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Constitutional Courts Facing the Euro Crisis.
Italy, Portugal and Spain in a Comparative Perspective.

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European University Institute
Max Weber Programme

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Abstract

This paper aims to analyse whether and to what extent Euro-crisis law – a mix of international, European and national measures adopted in reaction to the Eurozone crisis – has affected constitutional case law in three Eurozone countries receiving financial support or assistance and provided with a Constitutional Court: Italy, Portugal, and Spain. The paper identifies elements of continuity and innovation in the rulings of the three Courts compared to the pre-crisis period by looking at how constitutional judges ‘manage’ social rights and regional autonomy, and how they develop their constitutional reasoning. It is argued that, contrary to expectations because of the new fiscal constraints and although with some remarkable differences, Euro-crisis case law is usually in continuity with the past rulings of these Constitutional Courts and this is due both to legal elements – like access to the Court, its composition, the appointment of judges, the effects and timing of decisions, and the standards for review – and non-legal elements – like the economic situation and changes occurring in the political context.

Keywords

Constitutional Courts – Euro-crisis law – social rights – regional autonomy – constitutional reasoning

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Max Weber Postdoctoral Fellow in Law, 2013-2014

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I. INTRODUCTION

In the last four years, the reform of economic governance in the EU has imposed strict fiscal constraints on the public accounts of the Eurozone countries by way of international, European, and, consequently, national measures. For the purpose of this paper this complex and heterogeneous body of law is named ‘Euro-crisis law’.¹

Indeed, Euro-crisis law stems from a complex of legal measures and primarily affects the Eurozone countries – and to a lesser extent non-Eurozone Member States, especially those receiving financial support, depending on their actual economic situation, e.g. whether a bailout has been declared or not. The notion of Euro-crisis law encompasses a wide range of sources of law: EU law, like the six-pack and the two-pack;² international agreements signed by all Eurozone Member States, like the Treaty on the European Stability Mechanism (TESM); bilateral agreements providing loan assistance to a specific country; and national law, at the constitutional or subconstitutional level, like balanced budget clauses or European-driven structural reforms. There is no scholarly agreement on whether international and European Euro-crisis law leaves a narrow or wide margin for manoeuvre to national legislators.³ However, this discretion is certainly far more limited in States that are subject to strict conditionality and to macroeconomic imbalances and excessive deficit procedures.

While in matters of European and Monetary Union (EMU) the role of the Court of Justice of the EU is definitely limited in comparison with other fields of law, there is the prospect that Euro-crisis law may prompt a more active role for national courts and especially for constitutional judges.⁴ In particular, these judges are called on to solve an increasing number of constitutional conflicts deriving from potential clashes that the new measures are likely to introduce between rights protection, institutional roles and autonomy of the different levels of government on the one hand, and a tightening of public resources in a time of economic crisis on the other. This does not imply, however, that constitutional judges are always willing to adjudicate such cases and that they are keen to invalidate legislation in a much more pervasive manner than they usually do in times of ‘ordinary constitutional life’. Depending on the external non-legal and legal constraints in which judges operate – again, bailout or non-bailout country, political context, past case law, and judicial appointments – and on the system of constitutional adjudication, the judicial reaction might also be limited to confirming the decisions taken by political actors and to relying on previous case law. The increasing number of constitutional conflicts to be adjudicated by the courts rather than being solved by politics does not hinder the fact that constitutional judges might well accept ‘the primacy of discretionary politics in the management

¹ The expression ‘Euro-crisis law’ is borrowed from the title of a research project run by the Law Department of the European University Institute, Florence: ‘Constitutional Change Through Euro-Crisis Law (2013-2015)’.

² The so-called six-pack is composed of five regulations and a directive which entered into force on 13 December 2011 (EU Regulations, no 1173, 1174, 1175, 1176, and 1177/2011 and Directive EU 2011/85, OJEU L 306, vol. 54, 23 November 2011). The two-pack is composed of two EU Regulations (regulations no 472 and 473/2013, OJEU L140, vol. 56, 27 May 2013). Finally, the TSM entered into force on 27 September 2012 and the mechanism has been in operation since 8 October 2012.

³ For example, Article 3.2. of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, (hereinafter, Fiscal Compact) creates an obligation, at least for the Contracting Parties within the Euro area, to adopt a balanced budget rule ‘through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes’, by one year after its entry into force on 1 January 2013. However, only a minority of Eurozone countries (like Italy and Spain) have constitutionalised the balanced budget clause, which means that a constitutional reform was an option but was not mandatory. See, for Italy, M. Luciani, ‘L’equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità’, Conference organized at the Italian Constitutional Court on *Il principio dell’equilibrio di bilancio secondo la riforma costituzionale del 2012*, Rome, 22 November 2013, p. 11; for Spain, see M. Aragón Reyes, ‘Encuesta sobre la reforma constitucional. La reforma de l’artículo 135 CE’. *Revista española de derecho constitucional*, no. 16, 2011, p. 169. Compare also the decision of the Conseil constitutionnel no. 2012-653 DC, 9 August 2012.

⁴ See F. Fabbrini, ‘The Fiscal Compact, the golden rule and the paradox of European federalism’. *Boston College International & Comparative Law Review*, 36 (1), 2013, p. 1-38.

of the crisis' and might fail 'to develop any criteria against which the legitimacy of these practices might be assessed'.⁵

To date, a massive amount of literature has dealt with the role of constitutional and supreme courts in matters of budget and of legislation that has financial implications.⁶ The difficulty encountered by judges in taking decisions that so directly affect the rights of people, the rule of law, and the inter-institutional balance has been strongly emphasised.⁷ While so far the literature has mainly focused on the judicial review of specific European and international law measures linked to the financial crisis,⁸ a comparative analysis of the role of constitutional judges in the aftermath of the Eurozone crisis is still lacking.⁹

The aim of the paper is to fill this gap and to answer the following questions. What is the reaction of constitutional judges, in particular in some Eurozone Member States experiencing financial troubles – namely, in Italy, Portugal and Spain – to the crisis? Has the Euro-crisis law represented a breakthrough

⁵ See M. Everson & C. Joerges, 'Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?', *LSE 'Europe in Question' Discussion Paper Series*, no. 63, 2013, p. 23, available at <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper63.pdf>. In other words, judicial activism as a reaction against the measures adopted to contrast the crisis cannot be taken for granted.

⁶ From classics, like A. Bickel, *The Least Dangerous Branch: Supreme Court at the Bar of Politics*, 2nd ed., Yale, Yale University Press, 1986, esp. p. 111 ff. and C. Mezzanotte [1984], *Corte costituzionale e legittimazione politica*, new edition, Napoli, Editoriale Scientifica, 2014, p. 1-55 to national case study – see, e.g., V. Onida, *Le leggi di spesa nella Costituzione*, Milano, Giuffrè, 1969, G. Rivoecchi, *L'indirizzo politico finanziario tra Costituzione italiana e vincoli europei*, Padova, Cedam, 2007, p. 212 ff., and V. Ruiz Almendral, *Estabilidad Presupuestaria y Gasto Público en España*, Madrid, Editorial La Ley, 2008 – and to the context of the European Union – M. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, Hart Publishing, 1998, p. 35 ff., and G. DelleDonne, 'A Legalization of Financial Constitutions in the EU? Reflections on the German, Spanish, Italian and French Experiences', in M. Adams, F. Fabbrini, & P. Larouche (eds), *The Constitutionalization of European Budgetary Constraints*, Oxford-Portland, OR, Hart Publishing, 2014, p. 181-204.

⁷ See, for example, E. Chiti & P. G. Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis', *Common Market Law Review*, vol. 50, no. 3, 2013, p. 683-708, D. Curtin, 'Challenging Executive Dominance in European Democracy', *Modern Law Review*, vol. 77, no. 1, 2014, p. 1-32, and C. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's bailouts*, 2014, forthcoming.

⁸ Great attention has been devoted, for example, to the judicial reception of the Treaty on the European Stability Mechanism (ESM) and to the Fiscal Compact – on which see, e.g., F. Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective', *Berkeley Journal of International Law*, vol. 32, no. 1, 2014 forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328060, and S. Bardutzky & E. Fahey, 'Judicial Review of Eurozone Law: The Adjudication of Postnational Norms in EU Courts, Plural - A Case study of the European Stability Mechanism', *Amsterdam Centre for European Law and Governance Research Paper No. 2013-06*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2287917## – as well as to specific rulings of national Constitutional and Supreme Courts, like the *Pringle case* – see P. Craig, 'Guest Editorial: Pringle: Legal Reasoning, Text, Purpose and Teleology', *Maastricht Journal of European and Comparative Law* vol. 20, no. 1, 2013, p. 3-11, B. de Witte & T. Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle', *Common Market Law Review*, vol. 50, no. 3, 2013, p. 805-848, and V. Borger, 'The ESM and the European Court's Predicament in Pringle', *German Law Journal*, vol. 14, no. 1, 2013, p. 113-139 – or the decision of the German Constitutional Court to issue a preliminary reference to the Court of Justice of the European Union about the validity of the outright monetary transaction programme – see the special issue of the *German Law Journal* on OMT, vol. 15, no. 2, 2014.

⁹ There have been either contributions on the constitutional implications of the Eurozone crisis from the point of view of the European Union – see, for example, K. Tuori & K. Tuori, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge, Cambridge University Press, 2014, esp. p. 117 ff. – or ones devoted to a specific Member State – see e.g. J. García Roca & M. Á. Martínez Lago, *Estabilidad presupuestaria y consagración del freno constitucional al endeudamiento*, Pamplona, Aranzadi, 2013, p. 65 ff. and the special issue of *Revista General de Derecho Público Comparado*, Sabrina Ragone (ed.) on 'Costes y beneficios de la descentralización política en un contexto de crisis', no. 15, 2014 – or collections of country studies focused on specific aspects of constitutional law, although not on a comparative analysis of Constitutional Courts – see, e.g., X. Contiades (ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis*, Farnham, Ashgate, 2013, and C. Kilpatrick and B. de Witte (eds.) *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, Law 2014/05 EUI Working Paper.

for their case law? These issues will be addressed by looking at constitutional judgments since 2010, and in particular at the case law on measures having a financial impact (fiscal consolidation programmes, structural reforms, budgetary acts) to consider how the case law of the courts has been affected by Euro-crisis law.

Italy, Portugal and Spain have been selected as case studies as they are three Eurozone countries which have received financial support or assistance, but to a different degree. Portugal has been a bailout country since 2011, and thus subject to strict conditionality, and exited the financial and assistance programme only in May 2014. Italy and Spain benefited from the Securities Markets Programme of the European Central Bank, and Spain requested a bailout only for the financial sector. Therefore, the constraints imposed on Portugal were far more severe than those on Spain and Italy. As a consequence, different economic and legal situations might have played a role in the reactions of the Constitutional Courts towards Euro-crisis law.

However, a comparison between Italy, Portugal and Spain is interesting for another reason. Italy and Spain are based on a centralized model of constitutional review of legislation, with an *ad hoc* Constitutional Court designed to this end (Articles 134 It. Const.; 159 Sp. Const.).¹⁰ For the purpose of the present paper, Portugal can also be included in this category. Although this latter country has a hybrid system of constitutional review of legislation, partly centralized in the hands of the Constitutional Court and partly decentralized to ordinary judges,¹¹ all the relevant constitutional judgments on Euro-crisis law were issued by the Portuguese Constitutional Court assuming original jurisdiction on the constitutional challenges. On two occasions, the Court was asked to accomplish an *ex ante* review of a Euro-crisis measure (Article 278 Pt. Const.); the remaining cases were adjudicated by the Constitutional Court on the basis of challenges brought *ex post* by the actors empowered to do so by the Constitution (Article 281 Pt. Const.). None of these decisions represented the outcome of an appeal against a ruling by an ordinary court.

Although the three States are provided with a Constitutional Court as the institution primarily entitled to solve constitutional conflicts dealing with Euro-crisis law, these Courts differ substantially regarding the avenues along which to bring constitutional challenges before them, the way the constitutional proceeding is designed and the timing of their decisions. These procedural constraints can substantially affect the outcomes of constitutional case law.

Finally, the Constitutions of these three Eurozone countries as standards for review also appear somewhat different in terms of protection of social rights, of constitutionalisation of budgetary constraints, and of guarantees of regional legislative and budgetary autonomy, all of them being areas that are more likely than others to be deeply affected by Euro-crisis law.

The main claim of this paper is that constitutional review of Euro-crisis law by the Italian, the Portuguese and the Spanish Constitutional Courts has not represented a breakthrough in their case law, contrary to what one might have expected. Instead, elements of continuity seem to prevail, even in the case of Portugal, whose Court has been severely criticized, in particular for judgments from 2013 onwards. Euro-crisis law has confirmed or strengthened trends in constitutional jurisprudence that

¹⁰ Among the many authors on the topic, see M. Cappelletti, *Judicial Review in the Contemporary World*, New York, Bobbs-Merrill Co., Inc., 1971, esp. p. 45 ff., L. Favoreu & W. Mastor, *Les Cours Constitutionnelles*, Paris, Dalloz, 2011, and M. De Visser, *Constitutional Review in Europe. A Comparative Analysis*, Oxford and Portland/Or, Hart Publishing, 2013, A. Stone Sweet, 'Constitutional Courts', in M. Rosenfeld & A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2013, p. 816-830.

¹¹ See A. Alen & M. Melchior, 'The relations between the Constitutional Courts and the other national courts, including the interference in this area of action of European courts', General Report, *Conference of European Constitutional Courts*, XIIth Congress, Brussels, May 2002, and M. L. Amaral, 'Problemas de *Judicial Review* em Portugal', *Themis. Revista da Faculdade de Direito da UNL*, vol. VI, no. 10, 2005, p. 69-70; J. de Sousa Ribeiro & E. Mealha, 'Portugal', in A.R. Brewer-Carias (ed.), *Constitutional Courts as Positive Legislators. A Comparative Study*, Cambridge, Cambridge University press, 2013, p. 721.

were already present before the financial crisis or that could be detected through a close look at constitutional judgments delivered before the most acute phase of the crisis, i.e. the one leading to a request for financial support or assistance. Such an outcome – it is argued – depends in particular on the national design of the constitutional review of legislation, which shapes the context in which the three Courts take their decisions and play their institutional role, including during the crisis. As mentioned, this design may be different in Italy, Portugal and Spain, but it is the main reason for continuity, with a few exceptions, prevailing. This continuity in the case law of each Court, however, does not necessarily imply that the contents of the decisions of the three Courts resemble one another. There are common trends, for example the constraint of regional autonomy or the preferential use of constitutional principles – e.g. equality and proportionality – in the adjudication of social rights, but there are also significant signs of divergence among these Courts, for example regarding the constitutional tolerance of limitations to social rights, which can be explained in the light of the constitutional standard of review as well as of non-legal elements, such as the particular economic situations. This is why the analysis of the case law dealing with social rights and with regional legislative competence is presented here by country.

The paper is organised as follows: section II defines the context of the operation of the Constitutional Courts, in terms of legal and non-legal constraints, and the systems of constitutional adjudication, for example regarding the composition and access to the Courts; section III is devoted to an analysis of the constitutional case law by looking at continuity and innovations in the three main fields that are deemed crucial for legal systems during the Euro-crisis: the protection of social rights, regional autonomy, and constitutional reasoning. Finally, section IV tries to draw some conclusions on constitutional adjudication of Euro-crisis law.

II. ITALY, PORTUGAL, AND SPAIN: THE CONSTITUTIONAL CONTEXT

II. A Political and economic situation

During the Eurozone crisis, in particular from 2010 onwards, Italy, Portugal, and Spain have featured one or more changes of government composition following elections. Since November 2011, Italy has experienced the alternation of three different governments: after Silvio Berlusconi, leader of the centre-right ruling coalition, resigned following changes in the composition of the coalition and troubles in the legislative process of approval of the annual audit report, a ‘technical government’ led by Mario Monti, former member of the European Commission, and composed of Ministers devoid of a parliamentary mandate – i.e. unelected – was appointed. This government resigned on 21 December 2012, once most of the tasks for which it was appointed, namely starting a process of restoration of sound public accounts and getting the spread between Italian and German government bonds under control, had been accomplished. A general election took place in February 2013 and led to political deadlock due to an inability to create a new government. In the aftermath of this political crisis, the decision was taken to summon the new Parliament for the election of the new President of the Republic, whose mandate expired in the same period. For the first time ever in Italian constitutional history, former President Giorgio Napolitano was re-elected. On 28 April 2013, Napolitano then appointed as new head of the Government Enrico Letta from within the Democratic Party, the party that had a relative majority in the two chambers. Because of an internal struggle for the leadership of the Democratic Party, Enrico Letta was forced to resign, and the new secretary of the party, Matteo Renzi, has been the President of the Council of Ministers since 22 February 2014.

Political stability in Portugal has been deeply affected by financial troubles, by Euro-crisis law, and by the threat of bankruptcy. In March 2011, Prime Minister José Sócrates was forced to resign after the rejection of the government amendments to the Growth and Stability Pact 2011 that every Eurozone country has to transmit to the European Commission during the European Semester. Consequently, a general election was held on 5 June 2011, which led to the defeat of the then ruling majority and in particular of the socialists, and recorded the lowest turnout ever in the history of democratic Portugal. The centre-right Social Democratic Party became the first party of the country and its leader, Pedro Passos Coelho, was appointed Prime Minister of a coalition government with the CDS-People’s party on 16 June 2011. Since then, the life of the government has been characterized by tensions with

opposition parties, by reshuffles, and by requests for several votes of no-confidence, especially on the implementation of Euro-crisis law through the budgetary process.

Finally, in Spain the ruling majority changed in November 2011 after a general election. The last act of the incumbent Prime Minister, the socialist José Zapatero, before he asked the King to call a new election and dissolve the Parliament, was to have the constitutional reform on financial sustainability passed. The new Prime Minister, Mariano Rajoy, leader of the People's Party, can count on a comfortable majority in Parliament and, notwithstanding the opposition of the left-wing political parties, the implementation of Euro-crisis law has been relatively smooth.

These three Eurozone countries have experienced severe financial troubles, are suffering from high unemployment rates, and are or were subject to an excessive deficit procedure: on 29 May 2013 the excessive deficit procedure against Italy was abolished and the deadlines for the correction of excessive deficits were extended for Portugal and Spain.

Although the three states were subject to financial support and assistance programmes, their economic and financial situations are not exactly alike. The size of their GDPs certainly has an influence on their respective 'contractual power' in the management of the Eurozone crisis. The Italian and the Spanish GDPs are respectively almost ten and six times the size of the Portuguese GDP. Having the third and the fourth largest GDPs in the European Union, Italy and Spain appear to be 'too big to fail' without bringing the entire Eurozone to a collapse.

The extent and aim of the financial support and assistance was also different. For example, Italy has never been in the position to request a bailout, as the other two countries did (Spain only for the financial sector); Spain and Portugal officially exited the bailout programme on 23 January 2014 and on 16 May 2014 respectively. Italy only benefited from the European Central Bank's Securities Markets Programme, a form of financial support that was not even advertised within the country or debated in Parliament, although Italy was the first beneficiary of this kind of measure in the Eurozone.¹² Given the huge size of the Italian public debt and the speculative attack, the European Central Bank secured over 100 billions of euros of Italian bonds from the market in 2011 and 2012, in exchange for an assurance on the part of the Italian Government about structural reforms to be undertaken, limitation of the deficit, and reduction of the debt.¹³ The Securities Markets Programme has been used by the other two countries, too, but for a more limited amount.

In addition to this, in 2012 the Spanish Government requested and obtained financial assistance for the re-capitalisation and the restructuring of the banking sector via the European Financial Stability Facility (EFSF), a private fund established in Luxembourg under Luxembourg Law on the basis of an international agreement signed in 2010 by all the Eurozone countries. Under the supervision of the European Central Bank, the Commission, and the International Monetary Fund, Spain signed the Financial Assistance Facility Agreement – an international agreement – with the EFSF and a Memorandum of Understanding on Financial-Sector Policy Conditionality on 20 July 2012, in which a roadmap and specific instructions for Spain, including regarding the legislation to be adopted, were

¹² See the Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme (ECB/2010/5), OJEU L124/8, 20.5.2010. For the case of Italy, reference has been made to 'financial support' since 'financial assistance' is deemed to be a tool of economic policy from which the European Central Bank is excluded, at least according to the recent (and the first) order for a preliminary reference to the Court of Justice of the European Union issued by the Federal Constitutional Court of Germany on 14 January 2014; see 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, para. 65. I am grateful to Thomas Beukers for pointing this out to me. In Italy, the use of the Securities Markets Programme was disclosed by an Italian newspaper, *Corriere della Sera*, in September 2011, whereas the Parliament was officially informed 8 months later through the Annual Report of the Bank of Italy for 2011 of 31 May 2012.

¹³ From August to November 2011, there was an intense exchange of letters between European Institutions, in particular the European Central Bank, and the Italian Government requiring it to restate its commitment to the reforms required.

set.¹⁴ Spain received the financial assistance in two disbursements, in December 2012 and February 2013, the latter by means of the European Stability Mechanism, which meanwhile had replaced the EFSF.

The economic situation in Portugal appeared even worse. On 6 April 2011, the resigning Prime Minister Sócrates declared the bankruptcy of the public finances and the day afterwards he notified the European Commission, the Eurozone countries and the International Monetary Fund of a request for financial assistance. On 17 May 2011, the Council of the EU agreed to provide assistance to Portugal subject to precise conditions for the recovery of the country. The Memorandum of Understanding on Specific Economic Policy Conditionality and the Loan Agreement were then signed. Unlike Spain, which relied on the EFSF and later on the European Stability Mechanism, the assistance to Portugal was split between three instruments: the EFSF, for the greatest part, the International Monetary Fund directly, and the European Financial Stabilisation Mechanism (EFSM), established under EU law by Council Regulation EU no. 407/2010 of 11 May 2010.¹⁵ Financial assistance was assured for three years – subject to review before each instalment was paid – and thus expired in mid-2014. Given the situation, financial assistance was coupled with a Memorandum on Economic and Financial Policies for the same period imposing a series of structural reforms and the consolidation of the financial sector. This eventually bound the new government to also cut wages and pensions, particularly in the public sector; a decision that was tolerated by the Constitutional Court only until 2012.

In particular in the case of Portugal, financial assistance programmes are a mixture of EU and international legal norms: the EU arm of the rescue package is provided by the EFSM, established by means of Council Regulation EU n. 407/2010 and the specific implementing decisions of the Council of the EU; the international arm, instead, is composed of the Financial Facility Assistance Agreement between the beneficiary state and the EFSF, and the Memoranda of Understanding, in their various forms (on Specific Economic Policy Conditionality, on Economic and Financial Policies, and Technical Memoranda).¹⁶ As was predictable, the heterogeneity in the nature and the sources of the legal constraints that bind these three Eurozone countries receiving financial assistance or support creates much confusion in their judicial treatment before constitutional judges.¹⁷

II.B Brief overview of the systems of constitutional adjudication

(i) Composition of Constitutional Courts and appointments

The procedures for the appointment of constitutional judges in the three States and their actual application since 2010 are particularly important to understand the development of constitutional case law in each country.

¹⁴ It is Article 2 of the EFSF framework agreement that prescribes this arrangement. A Memorandum of Understanding is negotiated by the beneficiary state with the European Commission, the European Central Bank, and the International Monetary Fund, on the basis of a Council Decision – in the case of Spain, EU Decision n. 443/2012 of 23 July 2012 addressed to Spain on specific measures to reinforce financial stability – adopted according to Article 136 TFEU. The legal nature of the Memorandum of Understanding has been discussed by scholars: some of them consider it legally binding (see E. Correia Baptista, ‘Natureza Jurídica dos Memorandos com o FMI e com a União Europeia’, in *Revista da Ordem dos Advogados*, Ano 71, II, 2011, pp. 477-488); according to others, the Memorandum contains guidelines of a political character (see G. Katrougalos, ‘The Greek Austerity Measures: Violations of Socio-Economic Rights’, *Int’l J. Const. L. Blog*, 29 January 2013, available at: <http://www.icconnectblog.com/2013/01/the-greek-austerity-measures-violations-of-socio-economic-rights>).

¹⁵ The EFSM ‘arm’ of the financial assistance is regulated by the Council of the EU Implementing Decision no. 344/2011 of 30 May 2011 on granting Union financial assistance to Portugal, which has been subject to several revisions; the latest of them was COM(2014) 54 final.

