sort of constitutional transformation[18]. The main strands of such a mutation are the predominance of intergovernmental relations and the growing asymmetrical nature of the EU. Moreover, even the legal nature of the crisis mechanisms opens up several problematic issues, in particular with regard to the fundamental rights protection within the EU in times of crisis. The ESM acts outside of the EU legal framework - even though two of its three main actors are EU institutions, the Commission and the ECB. This means that the ESM measures cannot be considered EU law, technically speaking (although in some cases they have been transposed into the Commission's Decisions). The crisis mechanism's ambiguous nature represented the main obstacle for the applicability of the EU's Charter of Fundamental Rights (EUCFR) to Union institutions and to the Member States acting under the ESM. With regard to the Member States, in the *Pringle* case the CJEU ruled that the EUCFR was not to bind them when establishing a stability mechanism such as the ESM, because in doing so they are not implementing Union law and the

[15] On the different nature in the legal form of the mechanisms adopted, see K. Tuori & K. Tuori, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge University Press, 2014 p. 90.

[16] On this point, see E. Chiti & P G. Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, in *Common Market Law Review*, 50(3) 2013, p. 683.

[17] Tuori and Tuori, cit., p. 123.

[18] See M. Ioannidis, *Europe's new transformations: how the EU Economic Constitution changed during the Eurozone Crisis*, in *Common Market Law Review*, n. 53/2016; C. Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, in *German Law Journal*, 15/2014.

treaties do not confer any specific competence on the Union to establish such a mechanism.[19]

With regard to the application of the Charter to EU institutions acting in the context of the ESM, the CJEU was cautious, leaving the issue substantially open[20] until the *Ledra Advertising* decision in June 2016. In this case, the Court recognized that even if the Commission acts within the ESM legal framework, it is not exempted from its role as the Treaties' guardian and therefore it has to abstain from signing an ESM act if there are any doubts about its compliance with EU law and the Charter. *Ledra Advertising* represents a step toward a normalization of crisis-driven measures, which until now have benefited from a sort of special legal status, a 'free zone' in which guarantees accorded by the application of EU law were weakened. It is in this grey area that the judiciary's role has been called into question, in order to face the legal challenges posed by emergency measures.

3. *The role of the judiciary at national level during the Eurozone crisis*

Many of the bailout measures enacted during the crisis have been challenged in front of national supreme courts[21]. Not only in Portugal – probably the most studied case - but even in Greece, Latvia and Romania there is abundant case law concerning the legitimacy of Euro-crisis-related measures with basic constitutional values, such as fundamental rights protection, and in particular the social rights dimension.

However, this case law is extremely heterogeneous, and a meaningful comparison has to take into consideration the differences within the constitutional justice systems and within the constitutions (the presence of emergency clauses, social rights protection and

[19] Case C-370/12, Thomas Pringle v. Government of Ireland, Ireland, The Attorney General, Judgment of the Court of Justice, para 178.

[20] See P. Craig, *"Pringle" and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance*, in *European Constitutional Law Review*, 9(2), 2013, p.263 and M. E. Salomon, *Of Austerity, Human Rights and International Institutions*, in LSE Law, Society and Economy Working Papers 2/2015, 15 <http://lse.ac.uk/humanRights/documents/2015/salomonWpsAusterity.pdf> accessed 5 July 2017.

[21] See B. Brancati, *Decidere sulla crisi: le Corti e l'allocazione delle risorse in tempi di "austerità"*, in *Federalismi.it,* n. 16/2015, available at www.federalismi.it.

justiciability). Moreover, while in Portugal, Latvia and Romania a constitutional court is present, that is not the case in Greece, where constitutional claims can be decided by many different courts. Even by looking at the constitutional adjudication procedure, one sees that only in Greece can complaints be directly brought to the court by the civil society; in Portugal, Latvia and Romania the constitutional judgments have been triggered by political institutions in a so-called "abstract" review.

Despite these differences, national courts ultimately have to face the same challenges: the review of austerity measures adopted by their respective national governments - often using emergency provisions - and negotiated with supranational institutions. In other words, they are called to play a pivotal role in counterbalancing the predominance of the executive power and international institutions. What could appear as typical judicial activism – juristocracy – in fact is not. As Kilpatrick argues, "juristocracy charges cannot be the same in times of EU sovereign debt"[22], since "during a bailout a wide range of national democratic choices become suspended as external lenders set the terms for loan disbursements"[23]. Crisis-related measures suffer a democratic deficit, as was demonstrated above: they are negotiated by supranational authorities, whose nature is executive or technical, and by national governments. The legislative branches, both at national and at EU level, are excluded from the decision-making process, and, even when there is a kind of involvement, either it is limited to informative duties or it lacks effectiveness. The ordinary legislative prerogatives are circumvented, and the triggering of emergency procedures leads to the derogation of the democratic rules operating in normalcy. In addition, austerity measures and their national implementations affect citizens' fundamental and social rights. In this scenario, in which traditional democratic circuits have been circumvented, constitutional courts would seem to offer a crucial role in protecting fundamental rights enshrined in national constitutions that the legislation enacted to face the debt crisis violated.[24] In the words of Kilpatrick, "hence,

[22] C. Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe*, cit., p. 17.

[23] Ibidem, p. 19.

[24] For a comparative overview, see C. Fasone, *Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective*, in EUI MWP 2014/25 Working Paper

constitutional court judgments can become a new resource for governments in dealing with lenders to argue for renegotiation of terms in order to maintain constitutionality[25]". Moreover, supreme courts' aim seems to be, paradoxically, the protection of the national legislative institutions, by reopening the decision-making process under the guidance provided by the Constitutional Courts as regards the respect of fundamental rights under the national constitution.[26]

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

Supreme courts find themselves also in the delicate position of deciding on emergency provisions, tracing the boundaries between the fundamental constitutional principles that cannot be derogated without infringing the constitutional order and the need to face a state of emergency, capable of threatening the sustainability of the national order itself.

3.1. *The use of the emergency argument in a national supreme court: a comparative path*

The "national courts dilemma" in judging austerity measures enacted in times of crisis clearly appears if one looks in a diachronic perspective to the case law of the courts involved in such a difficult task. Our research is focused on the case law of the Portuguese Constitutional Court, the Greek Supreme Courts, and the Courts of Latvia and Romania, all bailout countries. The argument concerning the "state of emergency" or the extraordinary contingency is a common one used by

<http://cadmus.eui.eu/bitstream/handle/1814/33859/MWP_WP_2014_25.pdf> accessed 4 July 2016.

[25] C. Kilpatrick, cit., p. 20.

[26] R. Cisotta and D. Gallo, *The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal*, in C. Kilpatrick and B. de Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: e Role of Fundamental Rights' Challenges,* European University Institute LAW Working Paper 2014/05, p. 94.

the courts in drawing the line between legitimate austerity measures and a violation of constitutional provisions.

The Greek crisis case law, for example, shows a very deferential attitude – at least in early rulings - towards the decisions taken to implement the conditions of the MOUs, using the state of emergency as its key argument: in fact, in decisions n. 668/2012 and n. 1685/2013 the Greek Council of State upheld the measures prescribed in the first Memorandum, grounding its rulings on the state of exception and on the need to enhance the financial credibility of Greece, with respect to the commitments assumed with the Troika.[27] The state of emergency was also used by the Greek Council of State in decision n. 2307/2014, regarding the legitimacy of the austerity measures provided by the second Memorandum. The Greek Court, while recognizing that such measures violated workers' rights, affirmed that they were proportionate and justified by the *extreme conditions* and the state of emergency that led to their adoption.

Within the Portuguese case law as well, the extraordinary circumstances of the Euro-crisis played a key role within the courts' reasoning[28]. The Portuguese supreme courts' jurisprudence on austerity measures is peculiar and interesting: the courts' position moved from a deferential approach, employed in decision n. 396/2011, to a more challenging one, shown in the landmark case n. 187/2013, in which the Court struck down the pay and pension cuts for public employees. In the very first decision concerning the crisis legislation, Acórdão n. 396/2011 of 21 September 2011, the Court maintained traditional self-restraint, upholding the provisions of the State Budget Law for 2011 on the cutback of public salaries. In this case, the Court dismissed the challenges to the Budget Law, ruling that there was no violation of the principles of equality, the principle of the protection of legitimate expectations or the principle of proportionality. According to the Court, the transitional nature of the measures challenged, due to the '*conjuntura de absoluta excepcionalidade*', justified the cuts to public salaries. However, a few months later, the position of the Court moved from this

[27] See C. M. Akrivopoulou, *Facing l'etat d'exception: the Greek Crisis Jurisprudence*, in *Int'l J. Const. L. Blog,* 11 July 2013, available at <www.iconnectblog.com/2013/07/facing-letat-dexception-the-greek-crisis-jurisprudence/> accessed 30 June 2017.