¹⁶ They are contained in the Economic Adjustment Programme for Portugal, which has been subject to eleven reviews. See http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

¹⁷ See C. Kilpatrick, *An economic emergency? The degradation of basic legal values in Europe’s bailouts*, unpublished manuscript, EUI Law Department, Seminar in Social Rights, Fall 2013, p. 12.

In Portugal, ten of the thirteen constitutional judges are elected by a parliamentary majority (Article 222 Pt. Const.) – of two thirds of the deputies present who represent the absolute majority in Parliament (Article 16, Law no. 28/82) – and the remaining three are co-opted by those in office. Although constitutional judges have to be lawyers or judges from other courts (Article 13, Law no. 28/82) they are chosen mainly by political parties and by the ruling majority at the time, and the judiciary itself is not involved in the process of appointments, unlike in Italy and Spain, where a quota of constitutional judges is chosen either by the ordinary and administrative higher courts or by the judicial self-governing body (Articles 135 It. Const. and 159 Sp. Const.).

The mandate is for nine years (non-renewable) in the three Courts, but, interestingly, in Portugal half of the Court – six members including the three co-opted – was renewed from 2012 to 2014, which is in the period in which the Constitutional Court adopted its most controversial decisions against the austerity measures. Moreover, in 2011 new parliamentary elections took place causing a shift in power between the majority and the opposition. Thus, the new constitutional judges were elected thanks to the support of the new government coalition. The impact on constitutional case law has been significant. As the Portuguese Constitutional Court decides by a majority whenever unanimity cannot be reached, and minority opinions are disclosed, it is clear that since 2012 the Court has been constantly divided when judging on Euro-crisis law, i.e. on the austerity measures adopted during the bailout.¹⁸ Almost all the relevant judgments have been taken with a 7-to-6 majority. Furthermore, every judge has been in the minority on one of the issues under review while at the same time being part of the majority on the other issues (decisions nos. 187/2013 and 413/2014).

The change of the political majority in the Parliament, the bailout, and the renewal of its composition have altered the internal balance within the Portuguese Constitutional Court. For example, *Acórdão* no. 353/2012, which declared the unconstitutionality of two articles of the Budget Act for 2012 – passed by the new Parliament – and which marked a turn in the case law of the Court on Euro-crisis law, was passed because of the support of the ‘old’ judges, elected during the leadership of the socialist party. In a previous judgment, no. 396/2011, based on the Budget Act for 2011, they had already set a threshold for what is admissible in terms of social security cutbacks and what is not.

A similar split in the operation of the Constitutional Court has not taken place in Italy or Spain. In Italy, the renewal of the constitutional judges has been more gradual over time and less influenced by political developments than in Portugal. Indeed, a third of the judges are elected by the two Chambers in joint session and with a qualified majority, well beyond the majority in power – two thirds of the members of the Parliament in joint session or three fifths after the third vote (Article 3, const. law no. 2/1967). A third is appointed by the President of the Republic, a *super partes* institution and the political guarantor of the Constitution, and the remaining third by the higher Courts. Although the financial crisis and the constitutionalization of the balanced budget clause have certainly affected the case law of the Court on Euro-crisis law, there have not been unexpected *revirements*. Moreover, even if there has been disagreement within the Court, it is not possible to ascertain it as no dissenting or concurring opinions are permitted.

Although in Spain dissenting opinions are allowed, they have been used on very few occasions in decisions on Euro-crisis law. The Court appears cohesive in its judgments, although its composition has completely changed over the last four years. Since the most acute phase of the Eurozone crisis hit Spain, starting from 2010, the composition of the Court has been entirely renewed. Such an overall transformation in this short period of time does not comply with the wording of the Constitution, which provides for the renewal of one third of the judges every three years (Article 159.3 Sp. Const.). The deadlock encountered in appointing new judges, in particular by the Parliament, and the end of the mandate of previous judges put the Constitutional Court under a serious threat of its activity being blocked. When a political agreement was finally found, the only viable solution to preserve the operation of the Court was to undertake three renewals of the judges in sequence over three years. It should be taken into account that of the twelve constitutional judges, four are elected by the Congress

¹⁸ The only exception is *Acórdão* no. 862/2013, supported by the judges in unanimity.

of Deputies and four by the Senate by majorities of three fifths of their members.¹⁹ Two judges are chosen by the Government and two by the judicial self-governing body. The Government and the Parliament, although the latter with qualified majorities, are thus able to control the composition of the Constitutional Court. Nine of the twelve judges have been chosen by the present Government and Parliament. Apart from other very important elements, like the Eurozone crisis knocking on the Spanish door, a landmark decision on budgetary matters issued by the Court in 2011 – before Zapatero resigned – and the constitutionalization of the balanced budget clause, also inspired by the above precedent, the new composition of the Constitutional Court in line with the new composition of the legislative and executive branches can contribute to explaining the very cautious approach of the constitutional judges in striking down national legislation.

(ii) Access to Constitutional Courts

Most of the judgments of the three Constitutional Courts on Euro-crisis law have been issued following abstract review of the measures. Just a few constitutional judgments on Euro-crisis law in Italy and Spain – and none in Portugal – have followed a preliminary reference concerning constitutionality from an ordinary judge. At the same time, although it is allowed in Spain and Portugal – but not in Italy – the constitutionality of international agreements, like the Fiscal Compact and the TESI or the Memorandum of understanding following the bailouts, from which many provisions of the subsequent Budget Acts directly derived, were not challenged before the Constitutional Courts.²⁰

Very often in the field of Euro-crisis law, Constitutional Courts have not assessed constitutionality on the basis of an actual application of the contested norm in a specific case.²¹ This kind of review directly challenges the legislative output of the Parliaments without testing the effects of a measure in its concrete operation. Moreover, abstract review does not usually lead the Courts to develop a rights-based approach in their rulings, to draw on the catalogue of constitutional rights for the interpretation of the constitutional problem at stake, or to address the constitutional issue in the light of protecting a particular right. Instead – as is indeed demonstrated by the case law of the three Courts – the abstract review of constitutionality pushes constitutional judges either to focus on the division of legislative competence and *ultra vires* activity or to solve the case on the grounds of constitutional principles (equality, proportionality, legitimate expectations). Nor is a rights-based approach favoured in Spain by the use of the well known *recurso de amparo* (Article 53 Sp. Const.).²² This is not a viable tool for adjudicating Euro-crisis law, first of all because legislative acts – primarily Budget Acts and laws implementing structural reforms – cannot be subject to a *recurso de amparo*, and secondly because a violation of social rights – or rather the *Principios rectores de la política social y económica* (Part I, Chapter 3, Sp. Const.) – is not protected by this kind of individual complaint, with the exception of the right to education.²³

¹⁹ The appointees of the Senate are chosen following consultation of the Autonomous Communities.

²⁰ However, while in Spain the Memorandum of Understanding on Financial-Sector Policy Conditionality and the Financial Assistance Facility Agreement were considered international agreements under Spanish law – see M. Estrada-Cañamares, G. Gomez Ventura, L. Díez Sánchez, *Constitutional Change Through Euro-Crisis Law: Spain*, EUI Law Department Research Project, section X.3, available at <http://eurocrisislaw.eui.eu/country/spain/topic/financial-support/> – in Portugal the Memorandum of Understanding and the Financial Assistance Facility Agreement were not formally recognized as international agreements under Portuguese law (see section III).

²¹ It must be taken into account that almost 90% of the cases decided by the Portuguese Constitutional Court deal with a concrete review of legislation, i.e. appeals made to the Constitutional Court against the rulings of other courts. See J. de Sousa Ribeiro & E. Mealha, 'Portugal', cit., p. 733.

²² On the *recurso de amparo*, see, for example, F. Fernández Sagado, 'El regimen jurídico-procesal del recurso de amparo en España', in Id., *La justicia constitucional. Una visión de derecho comparado*, Tomo III, Madrid, Dykinson, 2009, p. 759 ff.

²³ As claimed by M. González Pascual, 'Welfare Rights and Euro Crisis - The Spanish Case', in C. Kilpatrick and B. de Witte (eds.), cit., p. 98, 'the Spanish legal system does not provide many opportunities for claiming welfare rights in courts'.

In Italy and Spain, most case law on Euro-crisis law has dealt with disputes between the State and the Regions on the exercise of legislative competence on budgetary and social matters.²⁴ In Spain for the first time ever, the threshold of 1160 municipalities²⁵ representing at least one sixth of the Spanish population was reached to bring an action of unconstitutionality against State legislation for the violation of local competences, i.e. *conflicto en defensa de la autonomia local* (Article 75 ter LOTC). Around 3000 municipalities, most of them in Catalonia, succeeded in filing this complaint before the Spanish Constitutional Court against State Law 27/2013 on the rationalisation and sustainability of Local Administrations because of the strict limits imposed on local authorities and their competences in compliance with the principle of budgetary stability. This law determines the status, salaries and conditions for hiring employees as well as the range and costs of social services provided.²⁶ The case, admissible on 9 September 2014, is now pending before the Court for a decision on the merits of the constitutional controversy.

A significant number of complaints in Spain, and even more so in Portugal, have been filed by parliamentary minorities. Especially in Portugal, this kind of action has provided the socialist opposition with an effective mechanism to overturn the austerity reforms put forward by the coalition government as the subsequent rulings by the Constitutional Court have usually held the norm challenged to be unconstitutional.

It should be highlighted, however, that the most disputed decisions of the Portuguese Constitutional Court on Euro-crisis law have been triggered by a significant number of constitutional challenges brought by other institutional actors in addition to parliamentary minorities. For example, judgment no. 187/2013 was issued on the basis of challenges filed by the President of the Republic, by the Ombudsman and by two parliamentary groups.²⁷ This means that the concerns about the constitutionality of the measures – concerns that were later endorsed by the Court – were widespread at the institutional level and did not only regard one faction in the political spectrum. By the same token, the President of the Republic has exercised his power to request a preventive and abstract constitutional examination of the austerity measures on several occasions and he has done this more frequently than he used to do (Article 278 Pt. Const.). Since under this preventive control a declaration of unconstitutionality by the Court prevents the entry into force of the unconstitutional norms, unless they are subsequently re-adopted by a super-majority in Parliament,²⁸ the President of the Republic usually handles this power with care, since to some extent it is exercised ‘against’ the Parliament.

²⁴ In Italy, the original version of the constitutional bill that later introduced the balanced budget clause entitled the Court of Auditors (Article 100 Const.) to challenge the constitutional validity of a legislative act whenever it was deemed to violate the balanced budget rule. This provision, however, was eliminated during the parliamentary process of constitutional reform between the committee stage and the plenary discussion. Therefore, the chance to have a sort of automatic referral to the Constitutional Court of any law that is doubtful on the ground of its compatibility with the balanced budget rule has failed.

²⁵ One seventh of the municipalities existing in the territory where the contested legal provision is applied (Article 75 ter.1 (b) LOTC). The only case where a *conflicto en defensa de la autonomia local* against State legislation was declared admissible and later on was decided on the merits, was STC 240/2006, 20 July 2006. The *conflicto*, declared unfounded, was a peculiar one, in that it was brought before the Court by the city of Ceuta, which has a peculiar status in Spain, against Article 68, State Law 55/1999 referring precisely to this city plan, hence Ceuta was the only municipality to which the contested provision could be applied. Instead, in the present *conflicto* against State Law 27/2013 the whole of Spanish territory is potentially affected and this is why thousands of municipalities support the *conflict*.

²⁶ See *Boletín Oficial del Estado* No. 312, of 30 Dec 2012: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-13756.

²⁷ See M. Canotilho, T. Violante & R. Lanceiro, ‘Weak rights, strong principles: Social rights in the Portuguese constitutional jurisprudence during the economic crisis’, paper presented on the occasion of the IXth IACL World Congress, Workshop 4: Social rights and the challenges of economic crisis, Oslo, 17 June 2014, p. 6-7. Article 281.2 Pt. Const. lists the subjects who can trigger a (abstract) constitutional review of legislation: the President of the Republic, the Speaker of the Parliament, the Prime Minister, the Ombudsman, the Attorney general, one tenth of the members of Parliament, and autonomous regions should their autonomy be violated.

²⁸ A majority that is at least equal to two thirds of all Members present and greater than an absolute majority of all the Members in full exercise of their office’ in the unicameral legislature (Article 279.2 Port. Const.).

However, in a year and a half – from January 2013 to July 2014 – the President has already requested this preventive examination of austerity measures four times, which again indicates very serious concerns about the compliance of the legislation passed with the Constitution; concerns that were partly shared by the Court in the four cases.

This overview of access to the three Constitutional Courts can help to explain their case law on Euro-crisis law, and in particular why the Portuguese Court has so far been more active than the others and why a rights-based reasoning has not been developed by these constitutional judges.

(iii) Timing, effects and types of constitutional judgments

Within the category of abstract review, the timing of the involvement and the effects of constitutional judgments play a great role in terms of the legitimacy of the Courts' case law, especially when the judgments can produce huge financial consequences.²⁹ The rules and the practice that constrain the activity of Constitutional Courts in this regard can orient the substance of their judgments.

For example, in Italy and Spain, the abstract review of constitutionality, which always takes place *ex post* once a law has been finally published in the official journal, can be requested within specific deadlines – sixty days after publication in Italy (Article 127 It. Const.) and three months in Spain (Article 33, organic law no. 2/1979, *Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional*, LOTC). The deadline is fixed so as to limit the negative effects of having a law in force – and able to produce legal and financial effects, social security cuts or social benefits – which is later declared unconstitutional and annulled. To this end, in both Italy and Spain it is possible to ask for the suspension of the effects of the contested act when the constitutional challenge is brought before the Court. In Italy, a motion for suspension can be filed by both Regions and the State when the public interest or citizens' rights can be severely jeopardized by the effects produced by the law in the meantime; in practice such a request has been filed on few occasions and never upheld by the Constitutional Court. By contrast, in Spain, where only the national Government can file a motion for the suspension of a regional law and the Constitutional Court has to confirm or withdraw the suspension in five months, such a suspension has been upheld with regard to some regional austerity measures, like those excluding irregular immigrants from the Basque public health system (*Auto* no. 239/2012) and increasing the price of medicines (*Autos* nos. 122/2013 and 142/2013). Particularly in this latter case, the suspension allowed the level of the prices to be kept unchanged and avoided having to refund citizens for the extra price paid for medicines if the regional laws were found unconstitutional, as indeed later happened.

From the point of view of the relationship between the timing and the effects of constitutional judgments, a declaration of unconstitutionality on Budget Acts or on Acts having financial implications, like labour markets and pension reforms, can prove to be very problematic, in terms of the consequences it can produce for the rights acquired by citizens while the unconstitutional law is in force on the one hand, and on the other for the sustainability of public finance. The three Courts cope with the issue of the retroactive effects of a declaration of unconstitutionality in the *ex post* constitutional review in different ways.

Indeed, the *ex ante* constitutional review does not pose specific problems in this regard. As the Portuguese Constitution clarifies, the norm subject to this form of review and which is suspected to be unconstitutional is not yet in force at the point when the Court is asked to decide (Article 278 Pt. Const.). This can explain why the frequent declarations of unconstitutionality in this proceeding when assessing Euro-crisis law do not alter the rights and the living conditions of the people (decisions nos. 474/2013, 862/2013, 574/2014 and 575/2014). These declarations can negatively affect the

²⁹ In particular on Italy, see Corte costituzionale, *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, Milano, Giuffrè, 1989, and T. Groppi, 'The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?', *Journal of Comparative Law*, vol. 3, no. 2, 2008, p. 100-117. On Spain, see J.J. González Rivas, *La interpretación de la Constitución por el Tribunal Constitucional*, Madrid, Civitas, 2011, p. 124-126.

relationship between the Court and the Parliament and create concerns *vis-à-vis* European and international institutions if the measure at stake was previously negotiated with them, but there is a remedy: in Portugal the measure declared unconstitutional within the *ex ante* review can be modified by the Parliament or even be re-adopted with a qualified majority. Nevertheless before the preventive decision of the Court the measure at stake cannot reduce or increase existing wages, pensions or allowances. In other words the status of public finance remains unchanged before the Court rules.

By contrast, in *ex post* constitutional review the norm reviewed and eventually declared unconstitutional is in force, and in the period between its enactment and the Court's judgment has produced legal effects, i.e. has been able to affect revenues and public spending as well as social policy.³⁰ As a general rule a declaration of unconstitutionality has retroactive effects (*ex tunc*).³¹ Consequently, existing legal positions built upon the unconstitutional provisions are directly affected. The only exception on retroactivity regards the situations that had been ultimately settled according to a final judgment or a prescription.³² As can be easily understood, the implications of unconstitutionality for the legitimate expectations of people and for the national budget might be massive. One would expect, then, that Constitutional Courts should be very careful in striking down Euro-crisis law under *ex post* review.

In order to contain the retroactive effects of unconstitutionality provided by Article 136 It. Const., the Italian Constitutional Court has sometimes adopted 'supervening declarations of unconstitutionality' or, while ascertaining the unconstitutionality of a norm, the Court has avoided issuing a declaration of unconstitutionality because of the retroactive effects produced (judgments nos. 467/1991 and 125-256/1992). In the few cases since 2010 in which the Italian Court declared legislative provisions dealing with pension and allowance cuts unconstitutional while performing the concrete review, i.e. through an *incidentaliter* proceeding (e.g. judgments nos. 223/2012 and 223/2013), it has never applied those techniques which allow splitting the content of a declaration of unconstitutionality from its effects. Nevertheless the Italian Constitutional Court has usually preferred to uphold the validity of the norms under review, being conscious of the drawbacks of its judgments for fiscal policy and legitimate expectations of people and given the 'rigidity' of Article 136 It. Const.

In Spain retroactivity of constitutional judgements is even more critical than in Italy because of the backlog of the Constitutional Court, although following the reform of the *recurso de amparo* in 2007 this backlog has significantly decreased and is now almost under control.³³ The short deadline for the Regions or the State to file constitutional challenges for an *ex post* abstract review does not allow for a smooth resolution of constitutional conflicts, which remain unsolved for years while the law under review is fully in force. It usually takes from 2 to 9 years before a case is decided, although this figure has been reduced year after year. With such a delay, it should not come as a surprise that the Court, in spite of the general rule on retroactivity, has given itself the power to declare an act unconstitutional *ex nunc* so as to avoid problems with retroactive effects; this power, which is a jurisprudential creation, has been used with extreme care in the last few years and during the Euro-crisis, thus clearly defining the limits. Because of the delay in the adjudication, the Court has not decided many cases dealing with Euro-crisis law yet and, in the cases decided on the merits, whenever possible it has refrained from annulling austerity measures, given the duties and the benefits created by the law in the meantime

³⁰ On the effects of the difference between *ex ante* and *ex post* constitutional review on judicial behaviour, but in the specific case of the ratification of European Treaty revisions, see C. Closa, 'National Higher Courts and the Ratification of EU Treaties'. *West European Politics*, 36 (1), 2013, p. 116-117.

³¹ On the significance of the temporal effects of constitutional judgments in order to assess the implications of a Court's case law, see P. Popelier *et al.*, 'The Effect of Judicial Decisions in Time: Comparative Notes'. In P. Popelier *et al.* (eds.), *The Effects of Judicial Decisions in Time*, Intersentia, 2013, p. 1-13

³² However, if the unconstitutional norm grounded a final criminal judgment of conviction, then the effects of a conviction come to an end.

³³ See Tribunal Constitucional de España, *Memoria 2013*, available at http://www.tribunalconstitucional.es/es/tribunal/memorias/Paginas/memoria_2013.aspx, p. 59-60 and Annex III.

(Article 161.2 Sp. Const.). The cautious approach is confirmed in *Sentencia* no. 206/2013, where the Spanish Constitutional Court declared the Budget for 2009 partially unconstitutional almost five years after a constitutional challenge by a parliamentary minority was filed. The Court clarified that the declaration of unconstitutionality did not entail retroactive effects upon already established legal situations, i.e. those on which a final judgment had been delivered or the administrative situations had been settled.³⁴

By contrast, in Portugal it is the Constitution that provides the Constitutional Court with the authority to ‘rule that the scope of the effects of the unconstitutionality or illegality shall be more restricted’ than what is prescribed as the general rule of retroactivity and its exception (Article 282.4 Pt. Const.). The limitation of the effects of the declared unconstitutionality must be used ‘for the purposes of legal certainty, reasons of fairness or an exceptionally important public interest, the grounds for which shall be given’.

The Court has not used this clause consistently over time, very often from 1989 to 1995; never from 1996 to 2005, and on average once a year since 2006, ranging from 700 to 900 judgments per year. Interestingly, precisely when the application of the clause might appear particularly suitable, in the adjudication of the Euro-crisis law, the Portuguese Constitutional Court used Article 282.4 Pt. Const. only twice, the first being *Acórdão* no. 353/2012, which found provisions of the Budget Act for 2012 unconstitutional. Since the Budget Act was already in execution when it was judged (in July 2012), and thus the challenged wage cuts for public workers had already been applied, the Court decided to limit the legal and financial effects of its judgment. While the Court acknowledged that the suspension of the Christmas and holiday allowances together with the 13th and 14th month bonus was in breach of the equality principle (Article 13 Pt. Const.), it ordered this suspension, which according to the Budget Act was supposed to be temporary, to be maintained in 2012 despite being unconstitutional. Otherwise, in the event of a ‘plain’ declaration of unconstitutionality, the State would have been forced to give the allowances back to public workers. With this judgment, the financial effects of the austerity measures were saved. The ability of the Court to modulate the effects of its decision over time limited the disputable implications that could follow a refund to public employees and launched a warning to the Parliament not to adopt similar measures in the future.³⁵ Given the financial crisis and the rescue package for Portugal, the Court’s warning was not abided by and provisions in subsequent Budget Acts were then declared unconstitutional without any suspension of the effects of the judgments.

Recently, the Portuguese Court has decided to restrict the effects of its declaration of unconstitutionality again (judgment no. 413/2014), but in a rather different manner to that in the 2012 ruling. Indeed, the Court held that a further reduction of public salaries was in contrast with the principle of equality, but this time did not suspend the effects of its ruling. It only prevented its judgment from establishing retroactive effects and the wage cuts were annulled *ex nunc* starting from the date of the ruling – 30 May 2014, i.e. the wage cuts introduced before were not affected. This time, the standpoint of the Court appears to be the protection of the level of public salaries for the remaining period of execution of the 2014 budget, whereas in 2012 the point of view taken by the Court was that of preserving the level of public revenues estimated for the whole fiscal year.

³⁴ Own translation from Spanish. See STC 206/2013, § 3 (h) and (j): ‘*Dado el tiempo transcurrido entre la interposición del presente recurso y la publicación de esta Sentencia, debemos sin embargo limitar los efectos de la anterior declaración de inconstitucionalidad y nulidad, que no afectará por tanto a las situaciones jurídicas consolidadas, es decir, no sólo las decididas con fuerza de cosa juzgada, sino también las situaciones administrativas firmes, según hemos decidido en casos similares atendiendo a estos mismos intereses*’.

³⁵ On the Courts’ strategies to modulate the effects of their judgments over time as an effective tool against the rigidity of the simple annulment of a norm on the one hand, and the effects of a declaration of unconstitutionality devoid of a consequential annulment on the other, as has sometimes occurred in Spain – although not in the recent judgments on Euro-crisis law – see X. Magnon, ‘La modulation des effets dans le temps des décisions des juges constitutionnels’. *Annuaire international de justice constitutionnelle*, XXVII, 2012, p. 566 ff.

However, if on the one hand modulation of the temporal effects of judgments gives the Portuguese Constitutional Court leeway to determine the scope of its rulings exactly, on the other hand this technique appears to create much confusion.

Following decision no. 413/2014, the Portuguese Parliament, as the institution that had passed the contested Budget Act 2014, referred several questions to the Court seeking clarification on the temporal effects of this judgment. Some practical aspects of the implementation of the Court's decision about the quantification of the holiday allowance and the timing of its payment remained unclear according to the Parliament, which was in charge of following up the ruling. However, the Court stated that any ambiguity in the implementation of the judgment did not derive from the text of the judgment itself. The Constitutional Court is not a legislator and it is beyond its mandate to define the aspects requested, which concern the administrative competence of the Government and the exercise of a rule-making power. Nor, according to the Court, could the principle of inter-institutional cooperation be invoked by the Parliament to this end. Thus, the doubts remained unsolved and the judgment proves how difficult the relationship between the political institutions and the Constitutional Court is in the current circumstances.