[28] M. P. Maduro, A. Frada, L. Pierdominici, *A Crisis Between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*, in *E-pública*, vol. 4, n.1, 2017, available at www.e-publica.pt.

traditionally deferential approach towards the parliament to a challenging one: in Acórdão n. 353/2012, the Court declared several provisions of the State Budget Law for 2012 unconstitutional. In particular, according to the Court, the norms concerning the suspension of Christmas and holiday-month payments during 2012–2014 for public sector workers and retirees were unconstitutional because they violated the principle of equality, requiring the just distribution of public costs[29] between all citizens in proportion to each one's financial capacity. In the Court's overturning of its precedents, a decisive aspect was the fact that the cuts to remunerations and pensions lost their original 'extraordinary and provisional' nature due to the emergence of the economic crisis, and instead seemed destined to endure for years, with terrible and persistent consequences on the levels of remuneration for specific worker categories. Moreover, the Court warned that "the extremely serious economic/financial situation and the need for the measures that are adopted to deal with it to be effective cannot serve as grounds for dispensing the legislator from being subject to the fundamental rights and key structural principles of the state based on the rule of law, and this is true namely with regard to parameters such as the principle of proportional equality".[30]

After this 'warning', the Constitutional Court of Portugal, in subsequent case law, adopted a progressively more 'activist' approach. The foremost case of this period of jurisprudence was the aforementioned Acórdão n. 187/2013, of 5 April 2013, in which the Court declared unconstitutional several provisions of the Budget Law for 2013[31], adopted in order to implement the conditions posed by the Financial Assistance Program, agreed to by the Portuguese government and the Troika. The Constitutional Court went on to follow, in subsequent rulings, the trend it had established with Acórdão n. 187/2013. In Decisions n. 602/2013, n. 862/2013, n. 413/2014 and n. 575/2014, the Court once more struck down provisions concerning

[29] See Tribunal Constitucional Acórdão 396/2011, Processo n. 72/11.

[30] C. Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe*, cit., p. 12.

[31] The norm under scrutiny concerned the suspension of the additional holiday month of salary for public administration staff (and also for teachers and researchers), the suspension of the holiday month of pensions for public and private sector retirees and the duty imposed upon the beneficiaries of unemployment subsidies to pay social security contributions of 6% instead of 5%, in violation of the principles of equality and proportionality.

labour law (for example, legislative measures that would make it easier for the government to dismiss civil servants, as well as cuts in public wages) and the public pension system's reform, thereby affecting its relationship with the government and the legislature. What is remarkable in these last cases is that the state of emergency argument disappeared from the Court's reasoning, making the Court's scrutiny stricter towards any limitation or reduction of constitutional rights.

If we move to the Eastern bailout countries, Latvia and Romania, we can see a different approach to the crisis-related measures judged by supreme courts.

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

The first set of cases decided by the Constitutional Court - decision n. 1414/2009 and n. 1415/2009 - refers to the constitutionality of Law 329/2009, which provided among other things the reorganization of public authorities and institutions, and the rationalization of public expenditure; and Law 330/2009 on a unitary wage system. These laws were challenged by the Members of the Parliament, also on the basis of the procedure through which they were adopted, which is the so-called "engagement of responsibility of the Government" provided by Art. 114 of the Constitution. According to this procedure, the Government puts at stake its responsibility in front of the Parliament with regard to a bill, a program, etc. If the Parliament does not approve a motion of censure, within three days from its presentation the act is considered approved, avoiding a direct scrutiny by the Parliament. Since the eruption of the crisis, this extraordinary instrument - as well as the emergency ordinance of article 115 of the Constitution - has been used in order to approve crisis-related measures, mainly impinging on social rights. It is precisely on the legitimacy of the contested procedure that the Court used the argument of the state of emergency. The Parliament argued that the use of the engagement of responsibility by the Government represents a deprivation of the Parliamentary prerogatives within the legislative process. On the contrary, the Court affirmed that the recourse to the procedure provided by art. 114 Const., leading to the end of obstructionism and filibustering, was necessary in order to respond promptly to the requirements of the International Monetary Fund. Even though the

Court did not abstain from declaring unconstitutional several other provisions of law, such as those concerning the prohibition of cumulating the salary, it upheld the provisions concerning the obligation of the public authorities to cut the personnel expenditure by 15.5%. Even in this case, the emergency situation provides the key argument of legal reasoning: indeed the Court recognized that the challenged provisions impinged on the constitutional rights of property; but at the same time, it justified the restriction of that right in the light of the "budgetary constraints generated by the economic crisis".

Besides these aforementioned decisions, the Romanian Constitutional Court decided on a large number of cases dealing with austerity measures and social rights between 2009 and 2011, particularly concerning cuts in wages, pensions or other benefits. In this case law, a key role was played by the notion of the public interest, which, when used, "provided an easy path towards constitutionality". The recourse to the public interest argument was used as a sort of passe-partout in order to justify rights restrictions, even without a formal declaration of a state of emergency (provided by art. 93 of the Romanian Constitution). Even in the Romanian case, we can recognize the effort of the constitutional judge to find a fair balance between "the general interest of the community and the protection of the fundamental rights of the individual" in times of crisis.

Last but not least, in this brief comparative journey, we consider the Constitutional Court of Latvia, which ruled in several cases (eight between 2009 and 2010) on the constitutionality of crisis-driven measures. The cornerstone of the Latvian constitutional court's reasoning in austerity measures is the principle of proportionality: "the constitutional court has already concluded that during economic recession or other extraordinary situations the principle of legal certainty requires the balancing of legal trust of persons with interests of the society. In a such a case, a decisive role is played by the fact whether the principle of proportionality has been observed"[32].

The Latvian judges, as well as the Romanian and the Portuguese ones, acted on the thin line between preserving the integrity of the constitutional order and admitting breaches in it justified by the emergency situation. Kilpatrick clearly observes that all these courts, unlike the Greek ones, "found that the extremely serious economic/financial situation and the need for measures that are adopted

[32] Z. Rasnača, Latvia, Report in www.eurocrisislaw.eui.eu.

to deal with it to be effective cannot serve as grounds for dispensing the legislator from being subject to the fundamental rights and key structural principles of the State based on the rule of law"[33].

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

3.2. Emergency in non-bailout countries: the case of Italy

Although Italy has not received financial assistance and cannot be considered a debtor country involved in an assistance program, its constitutional order has been deeply influenced by the crisis-related measures, such as the Fiscal Compact Treaty, and by extraordinary sources of pressure, as the well-known 5 August 2011 letter signed by Mario Draghi and Jean-Claude Trichet[34].

This letter was certainly an unusual form of pressure[35], determined by the crisis circumstances experienced by Italy: there were serious concerns about Italy's ability to find the financial resources necessary to avoid default. The letter, which can be considered a form of *sui generis* conditionality[36], recommended a very detailed reform agenda to be enacted preferably by a law decree issued by the government, and it included expenditure cuts in the public sector and

[33] C. Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe*, cit., p. 12.

[34] The letter suggested to the Italian government several reforms to be implemented, such as the deregulation of economy, privatizations, more work flexibility, and the pension system's reform.

[35] See C. Joerges, *Integration through law and the crisis of law in Europe's emergency*, in D. Chalmers, M. Jachtenfuchs, C. Joerges (eds.), *The End of the Eurocrats' Dream,* Cambridge, 2015, p. 320.

[36] As D. Tega notes, "Compliance with these requests was implicitly presented as a condition for ECB financial support, namely through the massive purchase of Italian government bonds on the secondary market", D. Tega, *Welfare Rights in Italy*, in C. Kilpatrick and B. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges, EUI Working Paper LAW* 2014/05, p. 31.

interventions in the pension system, as well as in the realm of social rights.

The Italian government enacted such reforms, mainly using decree laws, which can be promptly put in place. However, many of these provisions were brought by judges and Regions in front of the Constitutional Court, which since 2010 has developed a case law recognized as "crisis jurisprudence".