There is a final element to be taken into consideration about the timing and effects of constitutional judgments on Euro-crisis law. Particularly in this field, a timely decision by the Constitutional Court can make a difference. As remarked, if a legislative provision raising taxes or providing social benefits is annulled before or immediately after its entry into force, the effects of such a decision are not so disruptive for the legal system and for individuals. Once they have been referred to, the Italian and the Portuguese Constitutional Court decide on average no more than 10 months later. Although in Portugal there is no deadline for the *ex post* abstract review of constitutionality, it always happens that a constitutional challenge is lodged almost immediately after the entry into force of the law at stake, and it is promptly judged, as the relevant case law shows. By contrast, as highlighted for Spain, the amount of time elapsing between the referral to the Constitutional Court and the judgment on the merits, if any, irremediably undermines the effectiveness of constitutional review and forces constitutional judges either to uphold the validity of the norm or to declare the effects of unconstitutionality *ex nunc*, although the latter hypothesis was not really applied in the few judgments on Euro-crisis law.

(iv) Standards for constitutional review

The three Constitutional Courts manage rather different standards of constitutional review of matters relevant to Euro-crisis law, in particular about the protection of social rights, which are severely affected by austerity measures and the violation of which is indeed often claimed before the Courts, and about the presence of a balanced budget clause, if any, in the Constitution, which could orient the position of the constitutional judges.

The Portuguese and the Italian Constitutional Courts can rely on rich catalogues of constitutional rights, which also include social rights (Articles 29 to 34 of the Italian Const. and Articles 63 to 72 of the Port. Const.).³⁶ This might lead to an expectation of a development of constitutional case law oriented towards a strong protection of rights, even during the crisis. However, partly for reasons already pointed out – access to the Constitutional Court in Italy – and partly for reasons that will be highlighted below – i.e. the constitutionalization of the balanced budget clause in Italy, the composition of the Court, and consistency with previous case law in Portugal – social rights are not valued by these two Constitutional Courts as much as may initially be expected.

³⁶ In particular, the Portuguese Constitution, which entered into force in 1976, protects a wide variety of social rights, which even include the right to housing (Article 65), the right to childhood (Article 69), the rights of disabled citizens (Article 71) and the rights of the elderly (Article 72).

The catalogue of rights in the Spanish Constitution is far more limited³⁷ and, for example, the status of social rights, except for the right to education, remains uncertain. The Constitution defines most of them as ‘*principios rectores*’ (guiding principles) of social and economic policy’.³⁸ According to Article 53 Sp. Const., *principios rectores* are principles guiding legislation, judicial practice and the activity of public authorities. The same strength is not acknowledged to them as fundamental rights, which are also protected by the *recurso de amparo* before the Constitutional Court. As the Court itself has clarified (judgment no. 80/1982), however, these guiding principles – among them are the protection of health care and of social security – cannot be considered mere indications for public powers and challenging a law that violates them by means of constitutional review of legislation is allowed. In spite of this achievement, it cannot be ignored that the guarantees to enforce Spanish guiding principles in the fields of social and economic policy are less effective than those for social rights in Italy and Portugal because of the constitutional text.

A second significant element to orient the reading of the constitutional case law of the three Courts is the presence of a balanced budget clause in the Constitution. If such a clause is present, the Court cannot underestimate the balance between public revenues and expenditures when constitutional rights may be affected for this purpose.

For example, the Portuguese Constitutional Court does not have this ‘burden’ in the Constitution, although being a (bailout) Eurozone country it cannot completely neglect the obligations of fiscal stability imposed by EU and international norms. In Portugal, for political reasons it was not possible to reach the two-thirds majority required to pass a constitutional amendment and constitutionalize the balanced budget rule (Article 286 Pt. Const.). In order to fulfil the obligations prescribed by the fiscal compact (Art. 3) – to embed the balanced budget rule into a law having a reasonably high expectation of endurance – the Portuguese unicameral Parliament passed an amendment to the budgetary framework law (law no. 37/2013). It does not appear that the amendment really matches the requirement of Article 3 of the fiscal compact. The framework law can be reformed by a simple majority at any time, although Article 112. 3 Pt. Const. acknowledges a superior force to the framework law. Indeed, as with any other framework law, law no. 37/2013 is a standard for the Constitutional Court to review the legality of ordinary legislation (Article 280.2a, Pt. Const.).

Nonetheless, the lack of a constitutional balanced budget clause is not a minor element when analyzing constitutional case law and this is mirrored in the judgments of the Portuguese Constitutional Court, which has not hesitated to strike down austerity measures requested by the rescue package, in spite of the strict conditionality to which Portugal was subject until May 2014.

By contrast, Italy and Spain constitutionalized the balanced budget rule in 2011 and in 2012 respectively.³⁹ While these constitutional amendments were well accepted by the political parties – with a few exceptions – they were criticized by some scholars from procedural and substantial points of view. On the substance of these reforms which is particularly relevant to this analysis, it can be pointed out that in both countries there were academic opinions that considered a balanced budget rule already entrenched – in the Italian Constitution and in the Spanish legal system. In Italy, such a reading of the Constitution derives from a particular interpretation of Article 81.4 Const. – before the

³⁷ According to Article 10.2 Span. Const., ‘Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain’. Although international and European Treaties on fundamental rights, like the European Convention on Human Rights (ECHR) and the Charter of fundamental rights of the EU, complement the standard for constitutional reviews undertaken by the Spanish Constitutional Court within the so-called ‘constitutional block’, they have not been applied in the relevant judgments on Euro-crisis law so far.

³⁸ The right to sufficient remuneration (Article 35 Sp. Const.) and the right to collective bargaining (Article 37 Const.) are not considered *principios rectores*, for instance; they do not enjoy the same protection as the fundamental rights of Article 14 Sp. Const. and of Chapter 2, Division I, Sp. Const.

³⁹ It seems worth noting that since 1978 Spain has reformed its Constitution twice, always for EU-related reasons: the first time was in 1993 acknowledge rights to European citizens; the second was in 2011 for the constitutionalization of the balanced budget clause.

2012 reform – which required laws involving new or increased spending to detail the resources allocated for that purpose. While this provision has also been used to contain public spending in the case law of the Constitutional Court since the 1990s,⁴⁰ it has never been interpreted by the Court as if a balanced budget clause was in force. By contrast, since the entry into force of the constitutional reform of 2012 and in spite of the fact that the balanced budget clause has only been in operation since January 2014, the Constitutional Court has started to refer more and more often to the compelling interest in having a balanced budget and sound public accounts. Although the new clause could not be officially used as a standard for constitutional review until 2014, constitutional case law has nonetheless been inspired by it being in the background of the Court's reasoning.

The opposite occurred in Spain. A balanced budget requirement was already in force in this country for all public administrations (state, regional and local), although it was not embedded in the Constitution. Law no. 18/2001 (*Ley General de Estabilidad Presupuestaria*) and Organic law no. 5/2001 (*Ley Orgánica complementaria a la Ley General de Estabilidad Presupuestaria*), as subsequently modified, fixed an obligation of a balanced budget for the public sector. The Constitutional Court in its judgment on the law and the organic law of 2001 also upheld their constitutionality and the duty to maintain balanced budgets (decision no. 134/2011) on 20 July 2011, two months before the constitutional reform was finally approved. To some extent, this case law anticipated the reform, which was adopted with the purpose of providing a clear anchoring of the balanced budget into the Constitution and of setting a new and long-lasting standard of constitutional review of legislation (Article 135 Sp. Const.).⁴¹ The reform will be fully implemented only in 2020 – which is with a delay of more than nine years from its approval – and meanwhile a gradual enforcement of the new standard is provided on the basis of temporary objectives for the reduction of the public deficit and debt. In spite of this long transitional period, the Constitutional Court has explicitly stated that following the constitutional acknowledgment of the principle of a balanced budget, this principle has become standard in its constitutional review based on the doctrine of the *ius superveniens* (decision no. 157/2011, § 3, 18 October 2011). Thus, the delayed implementation of the reform does not prevent the prompt operation of its most important clause.

The constitutionalization of the balanced budget rule was also an opportunity to insert other provisions into the Italian and Spanish Constitutions; for example, about a debt ceiling, about reference to EU law to determine the exceptional circumstances which allow derogation from a medium-term objective, and to clarify at the constitutional level the fiscal responsibilities of the State and the Regions/Autonomous Communities. All public administrations are bound to follow the new rule – according to the new versions of Articles 81, 97 and 117 It. Const. and to Article 135 Sp. Const. – and the reference to the EU law is likely to play an important role in the future enforcement of the clause. It should be highlighted that until 2011 EU law was not even mentioned in the Spanish constitutional text and the Court had always refused to consider EU norms as standards of constitutional review (decision no. 28/1991). However, as the debt and deficit limits set by Article 135 are now to be implemented 'in accordance with EU law', relevant EU norms cannot be neglected by the Constitutional Court. This Court often refers to EU law in general in its judgments on Euro-crisis law, although it usually avoids mentioning specific EU legal provisions to ground its decisions (*Sentencia* no 206/2013). It can be said then that EU law is used as a 'veiled' standard.

In Italy it appears that a similar outcome to that in Spain has been caused by the constitutional reform, with a high number of generic references to EU law in the constitutional judgments on Euro-crisis law. Normally, EU law is not a standard for constitutional review by the Court although it can be in a few cases. The most frequent of these is that of a constitutional challenge brought by the Regions or by the State about a possible violation of EU law by a national legislative provision. Indeed, in decisions nos. 60/2013 and 39/2014 the Italian Constitutional Court affirmed that compliance with EU obligations directly originated not only from the fundamental principles of coordination of public finance, which

⁴⁰ See C. Colapietro, *La giurisprudenza costituzionale nella crisi dello Stato sociale*, Padova, Cedam, 1996.

⁴¹ J. García Roca & M. Á. Martínez Lago, *Estabilidad Presupuestaria ...*, cit., p. 63-65.

are binding upon the Regions, but also from Article 117.1 It. Cost.⁴² and Article 2.1 of Constitutional Law no. 1/2012. In particular, according to the Court, the new first section of Article 97 It. Const., ‘reminds all public administrations to guarantee balanced budgets and the sustainability of public debt according to the EU legal system’.⁴³

The remaining two remote hypotheses in which EU law can be used as a standard of constitutional review by the Italian Court are: that of a national law that is found to be in breach of a non-self-executing EU norm by an ordinary judge, who, however, almost always first issues a preliminary reference to the Court of Justice of the EU; and that in which violation of the fundamental principles of the Constitution – *controlimiti* – is triggered by an EU norm; a case that in practice has never happened in Italy.⁴⁴

A similarly hesitant approach to including EU law as a standard in constitutional adjudication has been taken by the Portuguese Constitutional Court. In principle, the Court can apply EU as well as international norms as canon for the constitutional review of legislation: however, so far the Court has never used these norms as autonomous sources for assessing the constitutional validity of national legislation.⁴⁵ Portuguese constitutional judges regularly cite EU law and the international law that ground the rescue package for Portugal. This reference is made in *obiter dicta* and cases are always solved on the basis of national constitutional provisions. Instead, many judgments of the Court about Euro-crisis law, which have also led to the renegotiation of certain conditions of the Financial and Economic Assistance Programme, reveal that the Court does not hesitate to deviate from EU and international obligations when they can encroach upon ‘the fundamental principles of a democratic state based on the rule of law’, the only limit set by Article 8.3 Pt. Const. to the implementation of EU law.⁴⁶

III. CONSTITUTIONAL REVIEW IN A TIME OF EURO-CRISIS: CONTINUITY VS INNOVATION

In the following paragraphs, an assessment is carried out of the elements of continuity and innovation in the case law of the Italian, Portuguese and Spanish Constitutional Courts on Euro-crisis law. The focus is on two case studies, social rights and regional autonomy, and on the constitutional reasoning applied by the Courts to ground their decisions. Given the fact that, according to many scholars,⁴⁷ the legal measures adopted in reaction to the Eurozone crisis have challenged the persistence of

⁴² This article states: ‘Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations’.

⁴³ See decision no. 39/2014, § 2.

⁴⁴ See M. Cartabia, ‘The Italian Constitutional Court and the relationship between the Italian legal system and the European Union’, in A.-M. Slaughter, A. Stone Sweet, J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal change in its social context*, Oxford-Portland, OR, Hart Publishing, 1998, p. 133. The constitutional standard for the Italian participation in the European Union can be found in Article 11 and Article 117.1 It. Const.

⁴⁵ In this regard, see the national report of the Constitutional Court of Portugal submitted for the XVIth Congress of the Conference of European Constitutional Courts held in Vienna, May 2014 (November 2013), p. 4, available at <http://www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/LB-Portugal-EN.pdf>

⁴⁶ On this issue, see the latest developments in Portuguese constitutional case law analyzed in section III.C (vi).

⁴⁷ See M. Luciani, ‘Unità nazionale e struttura economica. La prospettiva della Costituzione repubblicana’, *XXVI Convegno annuale dei Costituzionalisti*, at <http://www.associazionedeicostituzionalisti.it/bgic/relazione-luciani>, p. 65 ff.; C. Barnard, ‘The Charter in time of crisis: a case study of dismissal’, in N. Countouris & M. Freedland (eds.), *Resocialising Europe in a time of crisis*, Cambridge, Cambridge University Press, 2013, p. 250 ff., R. Ruiz-Rico Ruiz, ‘Actuales desafíos de la Constitución normativa: el mega-principio de la Estabilidad presupuestaria como respuesta a la crisis económica y sus efectos perversos sobre el principio de constitucionalidad’, *Instituzioni del federalismo*, 2013, 229 ff., A. Morrone, ‘Crisi economica e diritti. Appunti per lo stato costituzionale in Europa’, *Quaderni costituzionali*, no 1, 2014, p. 79 ff., and I. Pernice, ‘Domestic Courts, Constitutional Constraints and European Democracy: What Solution for the Crisis?’, in M. Adams, F. Fabbrini & P. Larouche (eds.) *The Constitutionalization of European Budgetary Constraints*, Oxford, Hart. Publishing, 2014, p. 297 ff.

constitutional principles, like the rule of law, democracy, sovereignty and rights protection, one might expect a breakthrough in the constitutional judgments of the three Courts. However, this prediction is true only in part, as in the constitutional case law of the three jurisdictions elements of continuity with the pre-Eurozone crisis phase are also very important. Besides other elements of change, this continuity is attributable partly to legal elements – access to the Court and standards of constitutional review – and partly to non-legal elements, like the present economic and political situation and the composition of the Courts, which differ from one Member State to another.

III.A Managing ‘social rights’?

Despite the different conclusions they come to and the different reasons behind this trend, which will be highlighted in this section, since 2010 the judgments of the three Constitutional Courts on Euro-crisis law regarding social rights are in continuity with the pre-crisis case law in several respects, although they diverge in some regards.

Italy

In Italy, for example, the Constitutional Court has usually been particularly keen to protect social rights. In the 1990s, initially with reference to the right to health care (Article 32 It. Const.), the Court developed the notion of ‘the essential core of a right’ (decision no. 304/1994) that cannot be superseded by any other public interest or competing constitutional value, and subsequently applied this notion to other rights. This approach is also confirmed in some decisions on austerity measures following the Eurozone crisis. For instance, decision no. 80/2010 considered unconstitutional a provision of the State financial act of 2008 that made it impossible for public schools to hire teachers for physically impaired students. The hiring was precluded by a cut in public expenditure and was justified by the need to limit the deficit. The Court argued, however, that the essential core of the right to education is a limit to the action of the Parliament, which does not have discretion on this point.⁴⁸

At the same time, at least since the 1990s, the Italian Constitutional Court has acknowledged that its judgments can have huge financial implications. Particularly in the 1960s and 1970s the Court had extensively used particular types of judgment for which it was severely criticized as they caused significant growth in public expenditure. Indeed, by means of these ‘additive rulings’ (*sentenze additive*) the Court would declare a law unconstitutional ‘insofar as it did not’ provide for a specific norm and the Court itself ‘added’ the missing part of the legislative provisions.⁴⁹ This kind of decision was widely applied in the 1960s and 1970s, aiming to strengthen social protection and welfare and to remove violations of the equality principle. In doing this, however, the Court neglected to take into account the financial sustainability of its decisions.⁵⁰ As the management of public accounts went out of control while the financial situation started to worsen, at the turn of the 1990s, when the spectre of a crisis finally appeared, the Constitutional Court turned to a more cautious approach. In the landmark judgment no. 455/1990 the Court developed a ‘balancing test’ to accommodate social rights protection with the shortage and distribution of fiscal resources.⁵¹ Constitutional judges evaluated the social rights at stake in the broader framework of the financial crisis that hit Italy and also with a view to making the welfare system sustainable in the years to come and for future generations of workers (decisions nos. 99 and 390/1995). The concepts of ‘graduality’ of pension reforms and of ‘conditioned

⁴⁸ See T. Groppi, I. Spigno & N. Vizioli, ‘The Constitutional Consequences of the Financial Crisis in Italy’, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Farnham, Ashgate, 2013, p. 109.

⁴⁹ See S. Scagliarini, *La quantificazione degli oneri finanziari delle leggi tra governo, parlamento e Corte costituzionale*, Milano, Giuffrè, 2006; G. Rivosecchi, *L’indirizzo politico finanziario tra Costituzione italiana e vincoli europei*, Padova, Cedam, 2007 and M. de Visser, *Constitutional Review in Europe*, cit., p. 315.

⁵⁰ As mentioned above (section II), Article 81.4 of the It. Const., in its original version, established a constitutional limit to public spending by imposing a duty upon the Parliament and the Government to indicate the fiscal means of funding legislation that either increases public spending or decreases revenues. However, the Constitutional Courts’ rulings can also increase public spending, but the Court appeared to disregard these financial effects.

⁵¹ See D. Tega, ‘Welfare Rights in Italy’, *Social Rights in Time of Crisis in the Eurozone: The Role of Fundamental Rights’s Challenges*, cit., p. 54.

rights' were also developed by the Court (decision no. 455/1990).⁵² As in the 1990s, the concept of 'conditioned right' has been applied in the aftermath of the Eurozone crisis, for example to declare the guarantee of medical assistance as a financially conditioned right the protection of which depends on the resources available (decision no. 248/2011).

Likewise, in the wake of the Euro-crisis, the 'balancing test' was used by the Italian Constitutional Court to limit social rights in a case on the calculation of the pensions of cross-border workers between Italy and Switzerland (decision no. 264/2012, § 5.3). A retroactive legislative act of 'authentic interpretation' established that for the purpose of calculating the pension of these cross-border workers the salary earned in Switzerland had to be re-adjusted on the basis of the actual level of Swiss contributions rather than on that of the Italian contributions. This resulted in lower pensions than expected. The European Court of Human Rights, in the case *Maggio and others v. Italy* of 31 May 2011 (applications nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08), had already declared the legislative act of 'authentic interpretation' to be in breach of Article 6.1. of the ECHR. The Constitutional Court, however, in spite of this ECHR judgment, confirmed the validity of the legislative act:⁵³ the appellants did not have a legitimate expectation of a pension calculated according to the more favourable treatment and the 'authentic interpretation' provided was inspired by the principle of equality and solidarity. Indeed, according to the Constitutional Court:

'the effects of the said provision are felt within the context of a pension system which seeks to strike a balance between the available resources and benefits paid, also in accordance with the requirement laid down by Article 81(4) of the Constitution' – old version - 'and the need to ensure that the overall system is rational', thus preventing changes to financial payments to the detriment of some contributors and to the benefit of others. In doing so, it guarantees respect for the principles of equality and solidarity, which, due to their foundational status, occupy a privileged position within the balancing operation against other constitutional values'.

Also in its application of the equality principle (Art. 3 It. Const.) to solve cases on Euro-crisis law the Constitutional Court has used a reasoning developed years ago, during the 1990s financial crisis, although not always in a consistent manner. In 1997 the Court stated that stringent requirements and sacrifices of welfare rights could be seen in compliance with Article 3 It. Const. – under the double aspects of substantive equality and reasonableness – provided that they were exceptional, transient, non-arbitrary and relevant to the purpose achieved (see decision no. 245/1997 and order no. 299/1999). On this ground, provisions of decree-laws adopted during the Eurozone crisis with the aim of re-distributing resources from the pensions or the incomes of the richest part of the population in favour of the poorest have been declared unconstitutional on some occasions and in conformity with the Constitution on others.⁵⁴

Decree-law no. 78/2010 blocked the salary adjustment mechanism for magistrates and reduced their special allowance as a form of 'solidarity contribution', based on the fact that these workers already benefited from high levels of income. The Court considered the reduction of the allowance a form of taxation and declared it in contrast with the Constitution because it violated the principle of equality (Article 3) and Article 53, about the progressive nature of the tax system (decision no. 223/2012). The test developed in 1997 was applied here but was not successfully passed by the contested austerity measure and Article 9.2. of the decree-law was declared unconstitutional (§ 11.5). The breach of the principle of equality depended on the introduction of a measure that was targeted at a specific group of

⁵² See R. Bin, *Diritti e argomenti*, Milano, Giuffrè, 1992, p. 107 ff.

⁵³ The Italian Constitutional Court highlighted the fact that 'in contrast to the European Court, this Court carries out a systemic and not an isolated assessment of the values affected by the provisions reviewed from time to time, and is therefore required to carry out that balancing operation, which falls to this Court alone'.

⁵⁴ Article 77 It. Const. allows the Government to adopt decree-laws with immediate effect in extraordinary cases of necessity and urgency and they are to be converted, and if necessary amended, into a parliamentary act, within 60 days of their enactment. Otherwise, they lose their effects *ex tunc*. There are no limitations for the adoption of decree-laws in terms of subject-matter, except for issues to be provided for by constitutional law.

people – magistrates – whose independence and neutrality also derives from their income, and imposed upon them a deterioration of their living conditions. Moreover, according to the Court, the benefit to the public accounts of the reduction imposed upon the magistrates' allowance was minimal.⁵⁵

On 17 December 2013, the Constitutional Court again ruled on the constitutionality of Decree-law no. 78/2010, in particular about the freezing of the salary adjustment mechanism for non-contracted people working in the public sector (decision no. 310/2013).⁵⁶ The freezing of the salary adjustment mechanism was not considered a form of taxation⁵⁷ and it appeared a reasonable sacrifice to restore sound public accounts in the present economic crisis (§ 11). In addition, in the case at stake there were no exemptions to be invoked (decision no. 223/2012), like the special position of independence of the magistrates to be protected in the constitutional system (§ 13.1). It should be highlighted that judgment no. 310/2013 was much more balanced compared to decision no. 223/2012. The former avoided extending the preferential treatment questionably reserved to magistrates to other interested groups of workers that, from time to time, struggle to preserve their 'privileges' in spite of the lack of resources and the principle of solidarity. Therefore, in decision no. 310/2013 the Court tried to step back from its previous disputable orientation and to make an overall balancing between the social rights of specific groups and the sustainability of the welfare system for the benefit of all citizens. This approach has been further confirmed in other more recent judgments, nos. 7 and 154/2014: the freezing of the salary adjustment was deemed in compliance with the Constitution by applying the test developed in 1997. This measure was considered reasonable as it was transient and justified in the light of mandatory requirements to contain public spending. In this framework, the exercise of legislative discretion by the Parliament was functional for the fundamental needs of the economic policy and prevailed over a competing constitutional value (decision no. 154/2014, § 5.3).

All these rulings of the Italian Constitutional Court dealing with social rights were issued in the framework of a preliminary reference for constitutionality by ordinary judges and indeed it is this *incidentaliter* proceeding that favours a more rights-based style of reasoning by the Court. The new balanced budget clause since January 2014 has never been invoked as a standard for the constitutional review of austerity measures to accomplish a balance between this clause, on the one hand, and the principle of equality or workers' rights, on the other. Only in decision no. 310/2013 was a challenge of unconstitutionality rejected by using *ad adiuvandum* – although not as the main ground for the decision – new Article 81 Const., not yet in operation in 2013, and Council Directive 2011/85/EU on requirements for the budgetary frameworks of the Member States. It is too early to assess whether the new balanced budget clause is affecting constitutional case law on social rights in Italy. So far, it appears that there is nothing extraordinary in the Italian Court's case law during the current Euro-crisis compared to its previous case law. The Court relies on its precedents developed in the 1990s even in a period of serious deterioration of public accounts and of financial crisis.