The first relevant case is Decision no. 223/2012, in which the court declared unconstitutional a provision of Decree Law no. 78/2010 (the first decree openly addressing the ongoing financial crisis, blocking wage rises for magistrates). The Court struck down the contested legislation as unconstitutional, holding that, while certain temporary reductions justified on the basis of public finances could be legitimate, the contested provisions went a step further: they were going to make the effects of the pay freeze permanent, beyond the category of temporary emergency, thus undermining the independence of the judiciary vis-a-vis the other branches of the state.

This decision was followed by several cases on the compatibility of austerity measures with social rights[37], up until the two landmark and opposite cases n. 10/2015 and n. 70/2015. The latter in particular dealt with one of the policies established by the Monti government in order to reduce spending and to reset the economy (the so-called "Salva Italia" package); one of these policies affected pension payments. In brief, the measure meant that those receiving a pension three times above the minimum (so those earning above approx. EUR 1450 per month) would not receive a cost of living adjustment for two years. The question for the constitutional court was whether this measure reached an effective balance between the rights of pensioners and the state's wishes to rescue the economic system during the crisis. The court held that the measure did not balance the two considerations well enough and it was declared unconstitutional, despite the economic consequences of such a ruling. The Court struck down the legislation as unconstitutional on the grounds that it failed to comply with the principles of reasonableness and proportionality. After a discussion of previous legislations providing a reduction in automatic annual increases, the Court held that the legislation at stake was "limited to a generic reference to the '*contingent financial situation*', while the overall design of the legislation does not establish why financial requirements should necessarily prevail

[37] See Italian Constitutional Court Decision no. 116/2013, and Decision no. 310/2013.

over the rights affected by the balancing operation, against which such highly invasive initiatives are adopted"[38]. Even if the right to an adequate pension was not recognized as absolute, it stated that any sacrifice in the name of budgetary requirements should be justified in detail.

However, this conclusion is partially in contrast with that of decision n. 10/2015 in which the Court, in order to minimize the financial impact of its decisions, mitigated the effects of its judgment by explicitly declaring that the law's illegitimacy was effective only starting from the day following its publication. In this case, the Court heard a reference from a tax board challenging legislation providing for a surcharge on corporate income taxes, which was applicable only to companies involved in the hydrocarbon industry. The Court declared the surcharge unconstitutional, holding that the legislation was inadequate for its purpose and unreasonable due to "its configuration as an increase in the rate applied to the company's entire income, rather than only to 'excess profits'; the failure to subject it to a time limit or to associate it with mechanisms capable of verifying whether the economic climate used as justification still obtains; and the fact that it is impossible to put in place assessment mechanisms capable of ensuring that the obligations resulting from an increase in the tax do not translate into increases in consumer prices"[39]. However, the Court also held that the declaration of unconstitutionality would not take effect immediately, but only upon publication of the judgment, in order to respect other requirements of constitutional law in light of the EU's constraints (particularly the balanced budget rule).

When called to rule on the financial crisis measures, the Italian Constitutional Court - even if not under the Sword of Damocles of international conditionality - took a very cautious and ambiguous approach: while reaffirming that constitutional principles must be preserved, the Court keeps these concerns in high consideration and scrutinizes each measure on a case-by-case basis, taking into account its specific features and effects[40] and trying to find the balance between emergency provisions and fundamental rights protection.

In particular, the Italian case shows the progressive rise of the relevance of the balanced budget rule, even before it acquired binding

[38] Italian Constitutional Court decision n. 70/2015.
[39] Italian Constitutional Court, Decision n. 10/2015.
[40] See D.Tega, *Welfare Rights in Italy*, cit., p. 31.

force, making clear the influence of the EU legal order and the overall context of crisis on the Court's reasoning.

4. *The CJEU facing the economic crisis*

The scenario proposed by the CJEU case law on crisis-related measures is completely different from the national ones. This is not surprising given the differences between a national court, acting in a certain social and cultural framework, and a supranational/international one, missing any kind of contextual constraint[41].

While national supreme courts show a proactive attitude in adjudicating Euro-crisis-related measures, the CJEU attitude looks more resilient, since the Court univocally upheld the emergency mechanisms, probably "because the assumed political stakes of such a decision are generally higher than with normal acts of authority"[42].

We can identify two main categories of case law in which the CJEU had the chance to pronounce – more or less directly – on austerity-related measures.

The first one concerns the legitimacy of the measures and programs adopted, namely the *Pringle* case and the *Gauweiler* case[43]. The second broad category includes decisions regarding the nature of the Memoranda of Understanding and their relationship with EU law. As I will try to show, the CJEU's perception of the crisis-related measures is still contradictory and inconsistent.

We cannot but start our analysis with the leading case in this field: the *Pringle* case on the legitimacy of the ESM Treaty. The Court of Justice had to deal with a preliminary reference issued by the Irish Supreme Court concerning the compatibility of the ESM Treaty with several provisions of EU law (and in particular with the no-bailout clause of art. 125) and the legitimacy of the simplified procedure adopted in order to amend art. 136 TFEU (giving legal basis to the ESM).

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[41] See D. Grimm, *Europe's legitimacy problem and the courts*, in D. Chalmers, M. Jachtenfuchs, C. Joerges, *The End of The Eurocrat's Dream*, Cambridge, 2016, p. 241 ss.

[42] K. Lane Scheppele, *The new Judicial Deference*, in *Boston University Law Review, vol.* 92 1, 2012, p. 101.

[43] Gauweiler and others v. Deutscher Bundestag, C 62/2014.

Regarding this, the Court affirms the legitimacy of art. 1 of Decision 2011/199 stating that Article 136(3) TFEU "confirms that Member States have the power to establish a stability mechanism and is further intended to ensure, by providing that the granting of any financial assistance under that mechanism will be made subject to strict conditionality, that the mechanism will operate in a way that will comply with European Union law. That amendment does not confer any new competence on the Union"[44].

Regarding the compatibility of the ESM with art. 125 TFEU, the Court recalls "that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy. The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union"[45].

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 Euro area's financial stability as a whole and subject to strict conditions.

On the basis of the ESM Treaty, stability support may be granted to ESM Members which are experiencing or are threatened by severe financing problems only when, as we said, such support is indispensable to safeguard the financial stability of the Euro area as a whole and its Member States; moreover, such support is subject to strict conditionality appropriate to the financial assistance instrument chosen. Therefore, the CJEU concluded that Article 125 TFEU was no obstacle to the adoption of the ESM Treaty.

As Fabbrini[46] pointed out, the reasoning of the CJEU – i.e. astutely neutralizing questions of incompatibility between the ESM and the provisions of the TEU and TFEU – suggests a favorable stand vis-à-vis the ESM, an instrument, which, albeit developed outside of the

[44] Case C-370/12, Pringle, para. 72.

[45] Case C-370/12, Pringle, para. 135.

[46] F. Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, in *Berkeley Journal of International Law (BJIL)*, 32/2014, p. 1.

framework of the EU law, directly contributes to the financial stability of the Eurozone.

Even in the OMT case, the CJEU, differently from the Bundesverfassungsgericht (BVerfG) and from the Advocate General Cruz Villalon, seemed to avoid really engaging with the legality of the ECB's unconventional measures. The OMT program — which followed on ECB President Mario Draghi's pledge to do "whatever it takes" to save the Euro — allowed the ECB to purchase government bonds on the secondary market when necessary in order to restore the normal transmission of monetary policy stimulus, on the condition that the Member States concerned entered a program of economic adjustment.

In its first, historic preliminary reference, the BVerfG was explicit in describing the OMT program as a violation of EU law and asking the CJEU to strike down the challenged measure as ultra vires. According to the treaty provisions, the EU has power in the field of monetary policy while it has no competence in the field of economic policies given to the member states.

As we may know, the OMT program can be triggered only for those Member States that have already entered into an ESM financial program. The ECB will purchase bonds as long as the State complies with conditionality policy. This parallelism caused the German court to argue that the OMT program forms an instrument of economic policy and therefore was an ultra vires act. On the contrary, the CJEU seems to escape this claim, securing the ECB's independence. It argues that the ECB has established the link with the ESM conditionality in order to exclude moral hazard, in particular the risk that states no longer consider it necessary to comply with adjustment programmes once the ECB purchased their bonds. Conditionality has been "transfigured" by the CJEU in order to legitimize the ECB program, which falls into the monetary policy realm, according to the Luxemburg court.