⁵⁵ Judgment no. 223/2012 has been severely criticized by scholars for the preferential treatment reserved to magistrates. See, for example, D. Piccione, 'Una manovra governativa di contenimento della spesa «tra il pozzo e il pendolo»: la violazione delle garanzie economiche dei magistrati e l'illegittimità di prestazioni patrimoniali imposte ai soli dipendenti pubblici', *Giurisprudenza costituzionale*, n. 5, 2012, p. 3353ff. Nevertheless, this decision set a precedent for subsequent decisions no. 241/2012 and no. 116/2013, the latter on Decree-law n. 98/2011, which subjected public pensions between 90,000 and 150,000 euro to a taxation of 5 per cent of the difference (i.e. 60,000 euro).

⁵⁶ In particular, Article 9, section 21, of Decree-law no. 78/2010 provides a freezing from 2011 to 2013 of: a) the salary adjustment mechanism for the three-year period; b) automatic variations in salary depending on the length of service; c) increases in salary subject to career developments. The freezing of the salary adjustment for diplomats provided by Decree-law no. 78/2010 was the object of decision no. 304/2013, where the Court came to the same conclusions as in judgment no. 310/2013.

⁵⁷ No reduction of allowances was introduced by Article 9, section 21 of Decree-law no. 78/2010, contrary to what was also disputed in decision no. 223/2012 for magistrates.

Spain

The continuity of the constitutional case law on social rights now dealing with the Eurozone crisis can also be detected in Spain, where there has traditionally been weak judicial enforcement of welfare rights, the so-called *principios rectores* of social and economic policy (see section II). The Spanish Constitutional Court has not delivered many judgments on Euro-crisis law or social rights/*principios rectores* yet.⁵⁸ This is partly because of the delay of the Court in deciding on the merits of a case – for the reasons explained in section II – once it is declared admissible, and partly on the deferential approach of the Court to the Parliament, which often leads the former to declare constitutional challenges inadmissible or to dismiss them by providing interpretations in conformity with the Constitution of the norm under review at the same time.

In addition, as has been highlighted, in Spain ‘Regions are in charge of the main social policies’.⁵⁹ In terms of constitutional case law, this means that most judgments affecting the Spanish welfare system – and also those in the wake of the Eurozone crisis – are delivered by the Court in the framework of constitutional conflicts between the State and regional legislation, in which a rights-based reasoning is usually avoided, as the main focus is on the correct allocation of legislative powers between levels of government. Although there are exceptions, this constitutional arrangement has not favoured an expansion of social rights protection.

All these elements help understand why in Spain there are only a few judgments on the implications of Euro-crisis law for social rights, and consequently why the Court’s most recent judgments in this field have remained consistent with the case law developed before the financial crisis.

So far, the constitutional challenges on Euro-crisis law brought by means of a preliminary reference of constitutionality have been declared inadmissible by the Constitutional Court.⁶⁰ Given the nature of the challenges, which have originated from the concrete application of Euro-crisis measures, usually against welfare rights, a preliminary reference of constitutionality could lead the Court to develop a rights-based reasoning, provided that challenges are declared admissible.

One of the references dealt with Decree-law no. 8/2010, which reduced public salaries in violation of an existing collective agreement and was thus deemed to violate the constitutional limits for enacting decree-laws (Article 86.1 Sp. Const.).⁶¹ Amongst these limits is the protection of fundamental rights. The judge who filed the constitutional challenge referred to the right to collective bargaining (Article 37 Sp. Const.) in connection with the right to freely join a trade union (Article 28.1 Sp. Const.), although the former is not treated as a fundamental right by the Spanish Constitution. The Court did not linger on the fundamental rights question or on what can be included or excluded from the limits set in Article 86.1. Const. because the preliminary reference was found to be procedurally inadmissible (*Auto* 85/2011).⁶²

⁵⁸ See A. Ruiz Robledo, *The Spanish Constitution in the Turmoil of the Global Financial Crisis*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Farnham, Ashgate, 2013, p. 141 ff.

⁵⁹ See M. González Pascual, ‘Welfare Rights And Euro Crisis - The Spanish Case’, cit., p. 96.

⁶⁰ According to Article 37.1 LOTC, a reference is inadmissible when it does not meet the procedural requirements provided by law (e.g. the nature of the body that makes the reference, how the order of reference is drafted, etc.) or when the challenged violation of the Constitution is patently non-grounded.

⁶¹ Article 86 Sp. Const. allows the Government to issue temporary legislative provisions (decree-laws) in the case of an extraordinary and urgent need and they are to be immediately submitted to debate and vote by the Parliament. Within thirty days of the promulgation of a decree-law, the Parliament may convert it into law or repeal it. Moreover, the decree-law ‘may not affect the legal system of the basic State institutions, the rights, duties and freedoms of the citizens contained in Part 1, the system of Autonomous Communities, or the general electoral law’.

⁶² The Court went directly to the point of the incorrect way of proceeding on the part of the judge who made the referral to the Constitutional Court, as the proposed standard of review – Article 86.1 Sp. Const. – was not communicated by this judge to the parties, while it was cited only in the order of referral to the Constitutional Court. The second question that was posed to the Court in the preliminary reference of constitutionality did not directly deal with social rights – namely whether the violation of a collective agreement by a decree-law entailed a violation of Article 9.3 Sp. Const. with respect

The self-restraint of the Court in the adjudication of Euro-crisis law affecting social rights is confirmed by *Auto* 113/2011. This case dealt with a very complicated issue in Spain, right protection in mortgage eviction, a problem that is affecting thousands of families as a consequence of the financial crisis. According to Spanish law, if a contractual term in a mortgage is unfair and illegal, compensation may be granted, but in a separate proceeding from the mortgage enforcement proceeding, which forces the owners to move out of their house anyway. Thus the change in house ownership takes effect in any event if the mortgage is not paid, without the legality of the mortgage contract being assessed in the same enforcement proceeding. Eventually, a different legal action can be undertaken seeking compensation for the unfair or illegal contractual requirements of the mortgage. In other words, the court in charge of the enforcement proceedings cannot grant interim relief. The judge who filed a preliminary reference for constitutionality detected a violation of Article 9.3 Sp. Const., on the prohibition of arbitrary action by public authorities, of Article 24.1 Sp. Const., on the right to effective judicial protection, and of Article 47 Sp. Const., on the right to enjoy decent and adequate housing. However, the Constitutional Court declared the preliminary reference inadmissible as the order of referral was on the one hand too generic and abstract to evaluate whether the challenged provisions were really relevant to the main proceedings, and on the other hand the order questioned the constitutionality of the system in place for executing mortgages and proposed an alternative regime. In this regard, the majority of the Constitutional Court found the order of referral to go beyond its remit, as an ordinary judge cannot invade the competence of the Parliament by putting forward a new legislative scheme and neither can constitutional judges be asked to assess the validity of this new (judicial) solution. It is only for the legislative power to decide on the Code of Civil Procedure and thus the issue was treated as a ‘political question’.

However, in this case a concurring opinion was delivered by Justice Eugeni Gay Montalvo. While he agreed with the majority of the Court that the constitutional challenges were not relevant to solving the main proceeding, he argued that the case before the Court deserved a more weighted evaluation in the light of the social and constitutional significance of the problems at stake. The Court ruled without taking the broader context of the financial crisis into account and neglecting that the regulation of mortgages, even in these tragic circumstances, had to comply with constitutional principles and values. According to Justice Gay Montalvo, the Court should not rely on its previous case law on mortgage contracts, developed more than thirty years ago (judgment no. 41/1981) under completely different economic and social conditions.⁶³ The new factual elements deriving from the financial crisis should have an impact on constitutional interpretation and justified a deviation from previous case law, according to the concurring opinion.

Exactly on the same day that the Spanish Constitutional Court ruled the constitutional challenge inadmissible, a Spanish court requested a preliminary reference for interpretation to the Court of Justice of the EU (CJEU) about the compliance of Spanish mortgage legislation with Directive 93/13/CEE on unfair terms in consumer contracts. Two years later, on 14 March 2013, the CJEU ruled in the *Mohamed Aziz* case (C-415/11) that Spanish legislation – namely Articles 695 and 698 of the Code of Civil Procedure – was in breach of the right of debtors to effective legal protection and subsequently national courts should suspend ongoing evictions.⁶⁴ Interestingly, the Court of Justice of

(Contd.) _____

of the hierarchy of legal provisions – but was equally declared inadmissible as ungrounded. An act having the same force as a law, like a decree-law, prevails over a collective agreement signed by the Government and the trade unions.

⁶³ L. Díez Sánchez, ‘Deconstitutionalisation of Social Rights and the Quest for Efficiency’, in C. Kilpatrick & B. de Witte, cit., p. 118, points out that the Spanish Constitutional Court ‘decided the issue on the grounds of the traditional priority of mortgage foreclosures, which dates back to 1872’.

⁶⁴ The judgment of the Court of Justice of the EU was actually much more nuanced in terms of right protection, as the issue of legal protection was mentioned only in § 62 and the Charter of fundamental rights was not even cited.

the EU has provided a superior level of protection to Spanish debtors dealing with unfair mortgage contracts during the Eurozone crisis than the Spanish Constitutional Court.⁶⁵

The reticent approach of this Constitutional Court to protecting welfare rights was recently confirmed in *Auto* 136/2014. This case dealt with the suspect retroactivity of the elimination of the Christmas allowance for public workers,⁶⁶ thus entailing a violation of Article 9.3 Sp. Const. The preliminary reference of constitutionality brought by *Tribunal Superior de Justicia de Asturias* was held inadmissible. The reasoning of the Court resembles that used in *Auto* 85/2011, as the procedural requirements for the admissibility of the preliminary question were not matched. In particular, the referring court did not disclose in advance to the parties – among them was a trade union – of the main proceedings the object of the constitutional challenge and the standard of constitutional review in order to let them react.

All in all, this consistent approach of the Court, in spite of the changing economic and social context, can be explained by the entrenchment of the balanced budget clause in the Constitution and by the subsequent acknowledgment – as *ius superveniens* – of new Article 135 Sp. Const. as a standard of review also applying to pending cases (judgment no. 206/2013).⁶⁷

However, in the difficult times of the financial crisis the protection of welfare rights in Spain could potentially be enhanced through the case law of the Constitutional Court on the conflict of competences between the State and Regions. Although the Court has not yet ruled on the merits of the cases, it is likely that regional laws enhancing the protection of the right to health care (Article 43 Sp. Const., on the *Principios rectores*) compared to the standard set by the State will be upheld. In two cases (*Auto* no. 239/2012 and no. 114/2014) the Court had to decide to maintain or to withdraw the suspension of the effects of regional laws of the Basque country and of Navarra that had been challenged by the national government on the ground of a violation of the framework legislation (*legislación básica*) on access to public health assistance (Article 149.1.16 Sp. Const.). As mentioned (section II), as soon as a regional law has been challenged, the national government has the authority to ask the Constitutional Court to suspend the effects of that law, especially when it entails significant financial implications, while waiting for the Court's final decision (Article 161.2 Sp. Const. and 64 LOTC).

Compared to the State framework legislation, the two regional laws removed the existing legal boundaries to the access of all residents in their territory to free public health care. Under the State framework law, for example, undocumented adult immigrants cannot benefit from the public health care services unless an emergency situation occurs – basically when a life is in serious danger.⁶⁸ The regional legislation, by contrast, included them with the extra cost being paid from the regional budget. Competing interests have to be balanced: on the one hand, as the government claimed, the regional legislation impairs the financial sustainability of the national health care system, as shaped by

⁶⁵ Indeed, H.-W. Micklitz & N. Reich, 'The Court And Sleeping Beauty: The Revival Of The Unfair Contract Terms Directive (UCTD)', *Common Market Law Review*, vol. 51, 2014, p. 771–808, p. 800 ff. about the *Mohamed Aziz* case, speak about a 'hidden constitutionalization' of private law.

⁶⁶ See Article 2 of the *Real Decreto-ley 20/2012, de 13 de julio, de medidas para garantizar la estabilidad presupuestaria y de fomento de la competitividad*.

⁶⁷ In judgment no. 206/2013, on the Budget Act for 2009, as in other rulings of the Spanish Constitutional Court, Article 135 was invoked by the referring judge as a standard for constitutional review besides other standards and the Constitutional Court made reference to the constitutional reform and to the past and the current version of Article 135, but the case was not solved on the ground of that Article.

⁶⁸ In decision no 269/2010 the Italian Constitutional Court, usually very reticent to confirm the validity of regional legislation that causes a growth in public expenditure, nevertheless upheld the constitutionality of a regional law that also recognized the right to health care for illegal immigrants, at least as regards non-deferrable and urgent medical treatment. Otherwise, the irreducible core of the right to health care would have been denied.

the contested national decree-laws passed in 2010 and 2012;⁶⁹ on the other hand, there is the protection of the right to health care of the most vulnerable individuals as well as of public health, which can be jeopardized by a lack of access to the public health service of a part of the population.

In order to decide on the suspension, the Spanish Constitutional Court elaborated on the protection of health care, which it found to be based on the connection between the *principio rectore* of Article 43 Sp. Const. and Article 15 Sp. Const., the fundamental right to life and to physical and moral integrity as recognized by the European Court of Human Rights. The weak enforcement of a *principio rectore* was strengthened thanks to the joint reading with a fundamental right, as interpreted in the framework of the Council of Europe.

In both cases, the suspension of regional laws was withdrawn, as according to the Court the rights acknowledged and the desirability of preventing risks affecting public health do have a special significance in the Spanish constitutional framework and cannot be affected by mere economic calculations and prospective savings in public expenditure (*Auto* no. 239/2012). This statement grants priority to social rights over the economic rationale in the context of the financial crisis in the Court's reasoning. In addition, the withdrawal of the suspension of the effects could suggest that the Court is willing to dismiss the State constitutional challenges about access to free public health care services when it eventually decides on the merits.⁷⁰

In both cases, however, the suspension of the regional legislative provisions that decreased the individual private prescription charge for medicines while at the same time increasing the public contribution (the so-called *copago*) was confirmed. No right-based reasoning was developed by the Court and economic data provided by the national government about the negative financial implications of regional provisions for public health care expenditure were taken into account. The problem of the sustainability of public health care expenditure, of which medical expenditures are a significant part, together with the shadow of the financial crisis, led the Court to take a different approach on this issue. This latter approach is, however, largely prevalent in the Constitutional Court's case law dealing with the Euro-crisis and delivered in the framework of State-Region constitutional conflicts, whereas the standpoint of the Court on exclusion from free public health care services is really an exception so far.

Furthermore, the need to deal with the financial crisis can also lead to a potential conflict between welfare rights. This risk is illustrated by the case of the constitutional challenge brought by the Parliament of Navarra against the State labour reform of 2012, Law no. 3/2012 (*ley de reforma laboral*). Amongst many other things, the reform extends the duration of the trial period from six months to one year (Article 4.3) and assigns to the National Advisory Committee on Collective Agreements and to similar bodies at regional level the power to solve conflicts between employers and employees when they cannot find an agreement on the application of a collective agreement (Article 14.1). The Court dismissed the constitutional challenge and made an interpretation in conformity with the Constitution by stating that the decisions of the Committee can always be appealed against before a court so as to grant full judicial control of them (judgment no. 119/2014 of 16 July 2014).

What is worth highlighting in this case law is that the reasoning of the Spanish Constitutional Court is based on the following assumptions. The labour reform, including the challenged provisions, pursues the constitutionally legitimate aim of adapting working conditions to a period of severe financial crisis that could even impair the existence of workplaces as a consequence of the closure of many medium-sized and small companies. Subsequently, the flexibilisation of labour contracts and the non-application of collective agreements, although the latter is an exceptional measure, find their *raison d'être* in the duty of public powers to guarantee the right to work and thus to preserve existing

⁶⁹ In the challenge dealing with the *Ley foral* 8/2013 of Navarra, the national government even invoked a threat to violate Spanish obligations towards the EU if the suspension of the effects of law was removed.

⁷⁰ Moreover, in *Auto* no. 239/2012 the Spanish Constitutional Court affirmed that the exercise of legislative competence by the Basque country does not encroach upon the State competence, as the former expands the basic level of protection set by the latter (§ 4).

workplaces (Article 40 Sp. Const.). The conflict between welfare rights that arises in this judgment of the Constitutional Court is that, as a reaction to the crisis, the usual safeguards of the right to work have to be limited or diminished in order to have this right protected for the greatest number of people possible.

In judgment no 119/2014, the Constitutional Court confirmed its previous case law and stated that the Spanish Constitution – Article 37 – does not foresee a specific model of collective bargaining and thus the Parliament enjoys a wide discretion on how to regulate it. Once again, the dismissal of the case, and again by means of an interpretation in conformity with the Constitution, and the reference to the significant powers that the Parliament has in this field testify that the Court has not departed from its precedents and from its deferential approach to political bodies.

Portugal

Regarding continuity and innovation in constitutional case law, even the Portuguese Constitutional Court, in spite to its highly contested rulings and despite some caveats, has developed its case law on ‘social rights’ during the Eurozone crisis in consistency with its previous judgments on the matter. ‘Social rights’ are put in quotation marks here because this type of right has been used as a standard for the constitutional review of legislation on very few occasions, both before and during the Eurozone crisis. Despite the very long and rich list of social rights entrenched in the Portuguese Constitution, the judicial enforcement of them, even by the Constitutional Court, has been extremely weak. Where a violation of social rights has been contested this Court usually solves cases either on the ground of fundamental principles of the democratic state (*Acórdão* no 3/2010), like the principle of equality, the principle of proportionality or the principle of legitimate expectations, which makes it easier to find an agreement among the constitutional judges and allows for case-by-case dispute resolution, or on the ground of non-written social rights, like the right to a dignified existence (*Acórdão* no 509/2002).⁷¹

What is new, however, in the constitutional case law dealing with the Eurozone crisis is that the Court has often departed from its traditional self-restraint when called on to decide on social entitlements and social spending. Its deferential approach towards the legislator usually shown in this field has been partially abandoned. This evolution in the rulings of the Portuguese Constitutional Court developed gradually, step by step, and the Court launched warnings to the Government and to the Parliament before it finally ‘dropped the bomb’ in 2013. Following *Acórdão* no. 187/13, which might be seen as a case of over-reaction by the Court, its rulings on Euro-crisis law have remained more or less stable in this regard, pointing to, sometimes latent and other times open, tensions between the Constitutional Court and political bodies.

In the period considered, 2010-2014, many factors can explain this change in the Court’s orientation. For example, as described in section II, the composition of the Court in 2010 was completely different from the composition of the Court today and the new judicial appointments took place in a period of great political instability (section II.A). Meanwhile, the economic situation became worse – which was the main cause of political instability. Portugal requested a bailout in 2011 and obtained financial assistance in exchange for a more austere fiscal policy. This latter element led to a redistribution of the already limited public resources, to the detriment of public workers and pensioners in particular.

As long as the cuts in social entitlements were linear or the increase in taxation uniform, the Court upheld the validity of the measure, taking into consideration the exceptional circumstances of the financial crisis and the urgency of the legislative reaction. For example, when in 2010, while Portugal was already under an excessive deficit procedure, the Court was asked to decide on the compliance of Laws nos. 11/2010 and 12-A/2010 with Article 103 (3) of the Constitution, on the fiscal system, which prohibits retroactive legislation, and with the principle of protection of legitimate expectations (*princípio da confiança*), which stems from Article 2 of the Constitution, the majority of the Court upheld the validity of the challenged measures (*Acórdão* no. 399/10 of 26 November 2010). According to the Court, there was no authentic retroactivity, the only kind forbidden by the

⁷¹ On this point, see M. Canotilho, T. Violante, R. Lameiro, *Weak rights, strong principles*, cit., p. 16.

Constitution, and the expectations of tax-payers were not violated insofar as the two laws pursued a legitimate aim – to increase resources with the purpose of re-balancing public accounts, they were adopted as urgent measures to counteract the financial crisis, and were announced well in advance as measures to reduce the public deficit and debt (§ 12.3).⁷² The Constitutional Court did not undertake any scrutiny in the light of the proportionality principle, for example to assess if less restrictive means could be used, and thus aligned its position with that of the legislator.

However, when the Court was asked to decide on wage cuts for public workers in 2011, and thus on the way public resources were allocated within the various segments of Portuguese society, the constitutional judges tried to set a standard to be applied in future cases to assess whether the cuts were consistent with the Constitution. The constitutional challenge was brought against the Budget Act for 2011 (*Lei do Orçamento de Estado para 2011*) whereby cutbacks in public salaries were increased from 5 to 10 per cent. *Acórdão* no 396/2011 of 21 September 2011 was adopted in the pre-assistance programme regime, although the Memorandum of Understanding was incidentally mentioned as a new boundary to be taken into account (§4). Although it was not the first time that public salaries were reduced, the particular economic circumstances entailed the threat that public wage cuts might become a persistent feature of Portuguese fiscal policy, as the annual Budget Acts could confirm the salary reduction year after year, or even increase it.

The Budget Act for 2011 was challenged before the Court on the grounds of a violation of the principle of equality (Article 13 Const.), of the principle of protection of legitimate expectations (Article 2 Const.) and of the principle of proportionality (Article 2 Const.). The Court dismissed the challenges and confirmed its reticence to enforce social rights: there was no legitimate expectation at stake, given the lack of a constitutional right not to have a wage reduction. Moreover, according to the Court, public salary cuts were justified on the bases of the transitional nature of the measure, and of the existence of a compelling interest to enforce the Growth and Stability Pact and to ensure fiscal sustainability by means of the most effective tools to achieve the target as soon as possible. Finally, the limitation of public salaries was also justified in the name of the public interest as, unlike private workers, public employees are paid with public money. In this ruling, the traditional deferential approach of the Court towards the Parliament was confirmed, while at the same time the Court set limits for future legislative actions and the path for the development of its case law on the Euro-crisis law; standards that indeed have been consistently reaffirmed in almost all constitutional rulings since then. Additional sacrifices burdening only civil servants and public pensioners are in compliance with the Constitution only if two conditions are cumulatively met: a) alternative measures to reduce public spending have been considered by the legislators but were deemed less effective for that purpose; and b) the sacrifices required were transitional.

Interestingly, because of a lack of compliance with these conditions, the dissenting opinions of some of the Constitutional Court judges in *Acórdão* no. 396/2011 – for example Carlos Pamplona de Oliveira, who considered the cut-back of public salaries an infringement of the principle of proportional equality for public workers and of legal certainty – a few months later grounded the majority opinion of the Court in subsequent judgments on Euro-crisis law.

Thus, in *Acórdão* no. 353/2012 of 5 July 2012 the Constitutional Court recognized as unconstitutional the provisions in the Budget Act for 2012 that suspended the 13th and 14th monthly allowances for public workers (and pensioners) from 2012 to 2014 and saw it as an integral part of the salary. By applying the test outlined in its ruling of 2011, this suspension amounted to a targeted discrimination against public workers. While in 2011 the Court linked the justification of the public salary cuts to the particular position of public employees, as their salaries are funded by taxpayers, one year later the Court argued that a non-legitimate violation of the principle of equality embedded in Article 13 Const. had occurred. The combined effect of the Budget Acts for 2011 and for 2012 led to a persisting

⁷² See J. E. Machado, 'The Sovereign Debt Crisis and the Constitution's Negative Outlook: A Portuguese Preliminary Assessment', in: X. Contiades (ed.) *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Farnham, Ashgate, 2013, p. 235.

impairment of many civil servants' living conditions. The suspension of the allowances was indeed neither temporary, as public workers would have experienced salary cuts for the third year in a row,⁷³ nor proportionate to the aims to be met. The lack of compliance with the principle of proportional equality derived, on the one hand, from the fact that some categories of public employees were exempted from the salary cuts without any clear reason, and on the other, the suspension of the 13th and the 14th monthly allowances in itself did not substantially contribute to achieving the medium-term objective.⁷⁴

It should be noticed that in this judgment for the first time the Court expressly acknowledged the Memoranda of understanding signed by the Portuguese Government during the bailout as legally binding according to Article 8.2 Const.⁷⁵ However, this legal nature of these Memoranda, according to some scholars,⁷⁶ has been put into question as they are not formally international agreements and they have not been treated as such in terms of execution in the Portuguese legal system or for the purpose of *ex ante* control of constitutionality, which is allowed for international treaties (Art. 278 Const.). Nonetheless, the Constitutional Court has always confirmed the binding value of the *Memoranda* and

⁷³ J. Gomes, 'Social rights in crisis in the Eurozone. Work rights in Portugal', in C. Kilpatrick and B. De Witte (eds.), cit., p. 81.

⁷⁴ Unlike Decision no. 353/2012 of the Portuguese Constitutional Court, these same provisions of the Portuguese Budget Act for 2012 were also subject to review by another Court, the second section of the European Court of Human Rights, on a different ground and with different results. See the case *Da Conceição Mateus v. Portugal* of 8 October 2013 (Applications nos. 62235/12 and 57725/12). The applicants were two Portuguese pensioners who since 2006 had received holiday and Christmas allowances corresponding to a 13th and 14th full monthly pension. By suspending these allowances, the Budget Act for 2012 was deemed to impair their living conditions. Although the applicants did not invoke any specific provision of the Convention for the protection of fundamental rights, the Court decided to refer to Article 1 of Protocol 1 for the possible violation of the right to property. The European Court appreciated the exceptional circumstances of crisis under which the Budget Act was passed, also relying on Decision no. 353/2012 of the Portuguese Constitutional Court. The rate of the applicants' basic pensions was left unchanged by the Act and the previous measures of the Budget Act for 2011 had proved to be insufficient for the purpose of limiting expenditures. The legislator acted within the margin of appreciation and the suspension of the Christmas and holiday allowances was not a disproportionate measure given the economic and financial crisis faced by Portugal. No breach of Protocol 1 was detected and the application was thus declared ill-founded. The reasoning of the Court was actually grounded on the following statement: in this field, "a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social policy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation". By contrast, the Portuguese Constitutional Court recognized the provision as unconstitutional, although it limited the effects of its declaration of unconstitutionality. The decision of the European Court is, in the end, a declaration of deference towards national law.

Portuguese Budget Acts have also been the object of two preliminary references to the Court of Justice, both issued by the labour court of Oporto, in particular to ascertain the compatibility of the provisions of the Budget Acts which provide for a reduction in public workers' salaries and for the non-payment by the State of previously due holiday and Christmas allowances with the Charter of fundamental rights of the EU. Both references – the first, case C-128/2012, *Sindicato dos Bancários do Norte and Others v BPN* with regard to the Budget Act for 2011, and the second, case C-264/2012, *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial*, on the Budget Act for 2012, were dismissed, on 7 March 2013 and on 26 June 2014 respectively, on the basis of a clear lack of jurisdiction of the Court of Justice, since the Charter is applicable only in situations which fall within the remit of EU law. While C. Barnard, 'The Charter in Time of Crisis' in N. Countouris and M. Freedland (eds), *Resocialising Europe in a Time of Crisis*, Cambridge, Cambridge University Press, 2013, p. 250-276, supports the dismissal of the first preliminary reference by the Court of Justice in the light of the purely domestic nature of the policy choices included in the Portuguese Budget Act. C. Kilpatrick, 'On the Rule of Law and Economic Emergency', cit., highlights that 'a full reconstruction of the Portuguese bailout sources actually shows an explicit and tight link between the challenged measure and EU sources'.

⁷⁵ 'Estes memorandos são vinculativos para o Estado Português, na medida em que se fundamentam em instrumentos jurídicos – os Tratados institutivos das entidades internacionais que neles participaram, e de que Portugal é parte – de Direito Internacional e de Direito da União Europeia, os quais são reconhecidos pela Constituição, desde logo no artigo 8.º, n.º 2. (§2).'

⁷⁶ See F. Pereira Coutinho, 'A natureza jurídica dos memorandos da "Troika"'. *Themis*, no. 24/25, 2013, p. 147-179.

of the Financial and Assistance Programme (judgments nos. 187/2013, 413/2014, 574 and 575/2014). To this end, in *Acórdão* no. 353/2012, while the Court declared the suspension of the allowances unconstitutional, it did not go so far as to irremediably impair the government's duties and commitments vis-à-vis the other Eurozone countries and the Troika. When the decision was taken, the execution of the budget for 2012 was already underway. Thus, the Court considered that the consequence of a declaration of unconstitutionality, namely the annulment of the law *ex tunc*, could have put the state's solvency in danger, as the State would have to give the suspended allowances back to their legitimate holders. Therefore, the Constitutional Court used the prerogative it has under Article 282.4 Pt. Const. and restricted the effects of the declaration of unconstitutionality and decided not to apply them to the suspension of the 13th and 14th monthly allowances in 2012. The Court thus sent a clear message to the parliament and government and for the next Budget Act recommended them to take the fundamental principles of the Constitution – like the principle of proportional equality – into consideration and balance them with the obligations arising from the Financial and Assistance Programme. This was to say that, should the legislator disregard this warning in the future, then the Constitutional Court would declare those provisions invalid and therefore annul them *ex tunc*.

Indeed, the next step in the development of the Court's case law was precisely to apply what it had threatened to do in *Acórdão* no. 353/2012. The application of its precedents and of the test developed in 2011 was, however, highly controversial as it was confirmed by a slight majority of the judges – 7 to 6 – which decided on each question.⁷⁷ The Budget Act for 2013, Law no. 66-B/2012, was partially struck down on 5 April 2013 by *Acórdão* no. 187/2013, which jointly decided four constitutional actions brought before the Court by a variety of actors: the President of the Republic, parliamentary minorities and the ombudsman (nos. 2, 5, 8, 11/2013). The Court recognized that the following provisions were in breach of the Constitution: suspension of the holiday allowance for public workers (Article 29), for teachers and researchers (Article 31), and of the holiday allowance for pensioners (Article 77); and the duty imposed upon the beneficiaries of unemployment subsidies to pay social security contributions of 6 instead of 5 per cent. The first three articles of the Budget Act for 2013 were found in breach of the principle of equality (Article 13), since the Act again targeted the same categories of people as the previous Budget Acts and thus *de facto* extended the wage and the pension cut for a further year. The forced payment of a contribution from unemployment subsidies, instead, was considered to violate the principle of proportionality: the same objectives could be achieved by less restrictive means and without damaging an already disadvantaged group of people. The Court referred extensively to the situation of economic emergency and to the Financial Assistance Programme and restated once more the need to accommodate its implementation with constitutional obligations.

The Court refrained from declaring other challenged provisions of the Budget unconstitutional,⁷⁸ but this judgment nonetheless resulted in a shock at the institutional level. Indeed, the Government had tried to adapt the Budget Act for 2013 to the conditions posed by the Court in 2012 by increasing the level of taxation for everyone and by containing the salary cuts for public workers. The composition of the coalition government itself was affected. In April 2013, the Minister for parliamentary affairs, Miguel Relvas, resigned and new Ministers were appointed. In July 2013, following the resignation of the Minister of Finance, Vitor Gaspar, Prime Minister Pedro Passos Coelho tried to end a week-long political crisis through a Government reshuffle. This political crisis was one of the many consequences of *Acórdão* no. 187/2013 which forced Portugal to re-negotiate the terms of the Financial and Assistance Programme. Indeed, the Portuguese Constitutional Court was perceived by the EU

⁷⁷ See G. Coelho, P. Caro de Sousa, '«La morte dei mille tagli». Nota sulla decisione della Corte costituzionale portoghese in merito alla legittimità del bilancio annuale 2013', *Giornale di diritto del lavoro e di relazioni industriali*, 3/2013, p. 527-544, and M. Nogueira de Brito, 'Medida e Intensidade do Controlo de Igualdade na Jurisprudência da Crise do Tribunal Constitucional', in *O Tribunal Constitucional e a Crise*, Almedina, 2014, p. 107 ff.

⁷⁸ The Court was also asked to review the constitutionality of other provisions of the Budget Act for 2013, such as art. 27, which confirmed the wage cut for public workers for the third year, and art. 45, about overtime payment, which were not eventually declared unconstitutional.

institutions and by the Troika as a threat to Portugal's financial stability and on the occasion of the seventh update of the Memorandum of Understanding on Specific Economic Policy Conditionality of May 2013 one of the conditions laid down for the Government to receive financial assistance was to 'take a number of steps aiming at mitigating the legal risks from future potential Constitutional Court rulings'.⁷⁹ This proves quite clearly how problematic judgment no. 187/2013 was for the legitimacy of the Portuguese Constitutional Court, for its relationship with the Government and for the fulfilment of European and international obligations.⁸⁰

However, in spite of the severe implications of the judgment, the Court did not depart from its consolidated line of reasoning. As stated above, judgment no. 187/2013 was also solved by applying fundamental principles of the Portuguese democratic State – namely the principles of equality and proportionality – as standards for review, in spite of the fact that the applicants had claimed a violation of specific social rights. For example, Article 77 of the Budget Act for 2013, on cutting the holiday allowance to pensioners, was claimed to encroach upon Article 63 Pt. Const. and the right to social security. The Court simply disregarded this claim and continued to do so in all its other judgments on Euro-crisis law, with one exception: judgment no. 602/2013.

In decision no 474/2013, of 29 August 2013, a decree of the Portuguese Parliament, which made the dismissal of public employees for objective reasons easier and which operated *ope legis*, was declared unconstitutional as it violated the principle of the protection of legitimate expectations and the principle of legal certainty, both derived from Article 2 Pt. Const. The Court stated that the national measures – the Budget Acts – implementing the Financial and Economic Assistance Programme had justified the salary cuts of public workers in exchange for the greater job stability that they enjoyed compared to workers in the private sector. Such a justification created an expectation among public employees that, according to the Court, had to be protected and that the decree contradicted. The relevant provision of the decree, however, did not survive the Court's usual test for temporary effects and proportionality of the measures. According to the Court, the contested provision was certainly not transitional and the legislator failed to demonstrate that the changes in labour relationships in the public sector were really necessary and adequate to match the need for a more efficient public administration.⁸¹

Likewise, in *Acórdão* no 862/2013 of 19 December 2013, in the framework on an *ex ante* constitutional review, several legislative provisions aiming to amend the statute governing the retirement of public sector staff were declared unconstitutional on the ground of a violation of the protection of legitimate expectations. These provisions (retrospectively) cut the pensions paid by the public pension fund (CGA) by 10 per cent and introduced a less favourable formula for calculating pensions. As in its previous judgments on public salary cuts (decisions nos. 353/2012 and 187/2013), the Constitutional Court highlighted that only some of the pensioners, namely public servant pensioners, were subject to cuts. According to the Court, in this case too the measure had an indefinite duration and it could only be justified if and insofar as it was part of an overall structural reform of the public system in which several factors affecting financial sustainability were addressed at the same

⁷⁹ See European Commission, *The Economic Adjustment Programme for Portugal - Seventh Review, Annex 5*, § 1.28, available at: http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp153_en.pdf and M. Nogueira, De Brito, 'Putting social rights in brackets? The Portuguese experience with welfare challenges in times of crisis', in C. Kilpatrick and B. De Witte, cit., p. 70.

⁸⁰ On the effect of *Acórdão* no. 187/2013 on the compliance with EU and international obligations taken by Portugal, see M. Nogueira De Brito, *Comentário ao Acórdão n.º 353/2012 do Tribunal Constitucional*, in *Direito & política* 2012, p. 108 ff.; A. Dos Santos, C. Celorico Palma, *O Acórdão do Tribunal Constitucional n.º 353/2012 de 5 de julho: a prevalência da razão jurídica sobre a razão económica*, in *Revista e finanças públicas e direito fiscal* 2012, p. 31 ff.; R. Cisotta & D. Gallo, *Il Tribunale costituzionale portoghese, i risvolti sociali delle misure di austerità ed il rispetto dei vincoli internazionali ed europei*, in *Diritti umani e diritto internazionale*, vol. 7, 2013, n. 2, p. 465-480.

⁸¹ This ruling was criticised as proving the judicial activism of the Court, in particular for the argument that the parliament failed to demonstrate the need for and the suitability of the reform of the rules on the dismissal of public workers: see G. Almeida Ribeiro, 'O Constitucionalismo dos Princípios', *O Tribunal Constitucional e a Crise*, Almedina, 2014, p. 71 ff.

time to improve intra- and inter-generational fairness. The Court only elaborated on the nature of the right to a pension as a social right in an *obiter dicta*. The Court conceived this right to be derived from the right to social security and a ‘positive constitutional-law social right’, which imposes a positive obligation upon the state.⁸² In spite of this definition, the Court did not use the right to a pension as a standard of review.

So far, the only ruling of the Portuguese Constitutional Court on Euro-crisis law in which social rights rather than fundamental principles of the Constitution have grounded the judgment was *Acórdão* no 602/2013 of 20 September 2013, in the matter of Labour Law. The Court struck down certain provisions of Law no. 23/2012 which amended the Labour Code of 2009. These provisions violated the constitutional prohibition of dismissal without just cause (Article 53 Pt. Const.) and certain provisions of collective labour regulation instruments (IRCTs), for example regarding rest periods granted as compensation for working overtime on normal working days, during compensatory weekly rest days or public holidays. The violation of the IRCTs by Law no. 23/2012 amounted to an infringement of Article 56, sections 3 and 4 Pt. Const., on the right of trade unions and of individuals to enter collective agreements, in combination with Article 18.2 Pt. Const, according to which restrictions of rights must be provided for by the Constitution and only for the protection of other rights and interests safeguarded by the Constitution itself.

This case, however, appears isolated in the rich case law of the Portuguese Constitutional Court on Euro-crisis law, since subsequent judgments were all decided, again, on the basis of fundamental principles, like the principle of equality (judgments nos. 413 and 574/2014), the principle of proportionality (judgment no. 413/2014), and the principle of legitimate expectations (judgment no. 575/2014). These cases, which saw the Court internally divided and which were solved by slight majorities, again dealt with salary and pension cuts for public workers and pensioners. The Court confirmed the application of its test developed in 2011 about the temporary nature of the cuts and their suitability to pursue the targeted objectives of fiscal stability and reduction of the public deficit. In particular, any cut in public wages that was planned to apply from 2015 onwards was held to be unconstitutional (judgments nos. 574 and 575/2014).

In *Acórdão* no. 413/2014 of 30 May 2014, Article 115 of the Budget Act for 2014 was declared unconstitutional as it required an additional sacrifice of unemployed people by again asking them – as in case no. 187/2013 – to pay a contribution from their unemployment subsidies. The measure was considered disproportionate as it affected a group who were already in a situation of particular vulnerability without achieving a substantive benefit in terms of public revenues. Furthermore, the Court declared the reduction of survivors’ pensions (Article 117 of the Budget Act) and public wage cuts (Article 33) to be in violation of the principle of equality. In particular, Article 33 increased the number of public workers who were subject to this increase in their salary cut – from 3.5 to 10 % of their wage – from those who earned more than 1500 euro (as had been upheld in case no. 353/2012) to those who only had an income above 675 euro. This minimum threshold was deemed too low. Given the financial impact of the judgment, however, the Court decided to exercise its power under Article 282.4 Pt. Const. and to declare the effects of the unconstitutionality of Article 33 to be *ex nunc* rather than *ex tunc*.

Perhaps a deviation from this case law is represented by *Acórdão* no. 794/2013 of 21 November 2013 and no. 572/2014 of 30 July 2014, both again showing a highly divided Court. In the first ruling, the Court upheld the constitutionality of norms that increased the normal working hours for public workers. These norms aimed to extend the application of the general labour rules to public employees. Such a convergence between the two regimes, according to the Constitutional Court, was foreseeable by workers, given the national economic situation, and thus it did not impair the protection of their legitimate expectations. Moreover, the right to remuneration was not violated insofar as the reduction in the payment for ordinary working activity could be compensated by payment for overtime work. Judgment no. 572/2014 confirmed the validity of the provisions of the supplementary budget act for

⁸² In this sense, see also *Acórdão* no. 572/2014, available at: <http://www.tribunalconstitucional.pt/tc/acordaos/20140572.html>

2014, which on the one hand increased the amount of the extraordinary solidarity contribution (CES) from the highest pensions while at the same time increasing the number of pensioners subject to this contribution, and on the other increased the contribution for public health insurance. The constitutionality of CES, which was introduced in 2011 and already judged in compliance with the Constitution in *Acórdão* no. 187/2013, was confirmed on the basis of the temporary and exceptional nature of the contribution, which, however, had been raised year after year in the annual Budget Acts. The contribution for public health insurance derived from the free choice of public workers to be registered in that insurance regime. As was expressly admitted, in this ruling the Court tried to limit the backlash of its previous judgment on the Budget Act for 2014, in particular *Acórdão* no. 862/2013, which considered additional pension cuts unconstitutional. In turn, the Portuguese Government was forced to submit a supplementary budget act for 2014 in order to retrieve resources to fund the system of social security while at the same time in a crucial moment for the country complying with the fiscal objectives for 2014. Portugal was indeed still benefitting from financial assistance, but was about to exit the financial and assistance programme. In addition, annulling the norms in the supplementary budget act on CES and on funding public health insurance would have ultimately impaired the legitimacy of the Court, making it responsible for a weakening of Portugal's financial credibility.

Portuguese constitutional case law on Euro-crisis measures has deeply affected the relationship between the Constitutional Court, on the one hand, and the Government and Parliament on the other. The contentious rulings in which the Court struck down parts of the annual Budget Acts split the Court and were the outcome of a very difficult compromise to reach, based on the enforcement of fundamental principles.⁸³ Indeed, reaching agreement on the application of these principles has at least two advantages: first, managing principles allows the Court to adapt the balancing case by case; second, solving a case based on principles does not tie the hand of the legislator as much as using social rights, which would leave less discretion to Parliament in shaping future legislation. Nevertheless, the resort to principles by the Portuguese Constitutional Court has not prevented it from accusations of judicial activism and against its legitimacy at the national and international levels.⁸⁴ The need for legal certainty and the threat of future declarations of unconstitutionality by the Constitutional Court have pushed the Portuguese Government to exploit the tool of *ex ante* review of draft Budget Acts – which has been used on very few occasions – so as to clarify in advance if there is a breach of the Constitution.

III.B Regional autonomy revisited

Italy, Portugal and Spain have either their whole territory or part thereof divided into regions provided with legislative autonomy, according to the constitutional allocation of legislative competences. In particular, Italy is organized into 20 regions and two autonomous provinces, Spain into 17 autonomous communities, and Portugal acknowledges legislative powers only to two autonomous regions, the Azores and Madeira, because of the ultraperipheral nature of these archipelagos, whereas the remaining part of the territory is only administered by the central government.

As usually happens in periods of crisis, State institutions have become more active in the protection of the unity of the nation and of equivalent living conditions throughout the entire territory. This process often goes in parallel with a limitation of the existing legislative powers and autonomy of regions for the sake of restoring financial stability and aiding recovery.⁸⁵ In order to react against economic and financial troubles, the state level of government is keen to re-centralise some policies or to lead coordinated action to restore certain common standards of living in all regions. In addition, especially when autonomous regions administer most of the social services, as in Spain, or a significant quota, as

⁸³ See T. Abbiate, 'Le Corti costituzionali dinanzi alla crisi finanziaria: una soluzione di compromesso del Tribunale costituzionale portoghese', *Quaderni costituzionali*, 2013, p. 146 ff.

⁸⁴ See P. Wise, S. Gordon, 'Portuguese government grapples with its constitutional court', *Financial Times*, 15 June 2014, available at: <http://www.ft.com/cms/s/0/b5c9a802-f48d-11e3-a143-00144feabdc0.html#axzz3Ds8YexZ6>

⁸⁵ See, for example, the effects of the New Deal on US federalism: E. S. Corwin, 'The Passing of Dual Federalism', *Virginia Law Review*, vol. 36 (1), 1950, p. 1-24.

in Italy and Portugal, and thus manage a substantial proportion of public spending, State institutions have an interest in further limiting regional autonomy in the present context of the Euro-crisis. Indeed, the State as a whole is responsible before EU institutions for compliance with Euro-crisis law. Therefore, particularly in this context, the burden of solving disputes between regions and the State is often left to the Constitutional Courts. Regions claim respect for their legislative prerogatives under the Constitution; the State advocates interventions at the central level of government to protect the common objective of sound public accounts for the entire territory.

This trend is confirmed in the constitutional case law in Italy, Portugal, and Spain during the Eurozone crisis. However, except for Portugal, where before the crisis the autonomy of Azores and Madeira had been very much enhanced, including through constitutional amendments, the limitation of regional autonomy in Italy and Spain is anything but new. From this standpoint, the application of Euro-crisis law in Italy and Spain has not overturned past constitutional case law; instead, Euro-crisis law has strengthened a trend that was already in place: the two Constitutional Courts have provided an interpretation of the constitutional provisions dealing with the division of legislative competence between the State and regions in favour of the former and expanding the power of the national Parliament for years.

Italy

In Italy, the legislative competence of the regions was extended by the constitutional reform of 2001 (Const. Law no 3/2001), which inverted the criteria for the allocation of legislative powers between regions and State. The catalogue of concurring competences was expanded,⁸⁶ the residual clause, once in favour of the State, now runs to the benefit of the regions, and the limit of the ‘national interest’ for regional legislation, which allowed the State legislative intervention over regional competences, was formally repealed.

The amended constitutional provisions soon became a source of constitutional conflicts between the State and the regions, which in turn gave rise to a significant growth in controversies before the Constitutional Court. In 2004, for the first time ever since the setting up of the Italian Constitutional Court, the number of judgments issued following a *principaliter* proceeding – which is used by the State or regions to challenge the validity of regional or State legislation – exceeded those rendered on the basis of an *incidentaliter* proceeding, i.e. on a preliminary question of constitutionality requested by ordinary judges.⁸⁷ Since 2004, the trend of an increasing number of *principaliter* proceedings has been confirmed, and in 2012 and 2013, in conjunction with the adoption of austerity measures by the State, the greatest part of the Court’s activity was absorbed by constitutional conflicts over the legislative competence of the State and regions.

In the case law of the Italian Constitutional Court, however, a restrictive interpretation of the new and broader catalogue of regional competences has largely prevailed since the entry into force of the constitutional amendments. Many scholars have even argued that the Constitutional Court has ‘re-written’ Title V of the Constitution, on Regions, Provinces and Municipalities, in favour of the State.⁸⁸ For example, the Court has used the principle of subsidiarity – which in Italy refers to administrative functions – to expand State legislative powers, provided that some procedural requirements are

⁸⁶ In matters of concurring competence the State can fix the fundamental principles by means of framework laws, whereas regions adopt detailed legislation in compliance with those principles.

⁸⁷ See the Annual Reports on constitutional case law and the Annual Reports of the Presidents of the Constitutional Court, available at: http://www.cortecostituzionale.it/ActionPagina_235.do

⁸⁸ See T. Groppi, ‘Giustizia costituzionale e Stati decentrati: la Corte italiana dopo la revisione del 2001’, in *Amministrare*, 2005, p. 5 ff., A. Ruggeri, ‘Riforma del Titolo V ed esperienze di normazione, attraverso il prisma della giurisprudenza costituzionale: profili processuali e sostanziali, tra continuo e discontinuo’, in *Federalismi.it*, www.federalismi.it, 6 October 2005, and S. Mangiameli, ‘I processi di riforma in itinere. Considerazioni sul riflusso della riforma federale in Italia’, in *Forum costituzionale*, www.forumcostituzionale.it, 5 October 2006.

complied with,⁸⁹ or has detected some subject matters – e.g. the protection of the environment and of competition and the determination of the basic level of benefits relating to civil and social entitlements – as ‘horizontal clauses’ that allow the State to pass laws even when regional competences are crossed.⁹⁰

This trend towards the limitation of regional competence through constitutional case law has been strengthened by the Italian Constitutional Court in the aftermath of the Eurozone crisis. A number of regional laws have been declared unconstitutional on the ground of the need to protect the economic and legal unity of the Italian Republic (from judgments nos. 274/2003 and 43/2004 to judgment no. 78/2014) and because of a lack of compliance with fundamental State principles in the matter of coordination of public finance, the main tool used as a ‘horizontal clause’ to re-centralise legislative powers to the national Parliament. Likewise State interventions grounded on this clause have usually been upheld (judgments nos. 267/2006, 179/2007, 37/2011, 198/2012 and 60/2013).

Several rulings of the Italian Constitutional Court have affected the concurring legislative competence between the State and regions in matters of public health care⁹¹ regarding exemption from payment for health care services (decision no. 325/2011), about the rules and limits for hiring medical personnel and the management of hospitals and public health care offices (decisions nos. 150/2010, 333/2010 and 68/2011), and regional health care expenditure (decision no. 79/2013). In a series of judgments from 2010 to 2014, not only did the Italian Constitutional Court rule that these issues fell within the remit of another concurring legislative competence, ‘coordination of public finance’, rather than in that of the protection of health care, but regional legislation was also systematically found to be in violation of the fundamental principles provided by State legislation on the coordination of public finance, and thus the relevant regional provisions were declared unconstitutional (decisions nos. 33/2012, 91/2012, 129/2012, 131/2012, 79/2013, 104/2013 and 180/2013). This case law of the Italian Constitutional Court also depended on the pressure exerted on public finance by the huge deficits of most of the 20 regional health care systems, which were in existence well before the Eurozone crisis. However, with the reform of economic governance in the EU these regional deficits could now endanger the achievement of the national medium-term objective. According to the Italian Constitutional Court, whenever the adjustment programmes regarding regional health care systems in deficit and agreed with the State were violated by regional legislation, regional laws must be declared in breach of Article 117.3 It. Const. Indeed, these adjustment programmes are deemed to set out the fundamental principles for the coordination of public finance to be complied with by regional legislation.