In this regard we must point out that the FEU Treaty contains no precise definition of monetary policy, but defines both the objectives of monetary policy and the instruments that are available to the ESCB for the implementation of that policy.

In its controversial decision, the Court affirmed that a programme like the OMT, which might also be capable of contributing to the stability of the Euro area - i.e. a matter of economic policy - does not call that assessment into question. Indeed, "a monetary policy measure cannot be treated as equivalent to an economic policy measure

merely because it may have indirect effects on the stability of the Euro area"[47].

In light of those considerations, it is clear that the OMT falls within the area of monetary policy, thus being legitimate. In other words, we witnessed a transformation of the EU constitutional landscape in an emergency through the role of the CJEU: as it has been argued, "while the extent to which the CJEU's reasoning in its ESM and OMT decisions has been influenced by the political crisis context is an open question, it is unlikely that the Court was able to block it out entirely".[48]

If we move to consider the second categories of CJEU decisions, we meet a completely different scenario.

In several preliminary rulings on the legality of national measures adopted on the basis of MOUs, the court denied that it had jurisdiction, not finding a link between such a national measure and EU law[49]. The Court ruled in such a sense in Case 128/12 (*Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios, SA*) and in *Sindacatos Nacional dos Profissionais de Seguros* in 2014. The reticence of the CJEU is highly problematic and contestable, particularly if we consider that in several cases the Content of the MOU has been implemented by the Council's decisions, making it difficult to deny the existence of a link with EU law. One could say that the CJEU in its early case law decided not to decide, leaving some fundamental questions on the legitimacy of conditionality and the MOU open, such as for example their justiciability in light of the Charter of Fundamental Rights, even when EU institutions act within the scope of the ESM (such as the Commission); this showed, "in sharp contrast to comparable non-crisis

[47] Gauweiler, C 62/2014, para. 52.

[48] C. Kreuder-Sonnen, *Beyond Integration Theory: The Anti-Constitutional Dimension of European Crisis Governance*, in *JCMS, vol. 54, 6,* 2016, p. 1361.

[49] On the nature of MOUs and their role within the EU legal framework see C. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts, in Oxford Journal of Legal Studies, vol.* 35 2, 2015, pp. 325-353.

cases – a distinct reluctance regarding individual rights protection by denying review of cases relating to the bailout regime"[50].

However, in the *Ledra Advertising* case[51] - concerning the role of the Commission and, to a lesser extent, the European Central Bank, in the negotiation and signing of the Memorandum of Understanding concluded between the Republic of Cyprus and the European Stability Mechanism during the financial crisis of the years 2012-2013 - the Court seemed to change its approach. *Ledra Advertising* can be considered a "Janus Bifrons": on one side the Court denies, again, EU citizenship to the MOU (which falls outside the scope of the EU law and therefore cannot be subjected to a direct annulment by the Court); on the other, however, the Court opens a slit with regard to the role and responsibility of EU institutions when acting within the ESM framework. In this regard, the Court recognized that the Commission, as "guardians of the Treaties", when acting on behalf of the ESM, should "refrain from signing a Memorandum whose consistency with EU law it doubts[52]". Certainly, *Ledra Advertising* represents an important change within the CJEU case law on bailout-related measures; however, its impact should not be overestimated: individuals, indeed, can challenge the EU institutions' bailout actions only by means of an action for damages but not by an annulment action, and within the former, not any unlawfulness by the EU institution, but only particularly serious illegality gives rise to damages liability[53].

Now the question is: does *Ledra Advertising* represent a new path within the CJEU case law with regard to the justiciability of bailout measures, or it is just a cautious attempt to patch up the Euro-crisis law's flaws?

5. *Conclusions*

[50] C. Kreuder-Sonnen, *Beyond Integration Theory,* cit., p. 1361. See also C. Barnard, *The Charter, The Court and the Crisis*, in *Legal Studies Research Paper Series* 18, 2013.

[51] Ledra Advertising Ltd v. European Commission and European Central Bank.

[52] Ibidem, para 59.