The Italian Constitutional Court has stated that the need for the coordination of public finance and for enhancing financial stability can justify a limitation of the shared regional legislative competence in matters of health care protection (decisions nos. 91/2012 and 51/2013) or even of the residual legislative competence of regions in the field of regional organization, i.e. the organization of public offices (decision no. 236/2013). The Court is perfectly aware of the centralizing effect on public policies of its case law grounded on the need for better coordination of public finance. In the Annual Report on constitutional case law in 2013, the then President of the Italian Constitutional Court,

⁸⁹ See the landmark decision no. 303/2003. Amongst these procedural requirements are: to reach an agreement between State and Regions on the adoption of State legislation, compliance with the principle of loyal cooperation and with the principle of proportionality.

⁹⁰ See judgments nos. 282/2002, 536/2002, 407/2002, 88/2003, 14/2004, 401 and 430/2007.

⁹¹ According to Article 117.3 of the Italian Constitution, a shared competence between the State and the Regions means that the State defines the fundamental principles of the legislation and the Regions adopt legislation that contains detailed provisions on how to regulate the matter at regional level. Regions must comply with the fundamental principles provided by the State, otherwise the regional legislative act is deemed to be in contrast with the Constitution, in particular with Article 117.3 Const., and thus can be annulled.

Justice Gaetano Silvestri, pointed to this outcome as a major concern: there has been a multiplication of judgments that justify the interference of the State in regional legislation (p.3)⁹².

A line of reasoning of the Italian Constitutional Court that is complementary to the first one about the limitation of regional legislative competence in the name of the uniformity and coordination of public finance and centralized control of expenditure is based on a *de facto* enlargement of the legislative competence of the State, in line with pre-crisis constitutional case law. In particular, the State legislative competence in the matter of the ‘determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory’, which is an exclusive legislative competence of the State (Article 117.2, lit. m, It. Const.), and the minimum levels of health care assistance, has been expanded by the case law of the Court to the detriment of regional legislative competences.

A remarkable example in which the justification of the crisis also vigorously appeared is decision no. 10/2010 on the so-called ‘social card’. The ‘social card’ was a bonus provided by Decree-law no. 112/2008 from which the most disadvantaged segments of the Italian population benefited so as to satisfy their primary dietary needs, and to support them in paying for health care services and accommodation costs. Three Regions challenged the constitutional validity of the decree-law on several grounds, all related to the invasion of regional legislative competences. In upholding the constitutionality of the decree-law, the Court stated that State action was necessary to protect human dignity in a uniform, appropriate and timely manner, in particular that of the most vulnerable part of the population. The duty of the Italian Republic to maintain economic and social solidarity (Article 2 Const.), the principle of substantive equality (Article 3 Const.), the right to welfare support (Article 38 Const.), and to determine the basic level of benefits throughout the national territory (Article 117.2, lit. m Const.) allowed the State to overstep the residual legislative competence of the Regions in matters of social services and welfare. Furthermore, the decree-law at stake was deemed in compliance with the Constitution in the light of ‘the extraordinary, exceptional and urgent situation following the international economic and financial crisis that also hit our country in 2008 and 2009’ (own translation). Thus, according to the Court, in a time of scarce resources even social rights should preferably be protected at State level so as to set common standards and to decide at the centre how to use resources.

On a few occasions, the Italian Constitutional Court has deviated from this case law by stating that restriction of the financial autonomy of the regions could not be justified simply by the economic emergency (decision no. 148/2012) and these limitations only remained legitimate as long as they were temporary (decision no. 193/2012). While the attempt to enforce fiscal federalism in Italy (Law no. 42/2009) had the ‘original intent’ of enhancing the autonomy of regions to impose and collect taxes and to decide on their own expenditures, it has turned out primarily to limit this autonomy by capping the out-of-control spending and deficits of many regions. This limitation is pursued with the aim of making regions responsible for the management of their own budgets without them becoming an unbearable burden for Italian financial stability. The responsabilization of regional governments can even be fulfilled through the dismissal of a regional President by the President of the Republic in the event of serious financial distress of a region (Article 2, Legislative Decree no. 149/2011).⁹³ This

⁹² The Report is available in Italian at the following address:

http://www.cortecostituzionale.it/documenti/relazioni_annuali/Silvestri_20140227.pdf

⁹³ This sanction against the President of a Region represented the first attempt regulated by law to apply Article 126 It. Const.: ‘The Regional Council may be dissolved and the President of the Executive may be removed with a reasoned decree of the President of the Republic [on the basis of an initiative by the Government] in the case of acts in contrast with the Constitution or grave violations of the law’. The hypothesis of serious financial distress, indeed, amounted to a grave violation of law for the purpose of Article 126 It. Const. Legislative Decree no. 149/2011 aimed to complement the application of fiscal federalism in Italy, based on Law no. 42/2009. See G. Perniciaro, G. Piccirilli, ‘il “fallimento politico” del Presidente della Giunta regionale. Note critiche sul decreto legislativo in materia di “premi e sanzioni”’, *Rivista dell’Associazione italiana dei costituzionalisti (AIC)*, no. 4, 2011, <http://www.rivistaaic.it/il-fallimento-politico-del-presidente-della-giunta-regionale-note-critiche-sul-decreto-legislativo-in-materia-di-premi-e-sanzioni.html>

sanction, which was linked to a persistent deficit of a regional health care system as a source of political failure of the President of a Region, was declared unconstitutional by the Italian Constitutional Court, not because dismissal for the purpose of sustaining regional accounts was illegitimate in itself, but because of the procedure fixed by Legislative Decree no. 149/2011 (judgment no 219/2013). The procedure foresaw the imposition of the sanction as automatic following the verification of the serious financial distress by the Court of auditors, without leaving discretion to the national Government about the exceptional circumstances that could justify the dismissal.⁹⁴ However, the Constitutional Court has not excluded that the threat of dismissal could be used to foster the fiscal responsabilization of the regions from above. It is this paternalistic view of the relationship between State and regions for the sake of financial stability that has led the dismissal of the President of a region to be described as the ‘new frontier of the coordination of public finance’ by the central government.⁹⁵

While waiting for the enforcement of the balanced budget clause, in operation since January 2014, the need to contain public expenditure has led the Constitutional Court to provide a more rigorous interpretation of the regional legislation of Article 81, in the version in force prior to Const. Law no. 1/2012. According to the then Article 81.4 Const., ‘any other law involving new or increased spending shall detail the means therefore’ and in decision no. 70/2012 the Italian Constitutional Court interpreted this provision as binding upon the Regions, too. Indeed, the Court declared the Budget Act of Campania (an Italian Region) for 2011 unconstitutional because the fiscal coverage it provided did not meet the standards set by Article 81.4 Const. as interpreted by the Court in its previous judgments concerning state legislation (decision no. 1/1966). In particular, fiscal coverage ‘must be credible, safe enough and not arbitrary or irrational’ (own translation). The lack of clarity, of data, and of entries in the regional budget might jeopardize the financial balance in 2011 and in the following years. The Court reached this conclusion notwithstanding the huge effects that a declaration of unconstitutionality of a Budget Act can produce. Subsequently, many other regional laws have been declared unconstitutional for violation of Article 81.4 It. Const. (e.g. judgments nos. 68/2014, 190/2014 and 224/2014).

The Italian Constitutional Court acknowledged the new constraints deriving from the balanced budget clause both before and after its official enforcement (judgments nos. 60/2013, 4/2014 and 68/2014). However, by contrast with the Spanish Constitutional Court, since 1 January the balanced budget clause has not been treated as *ius superveniens* by the Italian Court and thus cases brought before January 2014 but decided afterwards have been solved on the ground of the old standard of review (Article 81.4). On one occasion – decision no. 68/2014 – the new constitutional standard, i.e. the balanced budget clause of Article 81.1 It. Const., was invoked by the State against a regional law that provided for a local art event to be funded by the Region without specific allocation of resources for this purpose. Part of the regional funds had to be transferred before January 2014, and thus the old version of Article 81 It. Const. was cited; however, the remaining part of the funds would have been granted in 2014 and this is why the new balanced budget clause was also mentioned as a standard of review. Nevertheless, the Italian Constitutional Court decided to solve the case on the ground of the lack of fiscal coverage of the regional law, and declared it in breach of Art. 81.4 It. Const. (old version). In the next few months, however, the Constitutional Court will decide on constitutional challenges brought in 2014 on the ground of the new constitutional provisions on a balanced budget

⁹⁴ Legislative Decree no 149/2011 was also found unconstitutional on other grounds, including the position of the President of the Region as the commissioner *ad acta* of the Region, which is also a serious problem in terms of de-responsabilization (see C. Pinelli, ‘In tema di scioglimento e rimozione degli organi regionali’, *Giurisprudenza costituzionale*, no. 3, 2014, p. 3145 ff.). However, given the weak connection of these elements with the adjudication of Euro-crisis law, they are not analysed here.

⁹⁵ See L. Gori, ‘La minaccia di rimozione del Presidente della Regione come nuova frontiera del coordinamento della finanza pubblica? Il decreto legislativo «premi e sanzioni»’, *Giurisprudenza costituzionale*, no. 4, 2013, p. 3150 ff.

for the State (Article 81.1 It. Const.), for the overall system of public administration (Art. 97 It. Const.) and for regional and local authorities (Article 119.1 It. Const.).⁹⁶

Even before the balanced budget clause has been fully enforced by the Court,⁹⁷ constitutional rulings on Euro-crisis law affecting regional competences can so far be seen to be in continuity with past decisions of the Italian Constitutional Court that have usually run in favour of the expansion of the State legislative domain. This reading of constitutional case law during the Eurozone crisis is further confirmed by judgment no. 88/2014. This case law is important for several reasons. It was the first case dealing with the new provisions introduced after the constitutional reform of 2012 on a balanced budget that was brought before the Italian Constitutional Court by regions provided with a broader level of autonomy than ordinary regions – a special region, Friuli-Venezia-Giulia, and an autonomous Province, Trento. Second, the object of constitutional review was State Law no. 243/2012, the ‘reinforced’ law applying many provisions of Const. Law no. 1/2012 that was adopted and can be amended only by an absolute majority in Parliament and that in prospect can be used by the Court as a standard for constitutional review besides the constitutional balanced budget clause.⁹⁸

The applicants contested the violation of regional autonomy by the very detailed provisions of State Law no. 243/2012 on regional and local authorities resorting to borrowing and on the constraints for regions in using deficit spending. The Italian Constitutional Court, however, dismissed most of the regional challenges. It only considered unconstitutional the conferral to the Government of a general power to regulate borrowing by regional and local authorities, which the Court narrowed to regulation of the ‘technical’ aspects, thus preserving the political discretion of the national parliament and of the regional political bodies. Moreover, the Italian Constitutional Court found unconstitutional the lack of involvement of the inter-governmental Conference between the State, regions and local authorities to determine their contributions to the amortization of public debt. Although this ruling will allow regions to participate in the procedure, the Court clarified that should an agreement within the inter-governmental Conference be impossible to reach the State can decide anyway without the consent of the Regions. This ruling can be read as ultimately strengthening the legitimacy of State Law no. 243/2012 vis-à-vis regional claims.

Spain

Since the beginning of the Eurozone crisis, the legislative powers of the Autonomous Communities have also been severely constrained in Spain. The constitutional reform of 2011 and its subsequent legislative enforcement have definitely seconded this trend, also affecting the constitutional review of legislation. Organic Law no 2/2012, on Budgetary Stability and Financial Sustainability, substantially replicated the EU Stability and Growth Pact at national level between the centre and the periphery. For example, a potential violation of the balanced budget clause on the part of the Autonomous Communities can be easily challenged by the State before the Constitutional Court, but no symmetric appeal is provided for the Autonomous Communities against the State.⁹⁹

⁹⁶ See, for example, the constitutional complaint filed by Sicily (no. 17/2014), one of the Italian Regions, against State Law no. 147/2013 (*Legge di stabilità 2014*), Official Journal, no 18 (Part. I), 23 April 2014.

⁹⁷ The constitutional reform of 2012 by Const. Law no 1/2012 has indeed been described as a ‘counter-reformation’ against regional autonomy compared to the constitutional reform of 2001 and to ‘fiscal federalism’: see M. Cecchetti, ‘Legge costituzionale n. 1 del 2012 e Titolo V della Parte II della Costituzione: profili di contro-riforma dell’autonomia regionale e locale’, *Federalismi.it*, 19 December 2012, www.federalismi.it

⁹⁸ See N. Lupo, ‘La revisione costituzionale della disciplina di bilancio e il sistema delle fonti’, in *Costituzione e pareggio di bilancio. Il Filangieri 2011*, Napoli, Jovene, 2012, p. 89 ff. and G. Scaccia, ‘La giustiziabilità della regola del pareggio di bilancio’, *Rivista dell’associazione italiana dei costituzionalisti (AIC)*, no 3, 2012.

⁹⁹ See the third additional provision, on the constitutional review of legislation, of organic law no 2/2012: the possibility of challenging the constitutional validity of legislation which conflicts with new Article 135 Sp. Constitution – the balanced budget clause – is explicitly provided only for the State against the laws of Autonomous Communities. Nevertheless this prerogative has not yet been used by the national Government.

This Organic Law no. 2/2012 has indeed been challenged before the Constitutional Court on several grounds by the Government of the Autonomous Community of Canary Islands (*Recurso de inconstitucionalidad* no 557/2013). For example, the Government of Canary Islands contested the power of the national Government, conferred by Article 16 of Organic law no. 2/2012, to fix for each Autonomous Community the objective of budgetary stability and the level of public debt and thus to annul the fiscal autonomy of the Communities. The appeal was declared admissible by the Constitutional Court, but it is currently pending judgment on the merits of the complaint.

The limitation of the budgetary autonomy of the Spanish regions, however, dates back at least ten years before the constitutional reform of the balanced budget clause and the Euro crisis. In other words the trend towards re-centralization of the Spanish quasi-federal State preceded the current financial troubles, and the crisis, as in Italy, has just strengthened a process that was already in place.¹⁰⁰ Limitation of regional budgetary powers was achieved first of all by means of ordinary and organic State legislation, the constitutionality of which was systematically confirmed by the Spanish Constitutional Court, while at the same time the Court did not hesitate to strike down budget acts of the Autonomous Communities.¹⁰¹ The entry into force of the first Law on Budgetary Stability, no. 18/2001, and its subsequent amendments, triggered a series of actions for unconstitutionality on the part of the Parliaments and Governments of the Autonomous Communities. The new Law on Budgetary Stability, indeed, also fixed guiding principles for regions and local authorities – like the principle of budgetary stability – that could constrain their budgetary autonomy and that were accused of encroaching upon regional competences.¹⁰²

Based on an action brought by the Parliament of Catalonia against the Law on Budgetary Stability, in decision no. 134/2011 the Spanish Constitutional Court decided its leading case for constitutional case law on the Euro-crisis measures. As highlighted, the judgment was issued before the constitutional amendment bill was examined in Parliament, but in spite of this fact the Constitutional Court considered the principle of the balanced budget to deserve constitutional protection. The Parliament of the Autonomous Community of Catalonia had filed an action challenging the violation of the constitutional principle of financial autonomy of the Community by Law no. 18/2001 and Organic Law no. 5/2001, as amended in 2007 and 2006, since they imposed the principle of a balanced budget. Although the Parliament of Catalonia acknowledged the exclusive legislative competence of the State on the basic rules and coordination of general economic planning (Article 149.1.13 Const.),¹⁰³ it contested that by means of the organic and ordinary laws the State Parliament acted *ultra vires* and imposed too tight a fiscal discipline compared to the obligations deriving from EU law, in particular the then version of the Stability and Growth Pact. The Constitutional Court disregarded the reference made by the Catalan Parliament to EU law. Relying on previous constitutional case law (since decision no. 28/1991), the Court excluded that EU legal norms could form part of the standard for the constitutional review of legislation. The Court dismissed the appeal: relying on past constitutional case law (decision no. 62/2001), the State had the power to introduce fiscal constraints upon public accounts and to impose compliance with the balanced budget rule on all administrations, including those of the Autonomous Communities. Therefore, even before the constitutional reform the Court *de facto* ‘upgraded’ the status of the balanced budget rule from ordinary to constitutional nature.

¹⁰⁰ See V. Ruiz Almendral, ‘The Spanish Legal Framework for Curbing the Public Debt and the Deficit’, *European Constitutional Law Review*, vol. 9, no. 2, 2013, p. 201.

¹⁰¹ See, for example, decision no. 3/2003 of the Spanish Constitutional Court, which declared the Basque autonomous community budget act for 2002 unconstitutional.

¹⁰² See L. Díez Sánchez, M. Estrada-Cañamares, G. Gomez Ventura, ‘Report on Spain’, *Constitutional Change Through Euro-Crisis Law Project*, Law Department, European University Institute, Florence, 12 September 2014, section VII.3, available at <http://eurocrisislaw.eui.eu/spain/>.

¹⁰³ On State basic legislation and horizontal titles or clauses regarding State legislative competences, see V. Ferreres Comella, *The Constitution of Spain. A Contextual Analysis*, Oxford and Portland/Or, Hart Publishing, 2013, p. 173-174.

Decision no. 134/2011 is the precedent on which 13 other judgments afterwards relied (see, for example, decisions nos. 157/2011, 185/2011, 189/2011, 195/2011, 199/2011 and 203/2011) based on actions of unconstitutionality brought by several Governments of Autonomous Communities and by the then socialist parliamentary opposition against Law no. 18/2001 on Budgetary Stability and Organic Law no. 5/2011, as modified. However, by the time of these new judgments Article 135 Sp. Const. had been amended and therefore the standard of review had changed as the Court clearly highlighted. Also based on the new constitutional standard, the Court confirmed its reading of the constitutional text that enables the State Government to guarantee the enforcement of the balanced budget rule for all levels of government.

The trend towards re-centralization is also confirmed by the enactment of State Law no. 27/2013 on the rationalisation and sustainability of Local Administrations. The validity of this Law was challenged before the Constitutional Court by a variety of institutional actors: by the Governments and the Parliaments of many Autonomous Communities, in practice all the Autonomous Communities not ruled by the *Partido Popular*, which has the majority at the national level and in 10 of the 17 Regions;¹⁰⁴ by the socialist parliamentary opposition in the State Parliament; and by nearly 3000 municipalities.¹⁰⁵ Besides the alleged violation of the regional legislative competences on local matters, it is also contended in these actions that Law no. 27/2013 impairs the competences of local Autonomous Communities themselves, in particular their right to self-government (Article 137 Sp. Const.) and their political and fiscal autonomy (Articles 140 and 142 Sp. Const.). The actions were declared admissible by the Constitutional Court, but given the timing of the Court's judgments, the cases will be decided on their merits in the coming years, which in turn implies that the effects of Law no 27/2013 on the regions and local government will endure.

The legislative powers of the Autonomous Communities, which, based on the Constitution and on their Statutes of autonomy, are competent to regulate most social policies (education, health care, social assistance), had also been already squeezed before the Eurozone crisis.¹⁰⁶ The 'expansion' of State legislation on social matters, which has been seconded by constitutional case law, has mainly derived from the extensive interpretation that the State legislator and the Constitutional Court have provided of the State legal bases for the different subject matters. According to the Court, these legal bases, established by the State and which have to be respected by Autonomous Communities when passing legislation in the relevant field, can also be fixed by regulations and often they have been considered in compliance with the Constitution despite going well beyond the definition of mere principles.¹⁰⁷ Even in matters of social assistance, where, based on the constitutional catalogue of subject matters, the State lacks legislative competence, since the early 1990s the Constitutional Court has acknowledged the authority of the State to grant social allowances (decision no. 13/1992) regardless of the regional competence in this field whenever such allowances ensure the fundamental conditions of equality 'of all Spaniards in the exercise of their rights and in the fulfilment of their constitutional duties (Article 149.1.1 Sp. Const.)'. This general and horizontal equality clause was regularly used by the Constitutional Court in the years of economic expansion to justify State intervention to the detriment of the autonomy of regional social policies (decision no. 61/1997).¹⁰⁸

¹⁰⁴ These are the Governments of Andalusia, Catalonia, Asturias and Canarias as well as the Parliaments of Andalusia, Navarra, Extremadura and Catalonia.

¹⁰⁵ On the conflict for the protection of local autonomy, for details see section II.B (ii).

¹⁰⁶ E Albertí Rovira, 'El impacto de la crisis financiera en el Estado autonómico español', *Revista Española de Estudios Constitucionales* No. 98, May- August 2013.

¹⁰⁷ See E. Sáenz Royo, *Estado social y descentralización política. Una perspectiva constitucional comparada de Estados Unidos, Alemania y España*, Madrid, Civitas, 2003, p. 229-235 and P. Masala, *La tutela dei diritti sociali negli ordinamenti di tipo compost tra uniformità e differenziazione. Decentramento e diritti sociali in Italia, Germania e Spagna*, Part II; Pisa, Pisa University Press, 2014, p. 126-138.

¹⁰⁸ Article 149.1.17 Sp. Const. has also been used as a legal basis for State intervention in matters of social assistance. This Article enables the State to adopt basic legislation and to regulate the social security financial system "without prejudice to the implementation of its services by the Autonomous Communities". However, resorts to Article 149.1.17 have been

The trend is again confirmed in the most recent case law of the Spanish Constitutional Court in the aftermath of the financial crisis. For example, the Constitutional Court has taken a stance in favour of the State Government against the attempt by Autonomous Communities to increase the price of medicines on their own. Measures taken by the Catalan Parliament and by the Parliament of Madrid imposed on citizens the payment of a fixed price – a tax of one euro – on medical prescriptions, the so-called ‘*euro por receta*’, which the central Government deemed in breach of the State competence to define the legislative bases in matters of health care (Article 149.1.16 Sp. Const.). Before the cases were decided on their merits, the Constitutional Court confirmed the suspension of the challenged regional measures requested by the State (*Auto* 122/2013 and *Auto* 142/2013).¹⁰⁹ According to the Court, whereas the reduction of pharmaceutical expenditure for public accounts was easily quantifiable as a consequence of the regional legislation and was justified under the present economic conditions, the benefit of the measures to the overall population was far more uncertain and hypothetical, in particular in terms of consequences for the right to health care and because of inequalities arising among citizens living in different regions (Article 43 Sp. Const.).¹¹⁰ The suspension of the regional measures was maintained since a declaration of unconstitutionality would have made it extremely problematic for Catalonia and Madrid to reimburse citizens, and also for their fiscal stability.

Indeed, the judgments on the merits in both cases (decisions nos. 71/2014 and 85/2014) found the formula of the ‘*euro por receta*’ based on co-funding of medicines between the national health care system and citizens unconstitutional. According to the Spanish Constitutional Court, the regional measures amounted to a violation of the State legislative competence. The fiscal autonomy of the Spanish regions (Article 15.1 *Ley Orgánica* 8/1980 *de financiación de las Comunidades Autónomas*) is limited by the State’s basic competence to uniformly define how the health care system is funded on the national territory (Article 149.1.16 Sp. Const.). Both cases were solved by the Court solely on the ground of a conflict between State and regional legislative competences, without taking into account the implications for the rights of citizens nor the new fiscal and austerity rules, including new Article 135 Sp. Const., which in principle could support a limitation of public expenditure in matters of health care.

Portugal

Compared to Italy and Spain, the protection of regional autonomy in Portugal during the Eurozone crisis did not occupy a central place in the constitutional debate. First of all, in Portugal the acknowledgment of legislative powers for the regions is far more recent than in the other two countries, being a consequence of the constitutional revisions in 1997 and in 2004.¹¹¹ The original text

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very limited compared to the general equality clause. See J. Tudela Aranda, *Derecho constitucionales y autonomía política*, Madrid, Civitas, 1994, p. 215. In decision no. 61/1997 as well as in decisions nos. 188/2001 and 251/2006 the Constitutional Court tried to point to the difference between protection of the fundamental legal position of equality, which the State is entitled to regulate, and the legal regime of the right at stake that can be subject to State or to regional legislation according to the constitutional catalogue of legislative competences and to regional Statutes. This distinction, however, has not prevented the expansion of State competence in a field – social assistance – that was originally ‘off-limits’.

¹⁰⁹ *Auto* 122/2013 refers to the suspension of Articles 16 y 41 de la *Ley del Parlamento de Cataluña* 5/2012; *Auto* 142/2013 refers to the suspension of Law no. 8/2012, *de medidas fiscales y administrativas*, of the Parliament of Madrid.

¹¹⁰ See M. González Pascual, ‘Welfare Rights and Euro crisis. The Spanish Case’, 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 Series – Law 2014/05, p. 99.

¹¹¹ See Constitutional Law no. 1/1997 (*Diário da República*, I Series A, 20 September 1997) and Constitutional Law no. 1/2004, *Diário da República*, I Series A, 24 July 2004. On Portuguese regions after the constitutional revision of 1997, see C. Blanco De Moraes, ‘Portogallo: requiem per il regionalismo amministrativo’, *Quaderni costituzionali*, 1999, p. 419; V. Piergigli, ‘Il decentramento territoriale nell’ordinamento portoghese’. In: S. Gambino (ed.) *Stati nazionali e poteri locali. Esperienze straniere e tendenze attuali in Italia*, Rimini, Maggioli, 1998, p. 1039; A. X. López Mira, ‘La regionalización en Portugal’, *Revista de las Cortes Generales*, no 53, 2001, p. 111 ff. On the constitutional revision of 2004, see R. Orrù, ‘La VI Revisao della Costituzione portoghese del 1976: della scelta “minimalista” al risultato altamente “problematico”’,

of the 1976 Constitution only provided for a very limited administrative autonomy for the regions. The second reason why concerns about regional legislative powers during the Euro crisis have been more circumscribed than those regarding, for instance, social rights lies in the fact that only the Azores and Madeira could be affected, since Portugal is a unitary state for the remaining part of its territory. The constitutional revisions of 1997 and 2004 certainly strengthened the political, administrative and legislative autonomy of the Azores and Madeira and some scholars even argued that the legislative unity of the Republic had been jeopardized.¹¹² For example, Article 290 Pt. Const. prohibits constitutional amendments that could impair the political and administrative autonomy of the two archipelagos; and Article 228 Pt. Const. enables the Azores and Madeira to pass legislation – called regional legislative decrees – on any matters that are not under the exclusive responsibility of State sovereign bodies, provided that they are set out in the regional statutes. Moreover, even when the State has exclusive responsibility according to the Constitution, the two regional assemblies can adopt legislative decrees if so authorized by the national parliament (*Assembleia da República*).¹¹³

In spite of the favour that the constitutional legislator has attached to regional autonomy, the Portuguese Constitutional Court has always been very cautious in this regard. Instead, the Court has usually provided a narrow reading of the legislative competences of the Azores and Madeira (decisions nos. 190/1987 and 151/1993)¹¹⁴ and some constitutional amendments regarding regions have been proposed to reverse constitutional case law and to expand regional autonomy against the interpretation of the Court.¹¹⁵

This is further confirmed by the constitutional case law dealing with regional autonomy in the aftermath of the Eurozone crisis (*Acórdãos* nos. 613/2011, 568/2012, 767/2013, 55/2014, 252/2014 and 467/2014). For example, in *Acórdão* 568/2012 the Portuguese Constitutional Court upheld the validity of Article 212 on the State Budget Act for 2012.¹¹⁶ Members of the socialist group in the legislative assembly of the Azores considered that the State Budget Act encroached upon the fiscal autonomy recognized to the region (Articles 227.1 j and 238 Pt. Const.) since it prescribed that 5% of the revenues collected in each region from income tax was to be devolved to local authorities. In accordance with its case law, the Constitutional Court considered that the State Budget Act only provided for a specification of the interpretation of the State Law on local assets and finance (*Lei das Finanças Locais*) and thus legitimately fell within the State competence. Nevertheless, the decision of the Court was not unanimous and, for example, Justice Maria de Fátima Mata-Mouros contended that a fair balance between the fiscal autonomy of regions and of local authorities could not be granted unilaterally by the State through an interpretive rule subverting the stable understanding and enforcement of the State Law on local assets and finance.

Even more significant for the relationship between regional autonomy and Euro-crisis law is *Acórdão* 55/2014, where the Representative of the Portuguese Republic in the Azores brought an action of unconstitutionality against a legislative decree of the regional assembly of the Azores which adopted

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Diritto Pubblico Comparato ed Europeo, no 3, 2005, p. 1136 ff. and J. Magalhaes, 'Uma revisao cirurgica e funda, no tempo certo' in: J. Magalhaes (ed.), *Constituição da República Portuguesa*, Lisboa, Publico Comunicação Sociale, 2004.

¹¹² See J. J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, Coimbra, Almedina, 2003, p. 213.

¹¹³ See Articles 227.1 and 228.1 b Pt. Const., as amended in 2004, when the reference to the compliance with fundamental principles of State legislation for the adoption of regional legislative decrees authorized by the national parliament disappeared.

¹¹⁴ These decisions are also particular in that it was the only occasion on which a legislative assembly – namely the legislative assembly of the Azores – has confirmed the provisions of a draft legislative decree which was subject to ex ante constitutional review and held to be unconstitutional by the Constitutional Court, which later quashed the legislative decree in force under *ex post* constitutional review.

¹¹⁵ See J. De Sousa Ribeiro & E. Meahla, *Constitutional Courts As 'Positive Legislators'*, Report drafted for the XVIII International Congress of Comparative Law, organized by the International Academy of Comparative Law, Washington D.C., 25-31 July 2010, p. 13, available at

http://www.tribunalconstitucional.pt/tc/content/files/relatorios/relatorio_004_confwashington.pdf.

¹¹⁶ See *Lei n.º 64-B/2011, de 30 de Dezembro* – “*Orçamento do Estado para 2012*”.

the regional budget act for 2014 in that it violated the State legislative competence aiming to protect the unity of the State and national solidarity (Articles 6 and 225 Pt. Const.) and the principle of equality (Articles 13 and 229.1 Pt. Const.).¹¹⁷ Indeed, the contested Azores regional budget act fixed a new regime of regional complementary income for civil servants in the region in spite of the fact that the State Budget Act for 2014 (*Lei n.º 83-C/2013*) not only provided for wage cuts but also forbade any income revaluation. According to the Representative of the Portuguese Republic, the effectiveness of these State austerity measures, which required sacrifices of all public workers, could have been impaired by the enforcement of the Budget Act for the Azores.

The Constitutional Court did not find the regional legislative decree in breach of the principle of equality, partly in consideration of the need to correct inequalities ‘deriving from the autonomous regions’ insular nature’ (Article 229.1 Pt. Const.), but it considered it infringing the legislative competence of the State for the protection of the unity of the Republic and of national solidarity. Thus the legislative decree was declared unconstitutional on the ground of the boundaries between State and regional competences. Interestingly, the provisions of the State Budget Act for 2014 that the legislative decree violated were a few months later also found unconstitutional as they encroached upon the principles of equality and of proportionality (*Acórdão 413/2014*).

III.C Constitutional reasoning

Access to the Constitutional Court, the timing of the judgments, the particular economic situation as well as past judgments issued on the occasion of previous financial crises have shaped the reaction of the three Constitutional Courts to Euro-crisis law. The arguments used by constitutional judges to ground their decisions during this new crisis show several affinities with the past case law of the Courts, although there are some remarkable exceptions.

For example, strategic and undisclosed reasons have certainly oriented the action of constitutional judges in the present context.¹¹⁸ Particularly in Italy and in Spain, where a balanced budget clause has been constitutionalized, although with delayed effects, the Constitutional Courts have tried to prepare the ground for the full enforcement of the clauses, usually by upholding the validity of austerity measures or by avoiding deciding on the merits. At the same time, given the financial troubles, these Courts have also tried to please their several stakeholders – political institutions, subnational entities, the EU, financial markets, etc. – whenever possible, to gradually prepare them for the change in the constitutional landscape, and to warn the legislator against potential unconstitutional developments, as the Portuguese Constitutional Court has done.

(i) The Courts’ self-perception of their role

First of all, constitutional review of the Euro-crisis law has led Constitutional Courts to clarify the limits of their jurisdiction and their role of adjudication.

In decision no 39/2014, for example, the Italian Constitutional Court defines at length its role in contrast to that of the Court of Auditors. Indeed, a provision of a State decree-law – Article 7, Decree-law 174/2012 – challenged by several Regions before the Constitutional Court, forced regional political bodies to adjust their draft regional budget acts to the regional section of the Court of Auditors’ audit report on fiscal stability and debt sustainability; otherwise, should a region avoid complying with the audit report, the regional budget act would never enter into force. By doing so, the decree-law illegitimately introduced a new form of constitutional review of legislation, in breach of the competence of the Constitutional Court (Articles 127 and 134 It. Const.). According to the Constitutional Court, the power to carry out constitutional review is only assigned by the Constitution

¹¹⁷ See *Decreto n.º 24/2013 da Assembleia Legislativa da Região Autónoma dos Açores – que aprova o Orçamento da Região Autónoma dos Açores para o Ano de 2014*. On the division of legislative competence between the two autonomous regions and the State, see A. Guerra Martins, *A Participação das Regiões Autónomas nos Assuntos da República*, Almedina, Coimbra, 2012, p. 28.

¹¹⁸ See, for example, A. Dyevre, ‘Making sense of judicial lawmaking: a theory of theories of adjudication’, *EUI Max Weber Working Paper*, MWP 2008/09, p. 5 ff.

to the Court itself and no other bodies are entitled to annul legislation or to prevent its entry into force. Based on the principle of uniqueness of constitutional jurisdiction (decisions nos. 38/1957, 21/1959, 6/1970 and 31/1961), the Constitution only enables the Constitutional Court to this end.¹¹⁹

While in this case the Italian Constitutional Court positively asserted its jurisdiction, the Spanish Constitutional Court avoided taking a stance in a very important case dealing with the review of the constitutional revision of 2011 (*Auto* n. 9/2012). A *recurso de amparo* was brought before the Court by some MPs from the political group *Esquerra Republicana-Izquierda Unida-Iniciativa Per Catalunya Verds* against the constitutional amendments just passed, partly to constitutionalize the balanced budget clause. In particular, the *amparo*, on the one hand, sought annulment of the parliamentary resolutions and agreements leading to the adoption of the constitutional reform through the urgency procedure and in *lectura única*, i.e. without the committee stage, in the Senate, or parliamentary debate; and on the other it contested the use of the ordinary procedure to revise the Constitution (Article 167 instead of Article 168 Sp. Const.), although the constitutional bill was able to impair the protection of fundamental rights and to limit the prerogatives of MPs and citizens. The Constitutional Court declared the *amparo* inadmissible as the governing bodies of the Parliament, according to the majority of the judges, simply applied the standing orders. The Court, however, did not decide on the merits of the case through a judgment (*Sentencia*); it only issued an order of inadmissibility (*Auto*). Indeed, the dissenting opinions of Justice Pablo Pérez Trepms and Justice Luis Ignacio Ortega Álvarez pointed to the missed opportunity for the Court to address for the first time ever the issue of the constitutionality of constitutional amendments in the Spanish democratic system, an issue of special complexity and of institutional significance that deserved much more careful consideration. In turn, the self-restraint of the Court, according to the dissenting opinions, jeopardized the legitimacy of the Constitutional Court and of the reform itself. Perhaps this *Auto* is the most significant demonstration of the deferential approach of the Court even when requested to decide on such prominent constitutional issues.

At the opposite extreme is the Portuguese Constitutional Court, which has designed for itself a very prominent role during the Eurozone crisis and indeed has attracted harsh criticism. Once it set the test for the review of the constitutionality of Euro-crisis law in 2011 (*Acórdão* 396/2011), the Court has consistently applied this test to national legislation, primarily annual Budget Acts implementing the austerity measures adopted in exchange for the rescue package. The Court was internally divided in most of its judgments and it did not hesitate to depart from its past deferential approach toward the Parliament whenever a lack of compliance with minimum conditions for the protection of the principles of equality and proportionality could irremediably undermine the Portuguese Republic as a democratic state based on the rule of law (Article 2 Pt. Const.). By doing so, even in contrast with international and European obligations, the Court acted as the only counter-power to European institutions and to national political institutions.

(ii) Emergency and crisis

None of the three States – Italy, Portugal or Spain – has formally declared a state of emergency in the light of the Eurozone crisis. However, the ‘emergency’, the ‘crisis’, the ‘extraordinary and unusual economic conditions’ and ‘urgency’, have been constantly cited in the rulings of the Constitutional Courts, often to justify restrictions of rights and of regional legislative competences. On the one hand, the use of the ‘crisis’ in the constitutional reasoning of these Courts is not new, as arguments of crisis or emergency often reappear in periods of economic stalemate or recession and thus they are not particular to the present Eurozone crisis; on the other hand, however, it is an element of innovation insofar as the legal reaction to the Eurozone crisis, compared to past crises, will entail – regardless of the adoption of constitutional amendments – permanent or semi-permanent changes in national constitutional systems, as the Italian Constitutional Court has acknowledged.

¹¹⁹ See, in particular, Italian Constitutional Court, decision no. 39/2014, § 6.3.4.3.1.

It is also clear from the way ‘emergency’ and ‘crisis’ are evoked that constitutional judges refer to a particular meaning of these states, namely the ‘emergency’ and the ‘crisis’ that derive from a financial disruption of the well-functioning of markets and of distributive and re-distributive policies. Indeed, the reasoning of the three Constitutional Courts is led by concerns for the shortage of financial resources, for their most appropriate distribution across policies and to people, about which level of government should take these decisions, and the degree of intervention by public authorities. In this regard, during the Eurozone crisis the kind of constitutional conflicts with which Constitutional Courts are confronted – concerning competence, resources and socio-economic rights – cannot easily be compared to those arising from other crises deriving, for example, from violations of public safety or environmental disasters, although the ultimate threat is common and consists in the potential violation of the rule of law.¹²⁰

The ‘crisis’ has been mentioned by the Portuguese Constitutional Court in all its decisions dealing with austerity measures since 2010. Nonetheless, in almost all its case law, the ‘crisis’ does not amount to a justification of public wage and pension cuts as, according to the Court, they were not transient, they were discriminatory and disproportionate to the targeted saving of public resources. Thus the crisis and the emergency deriving from the bailout did not prevent the Court from annulling legislation.¹²¹

The Spanish Constitutional Court, by contrast, has used the argument of the ‘crisis’ with the opposite result, namely to uphold the validity of the Euro-crisis measures, in particular decree-laws that, according to Article 86 Sp. Const., are subject to material limits: decree-laws may not affect, amongst other things, the duties and freedoms of the citizens contained in Part 1 of the Constitution. However, the Constitutional Court has referred to the emergency and the crisis to justify the adoption by decree-laws of labour reforms directly linked to the right of collective bargaining and to the right to work, as the measures challenged – the Court said – did not undermine the essential elements of those rights (*Autos* 85/2011 and 164/2014; *Sentencia* 119/2014).¹²²

In Italy the threat of a ‘crisis’ often appeared in the rulings of the Constitutional Court well before the Eurozone crisis started, for example during the period of financial turbulence in the 1990s.¹²³ Since 2010 – with the exception of 2011 – the ‘crisis’ has always been cited in the annual reports of the President of the Constitutional Court about the developments in constitutional case law as an element that orients the judgments of the Court.¹²⁴ However, in the judgments of the Italian Constitutional Court in the last four years the ‘crisis’ or the severity of the economic situation have been expressly evoked in less than ten cases, and always in decisions that finally upheld the validity of the measures under review. Nevertheless, the argument of the ‘crisis’ is sometimes applied *ad adiuvandum*, given the decision of the Court, and other times *a contrario* to state that, in spite of the crisis, certain constitutional values or principles have to be protected and prevail over the contingency of the economic situation. For example, in decision no. 10/2010, because of the impairment of living

¹²⁰ On this point, see D. Dyzenhaus, ‘States of Emergency’, in M. Rosenfeld & A. Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 442-462.

¹²¹ This confirms what has been argued by D. Cole, ‘Judging the next emergency: judicial review and individual rights in times of crisis’, *Michigan Law Review*, vol. 101, 2002-2003, p. 2565-2595, against the conventional wisdom that judicial review is somewhat ineffective during crises. The author primarily considers crises that derive from the limitation of individual liberties in response to terrorism.

¹²² According to L. Díez Sánchez, *Legal manifestations of emergency in Spanish Euro-crisis law*, paper presented on the occasion of the ‘Constitutional Change Through Euro-Crisis Law’ Workshop, Law Department, European University Institute, Florence, 17-18 October 2014, these rulings depart from past precedents of the Spanish Constitutional Court before the Eurozone crisis (e.g. *Sentencias* 29/1994 and 68/2007).

¹²³ See T. Groppi & I. Spigno, ‘Constitutional reasoning in the Italian Constitutional Court’, in A. Jakab, A. Dyeve & G. Itzcovich (eds.), *Comparative Constitutional Reasoning*, Cambridge, Cambridge University Press, forthcoming.

¹²⁴ See M. Benvenuti, *La Corte costituzionale*, in F. Angelini & M. Benvenuti (eds.), *Il diritto costituzionale alla prova della crisi economica*, Napoli, Jovene, 2012, p. 375-420, who makes reference to the role of previous financial crises, like in the 1990s, in the reasoning of the Italian Constitutional Court.

conditions throughout the country deriving from the crisis, the Court considered the expansion of State legislative competence in matters of social assistance to provide the so-called 'social card' in compliance with the Constitution. By contrast, in decision no. 151/2012, although the validity of the State Decree-law no. 78/2010 was upheld, the Constitutional Court considered that, even when facing a financial crisis, the State does not have the power to derogate from the constitutional allocation of legislative competences and that the principle *salus rei publicae suprema lex esto* cannot be invoked to suspend the constitutional protection of regional and local autonomies (§ 4). By the same token, however, the need to restrain public expenditure responds to the exceptional and contingent requirements of political, economic and social solidarity that requires the involvement of all levels of government 'to cope with the severe economic and financial crisis that Italy is going through (§ 5.2.2)'. In decision no. 223/2012, the Court explicitly rejected the argument of the crisis to justify the freezing of salary adjustments and the cut in allowances for magistrates in the name, amongst others, of the principle of equality.

Finally, in decision no. 310/2013 the Italian Constitutional Court differentiated between the current Eurozone crisis and previous crises, in particular about the duration in force of the austerity measures, which it deemed to be longer now than in the past.

'Because of the necessary long-term and multi-annual prospects of the current budget cycle, these sacrifices may apply for periods, certainly defined, but longer than those taken into account by the judgments of this Court mentioned, issued with regard to the budgetary cycle law of 1992 (§13.5)'.¹²⁵

In this case, the Court used the argument of the crisis to uphold the validity of State Decree-law no. 78/2010 about the blocking of salary adjustments for non-contracted workers in the fields of education and university, by making reference to the intensity of the Eurozone crisis and thus to the sacrifices required compared to the 1990s financial crisis.

(iii) Economic arguments

The three Constitutional Courts, and in particular the Portuguese Court, widely use economic arguments in their decisions. However, while the Portuguese Court has largely relied on calculations, estimates and data to provide justification for its case law on Euro-crisis measures, especially when wage and pension cuts have been under scrutiny, this has not been very usual in the Italian and Spanish Courts, which have often made references in their judgments to the financial impacts of the legislative provisions under scrutiny, but have only exceptionally used mathematical reasoning.

Applying economic arguments in constitutional reasoning is not something entirely new for these Courts. Nevertheless, during the Eurozone crisis resort to this by constitutional judges has reached levels that are incomparable to their previous usual practice, in terms of both frequency and extent. Moreover, how Constitutional Courts manage these 'economic subjects' remains unclear. The use of economics in constitutional interpretation is not eased by technical experts and advisors working for these Courts to assist their understanding of the financial impact of judgments. In the Italian, Portuguese and Spanish Constitutional Courts there is no body or committee that carries out impact assessment, including the quantification of the fiscal effects, of constitutional case law other than the support provided by law clerks, some of whom have a clear expertise in matters of tax law,¹²⁶ and neither is the presentation of *amicus curiae* briefs providing evidence and expert knowledge on the subject matter of a case allowed before these Courts.

The Constitutional Court of Portugal has used economic arguments in its constitutional reasoning in almost all its judgments on Euro-crisis law. For example, in *Acórdão* no. 353/2012, the Court calculated the variation in salaries and pensions before and after the Budget Act for 2012, aiming to understand whether the cuts were reasonable or justifiable. The Court found they were not, and on the basis of the standard set in this judgment has also made extensive use of data, estimates and

¹²⁵ Own translation of the judgment no. 310/2013, Italian Constitutional Court.

¹²⁶ On this issue, see T. Groppi, *I poteri istruttori della corte costituzionale nel giudizio sulle leggi*, Milano, Giuffrè, 1997.

regressions in other decisions. The source of such in-depth knowledge of economic and mathematical methods on the part of constitutional judges is not revealed – sometimes government estimates are cited, which raises questions regarding their legitimate use. This departs from legal considerations, although the latter have finally grounded the decisions. According to Article 222 of the Portuguese Constitution, all constitutional judges are required to have a legal background. Six of the thirteen judges ‘shall obligatorily be chosen from among the judges of the remaining courts’; the others from among jurists.

In contrast to the Italian and the Spanish constitutional judgments on Euro-crisis law,¹²⁷ the Portuguese Court has always cited scholarship, preferably legal scholars, and often foreign law and the legal practice of other EU Member States (*Acordão* no. 187/2013, § 18 and 19), but has never explained why and how it engaged in such mathematical exercises. For example, while the Court assessed the financial impact of public wage and pension cuts in *Acordão* no. 187/2013, § 95, it did not at the same time calculate the costs for Portugal of deviating from the conditions set by the rescue package which was renegotiated in 2013.

In Italy, by contrast, the Constitutional Court, which is equally composed of lawyers by training (law professors, judges, practising lawyers),¹²⁸ has on several occasions evoked the macroeconomic scenario and the fiscal constraints of the Eurozone crisis as a background for its decisions, but it has only cited figures and calculations in its reasoning occasionally, for example in judgments dealing with an increase in deductions from public salaries (decision no. 223/2012, §14) and with the so-called ‘golden pensions’ (decision no. 116/2013, §2.1). In the first case, the Court compared the percentage of deduction under the past and the current regimes, in particular the different tax rates; in the second case, the Court compared the size of the solidarity contribution imposed by Decree-law 98/2011 on holders of pensions above 90,000 euro a year with the lower contribution on all incomes above that threshold provided for by a subsequent decree-law, 138/2011, to conclude that the former was unreasonable.

The Spanish Constitutional Court, which like the other two Courts is composed of lawyers by training and by experience,¹²⁹ used economic arguments at length in one of its most significant decisions taken during the Eurozone crisis, *Sentencia* no 206/2013.¹³⁰ In this decision, in which some of the provisions of the Budget Act for 2009 were found unconstitutional,¹³¹ the Court engaged in a highly detailed examination of the underlying economic justifications for the Budget Act when it had to address the third challenge posed by the applicants, the then parliamentary minority of *Partido Popular*. The Court concluded that those justifications were not arbitrary.

This third question the Court was requested to answer concerned the allegation that the Budget Act was detached and inconsistent with the macroeconomic scenario with which it had to cope. In particular, according to the MPs of *Partido Popular*, the forecasts of revenues and expenditures on which the Budget Act for 2009 was based were too optimistic in terms of the estimated growth of the gross domestic product (§ 7). This allegation was based on many estimates produced by public and private bodies independent from the Government and, if confirmed, would lead to violation of several constitutional provisions, amongst which were new Article 135.2 Sp. Const. and the balanced budget

¹²⁷ The reference to scholarly works by the Italian Constitutional Court, as well as by any other court, in case law is forbidden by Article 118.3 of the Implementing Provisions of the Civil Procedure Code. See T. Groppi & I. Spigno, ‘Constitutional reasoning in the Italian Constitutional Court’, cit., p. 27.

¹²⁸ According to Article 134 It. Const., ‘The judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years practice’.

¹²⁹ Article 159.2 Sp. Const. States that members of the Constitutional Court shall be appointed among magistrates and prosecutors, university professors, public officials and lawyers, all of whom with at least fifteen years of practice in law in their profession.