[53] A. Hinarejos, *Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising, in Eu Analysis Law*, in www.eulawanalysis.blogspot.it, 25 September 2016.

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

In comparing the case law of national supreme courts and the CJEU, we have noticed two extremely different attitudes: while the former - although each of them with its specific features - engaged in the sensitive and double-sided task of accommodating on one side the protection of core constitutional values and individuals' fundamental rights, and on the other side the contingent necessities caused by the economic crisis and the public interest, the latter adopted a very resilient approach.

At the national level, even if the different courts showed diverse attitudes, different degrees of deference towards the national legislative branch and the use of different arguments and standards, they acted with a great awareness of the impact of their decisions in times of economic crisis, not only within the domestic realm, but also outside of the national borders at the EU level. We can define such approach as judicial activism or juristocracy, i.e. the interference of the judiciary within the democratic and legitimate choices of other institutional actors within the State. But in times of crisis, as we have already pointed out, juristocracy charges have to take into account that the democratic process is so to speak challenged through the use of emergency procedures, usually expanding the executive power and shortcutting parliamentary prerogatives.

On the contrary, if we look at the supranational level, the CJEU has adopted a very cautious approach so far, being deferent to the crisis mechanisms and to the ECB's expertise. If one can compare such a deferential approach to the usual relationship among courts and executives in emergency situations, several concerns may arise about the Court's role in ruling on the features of such mechanisms given the

nature of the ECB, an expert body, and the independence granted to it by the Treaties[54]. While usually courts play a counterbalancing role in emergencies, this does not seem to be the case for the CJEU, which on the contrary has sided with the "supra-national discretionary authority"[55], legitimizing their action in light of EU law even when they did not stand on any legal basis. As it was argued, the CJEU rulings "did not merely accommodate the respective emergency measures within the EU law; they also cemented those concomitant authority structures which lean towards authoritarianism rather than constitutionalism"[56].

In particular, the case law on the nature of the Memorandum of Understanding is inconsistent and debatable so far. The CJEU refused to review national emergency measures enacted in the light of the Eurozone crisis on the basis of MOU, leaving the protection of fundamental rights vis-à-vis the crisis measures in a sort of grey area of non-justiciability.

As was foreseeable, "while it is understandable for the Court to exercise judicial restraint when faced with situations of economic emergency, the approach adopted by the Court – namely the outright rejection of any link to the EU law – does not seem sustainable in the longer term"[57]. Indeed, the CJEU's decision in *Ledra Advertising* represents a first attempt to normalize crisis-driven mechanisms, making the EU institutions accountable to individuals, even when acting within the framework of the ESM. However, this is only a small step if we look at it within the context of the persistent flaws of the EU economic governance, the crisis of legitimation of the EU project and the deep gap between the EU institutions and its citizens.

In light of such a challenge for the EU integration project, it is probably "time for those who reform European economic governance to turn to Rawls and Walzer and to Hobbes, Bentham, Hegel, and Hart for inspiration on how to put flesh on the normative basis for acting in supreme emergency"[58].

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[54] A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective,* OUP, 2015, p. 131.

[55] For this concept see K. Dyson, *Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency*, cit., p. 208.

[56] C. Kreuder-Sonnen, *Beyond Integration Theory,* cit., p. 1361.

[57] A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, cit., p. 135.

[58] K. Dyson, *Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency*, cit., p. 221.

RIVISTA DI
DIRITTI COMPARATI

ABSTRACT: The paper deals with the role played by the judiciary during the Eurozone crisis, comparing the attitudes of national supreme courts (in Portugal, Italy, Greece, Latvia and Romania) and the Court of Justice of the European Union (CJEU) in judging austerity measures adopted under emergency circumstances. While at national level supreme courts have played a key role in fundamental rights protection, trying to safeguard the constitutional order's core values in moments of extraordinary circumstances, the latter - until the *Ledra Advertising* case - avoided judging the legitimacy of the bailout measures, which therefore represents a sort of black hole in the EU legal framework. The paper highlights the paradigmatic nature of the Euro crisis as a global crisis that involves national, supranational, and international settings and sheds light on the different attitudes of the Courts within the broader context of the persistent flaws of EU economic governance.

KEYWORDS: Emergency, Eurozone crisis, conditionality, courts

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