¹³⁰ See also section II.B (iii).

¹³¹ See *Ley 2/2008, de 23 de diciembre, por la que se aprueban los Presupuestos Generales del Estado para 2009*.

clause, as well as of the *Ley general de estabilidad presupuestaria*, part of the constitutional block, and of the parliamentary rules of procedure.

The Court decided to consider primarily if the alleged mismatch between the Budget Act and the real economy could amount to a violation of the prohibition of arbitrariness, a constitutional principle entrenched in Article 9.3 Sp. Const. The Court initially recalled its past case law – *Sentencia* no. 13/2007 – where it advocated self-restraint vis-à-vis the choices by the legislative branch. The review by the Spanish Constitutional Court was limited to assessing whether the challenged Act ‘lacked any possible rational explanation’ and so it analyzed all the potential justifications behind the norms and their economic consequences. Thus, the Court considered as a sign of the economic reliability of the Budget Act the fact that several independent agents, and not only national ones, like the European Commission, had examined the estimates during the budgetary process. Moreover, the Court affirmed that, given the arrangements of the budgetary cycle, the budget bill was presented to Parliament on 1 October 2008 and was based on forecasts released in June 2008, whereas the forecasts for economic growth published later, in late November 2008, signalled a significant deterioration in the macroeconomic situation of the whole Euro area due to the financial crisis, which could not have been predicted when the budget was drafted. In other words, according to the Spanish Court, there was no way to ensure that the economic forecasts on which the annual Budget was based would be met during the fiscal year.

Before the allegation of unconstitutionality on the ground of arbitrariness of the Budget Act was finally rejected, and in spite of the fact that it had claimed that it did not interfere with the discretion of political bodies, the Spanish Constitutional Court engaged in a very detailed examination of economic data on the gross domestic product for 2008 and 2009, which until then had been very unusual for this Court:

‘This is also evident if one examines, retrospectively, the actual trend in the real GDP in 2009. According to the constitutional challenge, on average the economic forecasts estimated a drop in the real GDP by 0.9 per 100, compared to the Budget Act, which considered as valid an increase of 1 per 100 (i.e. 1.9 points above the average quoted). However, the actual decline in the GDP in that year, according to official data published by Eurostat was found to be of 3.7 points’.¹³²

(iv) Constitutional principles

A common element underlies the case law of the three Constitutional Courts on Euro-crisis measures potentially affecting rights: cases have usually been solved on the ground of constitutional principles rather than on the enforcement of specific rights, in particular social rights (the right to health care, the right to work, the right to take collective action or the right to social assistance).¹³³

As highlighted, this approach can be explained by the significant financial implications deriving from the acknowledgment of a social right by the Courts compared to the application of principles, which entail case-by-case balancing with further competing principles. As a consequence, it is much easier for constitutional judges asked to decide on such controversial issues to find agreement on the basis of constitutional principles, which can be subject to re-determination in future cases, rather than on social rights, which could create new legitimate expectations. The difficulty in reaching a consensus within the Courts is certainly more problematic in the Italian Constitutional Court, where no separate opinions are admitted, but has become evident in the case law of the Portuguese Constitutional Court, where the number of dissenting opinions in most judgments can give an idea of the splits and cleavages created in the Court by the Euro-crisis law (*Acórdãos* 187/2013 and 430/2013), as well as in

¹³² See § 8, *Sentencia* no 206/2013, my own translation from the Spanish: ‘Así resulta además evidente si se examina, obviamente en retrospectiva, el comportamiento real del PIB en el ejercicio de 2009. Según la demanda, la media de las previsiones de los analistas estimaba la caída del PIB en un 0,9 por 100, por lo que reprocha a la Ley de presupuestos que asumiese como válido un incremento del 1 por 100 (esto es, 1,9 puntos por encima de la citada media). Pues bien, la caída real del PIB en ese ejercicio, de acuerdo con los datos oficiales publicados por la agencia europea Eurostat, resultó ser de 3,7 puntos’.

¹³³ See also section III.B (i).

some decisions of the Spanish Constitutional Court, for example on the constitutionality of the procedure to enact constitutional amendments in 2011 and on civil proceedings and mortgages (*Autos* 9/2012 and 113/2011).

In this vein, which is perfectly consistent with the pre-crisis case law, the principles of equality, of the prohibition of arbitrariness, of legitimate expectations, of judicial independence, of proportionality and of reasonableness have been extensively used by the Italian, Portuguese and Spanish Constitutional Courts to assess the constitutionality of right limitations by Euro-crisis law, even where, as in Italy and even more so in Portugal, a wide catalogue of social rights are entrenched in the constitutional text. Reliance on these principles by the Constitutional Courts can thus be seen in continuity with constitutional jurisprudence.

In particular, the proportionality principle and the principle of reasonableness have been confirmed as cornerstones of the constitutional reasoning during the Eurozone crisis.¹³⁴ The judgments of the three Constitutional Courts dealing with discrimination imposed as a consequence of the implementation of Euro-crisis law between the private and the public sectors, among different categories of workers and pensioners, and between different standards of social assistance across the national territory, have usually been solved by applying the principles of reasonableness and proportionality.

The Portuguese and the Spanish Constitutional Courts admit that they apply the ‘three-part test’ of proportionality developed by the German Constitutional Court, should a violation of a constitutional right occur:¹³⁵ first, they ascertain whether the measure under scrutiny is able to achieve the proposed objective; second, whether it was necessary or whether other less restrictive means could have been used instead to produce the same effects; third, whether the measure at stake is able to provide benefits and advantages in the general interest which are far more significant than the costs and the problems created.¹³⁶

The Portuguese Constitutional Court, in line with its past case law, has used the principle of proportional equality to ground its most significant decisions on Euro-crisis law. According to the Court, whenever differential treatment between groups of people occurs, the equality principle requires this treatment to be appropriate, necessary and rational with regard to the objective that is deemed to justify it. However – and this is where the proportionality test comes in – the sacrifices required of the group discriminated against cannot be excessive, i.e. cannot supersede the benefits granted to another group, from the viewpoint of the targeted objective and of the treatment reserved. The principle of proportional equality is subject to stricter scrutiny than just checking the ground of violation of the principle of arbitrariness.¹³⁷ The unequal treatment must be materially grounded and assessment of it is based on a triangular relationship to evaluate the degree of differentiation imposed, in its relationship with the objective fulfilled (goal-means), in a comparison between the group affected by the differentiation and others, and therefore between the two groups regarding the

¹³⁴ Most of the study of constitutional interpretation has been dedicated to the principle of proportionality: see, for example, R. Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers), Oxford, Oxford University Press, 2002, A. Stone Sweet & J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’, *Columbia Journal of Transnational Law*, vol. 47, 2008, p. 73 ff., and A. Barak, *Proportionality*, Cambridge, Cambridge University Press, 2012, p. 131 ff.

¹³⁵ See P. Machete & T. Violante, ‘O princípio da proporcionalidade e da razoabilidade na jurisprudência constitucional, também em relação com a jurisprudência dos Tribunais Europeus’, *XV Trilateral Conference of the Italian, Portuguese and Spanish Constitutional Courts*, Rome, Palazzo della Consulta, 24-26 October 2013. p. 17 ff. and E. Roca Trías & A. Ahumada Ruiz, ‘Los principios de razonabilidad y proporcionalidad en la jurisprudencia constitucional española’, *XV Trilateral Conference of the Italian, Portuguese and Spanish Constitutional Courts*, Rome, Palazzo della Consulta, 24-26 October 2013. p. 4.

¹³⁶ The Portuguese Constitutional Court has derived the principle of proportionality from Article 2 of the Port. Const.; the Spanish Constitutional Court from Article 53.1 of the Sp. Const.

¹³⁷ See P. Machete & T. Violante, ‘O princípio da proporcionalidade e da razoabilidade na jurisprudência constitucional, também em relação com a jurisprudência dos Tribunais Europeus’, cit., p. 79.

objective.¹³⁸ In particular, after *Acórdão* 187/2013 the application of the principle of proportional equality attracted severe criticism from scholars and from the dissenting judges in the Portuguese Constitutional Court on the ground of its implications for the domestic constitutional system.¹³⁹ The majority in the Court has been accused of mixing together equality and proportionality in that case, of overlooking the definition of *tertium comparationis*, and of comparing situations – namely those of public and private workers – that are not comparable in terms of status and of labour conditions. The Court thus shifted the object of review to the effectiveness of the public salary cuts to check whether they were proportionate; this effectiveness was evaluated on the ground of the ability of the cuts to reduce the public deficit. Such an assessment implied a value judgment on the part of the Court about what was needed to overcome the crisis and in turn resulted in merging different levels of analysis: equality, proportionality and economic effectiveness.¹⁴⁰

By contrast, in Spain, given the few cases in which the Constitutional Court has delivered a judgment on the merits of the controversy on Euro-crisis measures and the usual resort to interlocutory orders, either of inadmissibility or of admissibility on procedural grounds, the proportionality test has been rarely used when assessing the constitutionality of those measures (e.g. *Sentencia* no 119/2014).

In Italy, where the distinction operated by the Constitutional Court between proportionality and reasonableness is not really straightforward,¹⁴¹ scrutiny of the reasonableness of Euro-crisis measures as a crucial standard to assess their constitutionality can be found in those judgments dealing with limitations of allowances, the freezing of salary adjustments and pension cuts (decisions nos. 223/2012 and 310/2013). Originally, the Italian Constitutional Court referred reasonableness to Article 3 Const., and to the principle of equality against discriminatory treatment in equivalent situations. However, since the end of the 1990s scrutiny of the reasonableness of challenged measures has acquired autonomy and it is now applied ‘to complement and support any other constitutional principle invoked as a standard for the Court to decide’.¹⁴² For example, in judgment no. 223/2012 the scrutiny of the reasonableness of the decree-law at stake was complemented by scrutiny of its compliance with the principle of economic independence of the judiciary. The Court assesses the reasonableness of Euro-crisis measures – like any other legislative measure – on the grounds of intrinsic incoherence, illogical nature, and inconsistency with regard to the legal system or with reference to the aim pursued by the legislator.¹⁴³

¹³⁸ See R. Afonso Pereira, ‘Igualdade e Proporcionalidade: Um Comentário às Decisões dos Tribunal Constitucional de Portugal Sobre Cortes Salariais no Sector Público’, *Revista Española de Derecho Constitucional*, vol. 98, 2013, p. 317.

¹³⁹ This principle was used by the Portuguese Constitutional Court well before the Eurozone crisis, but it is in this context that its application has encountered the most significant critiques. See G. Coelho, P. Caro de Sousa, ‘«La morte dei mille tagli». Nota sulla decisione della Corte costituzionale portoghese in merito alla legittimità del bilancio annuale 2013’, *Giornale di diritto del lavoro e di relazioni industriali*, no. 3, 2013, p. 527-544, and M. Nogueira de Brito, ‘Medida e Intensidade do Controlo de Igualdade na Jurisprudência da Crise do Tribunal Constitucional’, *O Tribunal Constitucional e a Crise*, Almedina, 2014, p. 107 ff.

¹⁴⁰ See G. Coelho, P. Caro de Sousa, ‘«La morte dei mille tagli»’, cit., p. 538-539.

¹⁴¹ See M. Cartabia, ‘I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana’, *XV Trilateral Conference of the Italian, Portuguese and Spanish Constitutional Courts*, Rome, Palazzo della Consulta, 24-26 October 2013, p. 10, available at http://www.cortecostituzionale.it/documenti/convegni_seminari/RI_Cartabia_Roma2013.pdf. The Italian Constitutional Court appears to apply proportionality through a more structured test than reasonableness (see, for example, decisions nos. 1130/1988 and 1 /2014). A. Barak, *Proportionality*, cit. p. 373-378, highlights that when a limitation of constitutional rights is at stake it is really difficult to detect differences between the proportionality test and the reasonableness test in order to ascertain the constitutionality of such limitation. By contrast, under other circumstances, for example when dealing with the discretion of public authorities under administrative law, the distinction would be easier, since reasonableness would not be limited to the goal-means scenario: see N. Emilou, *The Principle of Proportionality in European Law: A Comparative Study*, London, Kluwer Law International, 1996, p. 37.

¹⁴² See M. Cartabia, ‘I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana’, cit., p. 1, own translation.

¹⁴³ See G. Scaccia, *Gli strumenti della ragionevolezza nel giudizio*, Torino, Giappichelli, 2007.

Furthermore, in particular in decision no. 264/2012, the Italian Constitutional Court emphasized the need for a systematic interpretation of the Constitution especially in a time of crisis with regard to the protection of rights and other competing constitutional principles and values, in order to read the constitutional text in an integrated and unitary manner and to balance potentially divergent claims stemming from the Constitution.¹⁴⁴

The principle of proportionality has been applied mainly in the field of the protection of rights, although not exclusively. For example, in Italy and Spain the limitations imposed upon regional legislation have been subject to scrutiny of whether the constraints were proportionate to the aim fulfilled. Both Constitutional Courts have stated, although not always in a consistent way, that in order to be justified such restrictions on regional autonomy must show a transitional character and must be matched with a well-grounded justification, i.e. measures taken generically in the name of the public good would not survive a proportionality scrutiny.

(v) Tackling the issue of the nature of Euro-crisis law and its constitutionally admissible limits: the Portuguese case

Beside the test to assess the constitutionality of Euro-crisis law that the Portuguese Constitutional Court has developed and has more or less used consistently since 2011 and the constant reference to constitutional principles rather than to the social rights invoked to solve these cases (section III.A), there is a further element of continuity in its constitutional case law compared to the pre-crisis period. When assessing the compliance of wage and pension cuts with the Constitution, the Court has always mentioned fiscal constraints deriving from the rescue package, from EU Treaties and from the Stability and Growth Pact, as revised by the six-pack and the two-pack.¹⁴⁵ Although the Court has never used these measures of EU law and of international law as a standard for its judgments, the reference to external constraints on the national budgetary process and to structural reforms has been a *leitmotiv* in its constitutional case law.

In contrast to the Portuguese Constitutional Court, neither of the other two Courts has chosen to explicitly tackle the issue of the legal nature of Euro-crisis law and of its permissible limits under the Constitution – an outcome that has depended mainly on the avenues of access to the Constitutional Courts in Italy and Spain, on the focus of judicial review, which has been much more directed at solving conflicts of competences rather than ensuring right protection, and on the timing of the judgments.¹⁴⁶

In the last two years, until *Acórdão* no. 575/2014, the Portuguese Constitutional Court gradually clarified its position towards Euro-crisis law. In the landmark judgment no. 187/2013 the Court only referred to the ‘international arm’ of the rescue package, namely to the Memoranda of understanding and the Financial and Assistance Programme and to the EFSF, while neglecting the ‘EU side’ of the financial assistance, i.e. the EFSM (EU Council Regulation no. 407/2010 of 11 May 2010). On that occasion, the Court treated the Memoranda of understanding and their updates as legally binding and as providing for direct legal constraints upon the Portuguese constitutional system. Indeed, in judgment no. 602 and no. 794/2013 the Court undertook a detailed examination of whether the provisions of Law no. 23/2012 and Law no. 68/2013 were actually the result of the transposition of specific clauses from the Memorandum of understanding into national law. Subsequently, in *Acórdão* no. 862/2013, the Court compared the content of the Memorandum of Understanding about financial assistance to Portugal with the prospective Budget Act for 2014 – as this was an *ex ante* review – in order to evaluate the reasonableness of the public pension cuts of 10 per cent. The Court found the

¹⁴⁴ See M. Cartabia, ‘I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana’, *XV Trilateral Conference of the Italian, Portuguese and Spanish Constitutional Courts*, Rome, Palazzo della Consulta, 24-26 October 2013. p. 10, available at http://www.cortecostituzionale.it/documenti/convegni_seminari/RI_Cartabia_Roma2013.pdf.

¹⁴⁵ See, in particular *Acórdão* no. 575/2014, § D.25, available at:
<http://www.tribunalconstitucional.pt/tc/acordaos/20140575.html>

¹⁴⁶ On this issues, see in detail section III.A

reduction in the public pensions provided by the Budget Act greater than that set out in the Memorandum itself, which in turn implied the existence of a considerable margin for manoeuvre by the legislator in shaping the content of the domestic austerity measures.

The latest developments in the Constitutional Court's interpretation of the cuts in public spending, in particular in the wages and pensions of public workers, in relation to European and international obligations came from *Acórdão* no. 575/2014. In this ruling, the Court finally disclosed its standing vis-à-vis Euro-crisis law, in particular EU law in the framework of the excessive deficit procedure. Indeed, the Court considered the EU Council of Ministers' recommendations within the excessive deficit procedure against Portugal to be non-legally binding insofar as they did not impose the adoption of concrete and *ad hoc* policies to put public spending and the deficit under control. In this field – the Court added – EU law is binding upon Member States only with regard to the objectives set, not on the national means chosen to reach those objectives. Furthermore, the Court added that the adaptation of national legislation to the standard fixed by EU law did not entail any consequence from the viewpoint of the application of the Constitution.

'By contrast, in a multilevel constitutional system, where several legal systems interact, domestic norms necessarily have to comply with the Constitution (as, according to the Portuguese Constitution – Article 221 – it is the Constitutional Court which has the competence for the administration of justice on legal and constitutional matters. Indeed, precisely EU law provides that the Union respects the national identities of its Member States reflected in their fundamental political and constitutional structures (Article 4.2 TEU)).'¹⁴⁷

Thus, the Portuguese Constitutional Court first appeared to overlook the problem of a potential conflict between EU law, in particular Euro-crisis law, and the Constitution, as if the enforcement of the former did not have implications for the latter, but then very clearly pointed to the 'priority' of the national Constitution by relying on the national identity clause included in the Treaty of Lisbon, although, according to many scholars, this clause is not designed to put the primacy of EU law into question but rather to move from 'absolute' to 'relative' primacy.¹⁴⁸ In spite of the fact that the national identity clause was cited in an *obiter dictum*, and before it entered into the merits of the case, the Constitutional Court did not even mention the principle of primacy of EU law but stated beforehand the obligation for national legislation to comply with the Constitution, while it based this assumption on Article 4.2 TEU.

In addition to this statement, the Portuguese Constitutional Court moved forward to say that in this field of law – namely Euro-crisis law – there is no divergence between EU law and Portuguese constitutional law so as to clear up any doubts about an insurgence of conflicts. According to the Court, there is instead a convergence between the two, based on the fact that the guiding principles used by constitutional judges to solve the case law on Euro-crisis measures, the principle of equality, the principle of proportionality, and the principle of the protection of legitimate expectations, are at the core of the rule of law and an inherent part of the common European legal heritage, which the EU is also bound to respect. The Court, however, appeared to disregard the very nature of these principles. Indeed, equality, proportionality, and legitimate expectations can be subject to different balancing, depending on the jurisdiction and on the national Constitution, and the balancing undertaken at

¹⁴⁷ See *Acórdão* no. 575/2014, § D.25, my own translation from the Portuguese: '*Pelo contrário, num sistema constitucional multinível, no qual interação várias ordens jurídicas, as normas legislativas internas devem necessariamente conformar-se com a Constituição (competindo ao Tribunal Constitucional, de acordo com a Constituição Portuguesa, administrar a justiça em matérias jurídico-constitucionais (cfr. artigo 221.º da CRP)). Aliás, o próprio direito da União Europeia estabelece que a União respeita a identidade nacional dos seus Estados-membros, refletida nas estruturas políticas e constitucionais fundamentais de cada um deles (cfr. artigo 4.º, n.º 2, do TUE).*'

¹⁴⁸ On this point, see A. Von Bogdandy, S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', *Common Market Law Review*, vol. 48, 2011, p. 1-38 and B. Guastaferrro, 'Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause', *Yearbook of European Law*, vol. 31 (1), 2012, 263-318.

national level might not necessarily in practice match the understanding of these principles under EU law and in particular by the Court of Justice of the EU.¹⁴⁹

IV. CONCLUSIONS

Constitutional judgments on Euro-crisis law in Italy, Portugal, and Spain, have strengthened tendencies or confirmed precedents that already featured in the case law of the three Constitutional Courts, namely, depending on the country, the limitation of regional legislative and budgetary autonomy (Italy and Spain), a more weighted balancing between social rights, financial resources, and legitimate expectations (Italy and Portugal, though going in opposite directions), and the pre-eminence of constitutional principles in the constitutional adjudication of rights (all three countries). In addition, in the case of the Portuguese Constitutional Court, the principle of proportional equality has continued to play the crucial role it had already been given by the constitutional jurisprudence of democratic Portugal, although – as many commentators have argued – in some decisions on Euro-crisis law the principle has been subject to a very broad and questionable application (*Ácordão* no. 187/2013). In other words, with a few exceptions the case law of these three Courts on Euro-crisis measures has been in continuity with their pre-crisis judgments.

The design and the practice of the systems of constitutional adjudication seem to explain this result, starting with elements like the composition of the Courts, the access to them and the timing of the judgments. In Spain, for example, the delay in taking decisions on the merits of the case usually leads the Court to declare constitutional challenges inadmissible or to provide interpretations in conformity with the Constitution.

Moreover, the Italian and the Portuguese Constitutional Courts have relied on ‘tests of constitutionality’ that they had already developed with regard to derogations from the protection of constitutional rights and these tests have been applied consistently during the Eurozone crisis. The consistency and continuity in the approach of the Courts is also confirmed by their constitutional reasoning. For example, in spite of the rich catalogue of social rights enshrined in the Italian and especially in the Portuguese Constitutions, the case law has almost always been decided on the ground of constitutional principles, in particular those of proportionality and equality; a finding that shows the concerns of these Courts for the potential financial consequences which would be triggered by a general strengthening of social rights, in contrast with a case-by-case approach favoured by adjudication grounded on constitutional principles.

Even the constitutionalization of the balanced budget clause in Italy and in Spain does not appear to have revolutionized constitutional case law. The constitutionalisation in Spain was indeed anticipated by a landmark judgment of the Constitutional Court (*Sentencia* no. 134/2011) and the Italian Constitutional Court had already adopted an austerity approach for years – for example in the previous period of financial instability in the 1990s – before the Eurozone crisis erupted.

If the general trend in the case law of each Court is thus continuity, with a few occasional disruptions, this does not imply that there is necessarily a convergence in the case law of the Italian, Portuguese and Spanish Courts. The Italian Constitutional Court, for example, has usually paid a lot of attention to fiscal sustainability and to public accounts during the Eurozone crisis – an approach which also seems shared by the few judgments delivered by the Spanish Court – in spite of the fact that the balanced budget clause has only been in operation since January 2014 and has not been a standard of review yet. This Court has also expressly acknowledged that the legal reaction to the Eurozone crisis is

¹⁴⁹ On the principle of proportionality, see, for example, N. Emiliou, *The principle of proportionality in European Law: A comparative study*, London, Kluwer Law International, 1996; W. van Gerven, ‘The effect of proportionality on the action of Member States of the European Community: National viewpoints from continental Europe’. In E. Ellis (ed.), *The principle of proportionality in the Law of Europe*, Oxford-Portland, OR, Hart Publishing, 1999, p. 37-64; and A. Barak, *Proportionality. Constitutional rights and their limitations*, Cambridge, Cambridge University Press, 2012, p. 184-199, who highlights an extra-EU influence on the way this principle is managed in some EU countries, i.e. the influence of Canada in Ireland or the influence of the ECHR on Central and Eastern countries.

different from the previous crises, as the austerity measures are expected to endure for years (decision no. 310/2013).

By contrast, the Portuguese Constitutional Court has placed itself in the position of the main guarantor 'of the democratic state based on the rule of law' (Article 2 Pt. Const.), also in the context of the present crisis. The Court has not hesitated to sanction – sometimes disputably and not always in cooperation with the legislator – the action of political institutions whenever they have overstepped the constitutional limits set in the case law. As the Court has recently claimed, the limits provided by the Constitution in this regard form part of the Portuguese national identity, which EU law is also bound to respect (*Acórdão* no. 575/2014).

These different outcomes of constitutional case law can be explained by the standards of constitutional review applied, by the particular relationship between the Constitutional Court, Parliament and Government in each country, and by the way Euro-crisis law has been managed by the three Courts. For example, while in Italy and Spain no decision was taken by the Constitutional Courts on the implementation of rescue packages – Italy did not even request a bailout – the Portuguese Constitutional Court was directly confronted with the issue, with the legal status and the binding nature of these instruments. Therefore, the economic situation of the Member State also, directly or indirectly, influenced constitutional case law.

