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Constitutions, social rights and sovereign
debt states in Europe: a challenging new area
of constitutional inquiry

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European University Institute
Department of Law

**CONSTITUTIONS, SOCIAL RIGHTS AND SOVEREIGN DEBT STATES
IN EUROPE: A CHALLENGING NEW AREA OF CONSTITUTIONAL
INQUIRY**

Claire Kilpatrick

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Constitutional Change through Euro-Crisis Law

This paper was first delivered at a conference held at the European University Institute in October 2014 presenting some initial results of the project on Constitutional Change through Euro Crisis Law. This project is a study of the impact of Euro Crisis Law (by which is meant the legal instruments adopted at European or international level in reaction to the Eurozone crisis) on the national legal and constitutional structures of the 28 Member States of the European Union with the aim of investigating the impact of Euro Crisis law on the constitutional balance of powers and the protection of fundamental and social rights at national level. An open-access research tool (eurocrisislaw.eui.eu) has been created, based on a set of reports for each Member State, that constitutes an excellent resource for further, especially comparative, studies of the legal status and implementation of Euro Crisis law at national level, the interactions between national legal systems and Euro Crisis law and the constitutional challenges that have been faced. The project is based at the EUI Law Department and is funded by the EUI Research Council (2013-2015).

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Abstract

Constitutions, social rights and sovereign debt states in Europe is a rich new seam of constitutional inquiry that challenges existing constitutional scholarship in various ways. I make five claims about how it expands and challenges existing constitutional and EU scholarship. 1. It is new terrain for constitutional social scholarship. 2. Middle-class and public sector entitlements are a deeply problematic area for constitutional social scholarship. 3. Juristocracy charges cannot be the same in times of EU sovereign debt. 4. It contributes in distinctive ways to questions of the existence of a structured EU, and a shared European, constitutional space. 5. Linking constitutional crisis with euro-crisis and social rights is an important project: Hungary under Orbán as an example.

Keywords

Sovereign debt; bailout states; Europe; EU; social and labour rights; constitutional challenges; comparative and EU constitutional scholarship.

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Introduction

Constitutions, social rights and sovereign debt states in Europe is a rich new seam of constitutional inquiry that challenges existing constitutional scholarship in various ways.

I start with some key markers of this new area. These concern the interaction of constitutional orders in Europe with sovereign debt arrangements which have EU involvement. Sovereign debt loan assistance (bailouts) has been granted to seven EU Member States - Hungary, Latvia, Romania, Greece, Ireland, Portugal and Cyprus. Non Eurozone states (Hungary, Latvia¹ and Romania) were the first wave of loans in 2008-10 while the Eurozone states entered into loans following the first Greek loan package in May 2010. Programmes have lasted over differing periods: well over five years in Greece (from May 2010 onwards), around three years for Ireland and Portugal with the same length planned for Cyprus which entered into its programme in May 2013 and periods of one to two years in Hungary, Latvia and Romania (although this understates subsequent requests for assistance and granting of precautionary financial assistance in some of these states following exit from the initial bailout). Moreover, EU bailout states remain under post-programme surveillance until the loan has been substantially repaid.²

Sovereign debt loan assistance came with conditions states had to meet. Those conditions prioritised rapid fiscal consolidation and structural reform, leading to dramatic changes to work and social rights and entitlements in bailout states. The EU institutions were for the first time involved in all these sovereign debt loans and some of the loans were provided from EU funding mechanisms. In what has been aptly dubbed ‘The European Rescue of the Washington Consensus’ the EU institutions, sometimes with greater insistence and less flexibility than the IMF,³ insisted on recipes familiar outside the EU in the 1980s and 1990s in rolling out harsh austerity programmes in EU States requiring sovereign debt loans. There have been cuts to health, education, social security and social assistance, pay, pensions as well as an extensive deregulation of collective bargaining structures and workplace protections. Never before has social loan conditionality⁴ affected in such a far-reaching way the states of Europe. It is unprecedented in its geographical scope with social loan conditionality applying to Western European states for the first time. It is also remarkable in the range of socially relevant loan conditions, the length of time over which evolving social loan conditions have applied, and the far-reaching effects the loan conditions have in many instances had on social and employment conditions.

¹ Latvia subsequently joined the Eurozone as of 1 January 2014.

² See eg Ireland where the Commission summarises as follows: ‘Ireland is now subject to post-programme surveillance (PPS) until at least 75% of the financial assistance received has been repaid. So barring any early repayments, PPS will last at least until 2031. The objective of PPS is ultimately to measure Ireland's capacity to repay its outstanding loans to the EFSM, EFSF and bilateral lenders. Under PPS, the Commission, in liaison with the European Central Bank, will (i) conduct regular review missions in the Member State to assess its economic, fiscal and financial situation; and (ii) prepare semi-annual assessments of Ireland's economic, fiscal and financial situation and determine whether corrective measures are needed’: http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm. Of the bailout states, only Latvia has exited bailout governance: From 20 January 2012 to 16 January 2015 Latvia was subject to post-programme surveillance (PPS). The PPS has expired, as Latvia has repaid 75% of the EU loan. In March 2014, Latvia repaid the first tranche of €1 billion and the second tranche of €1.2 billion was repaid on 16 January 2015: http://ec.europa.eu/economy_finance/assistance_eu_ms/latvia/index_en.htm

³ See S. Lütz and M. Kranke, ‘The European Rescue of the Washington Consensus? EU and IMF Lending to Central and Eastern European Countries’ 21 *Review of International Political Economy* (2014) 310.

⁴ Contrast D. Bilchitz, ‘Socio-economic rights, economic crisis and legal doctrine’ 12 *I.CON* (2014) 710 who assumes an *economic phenomenon* resulting from the *financial crisis* requiring *states* to make cuts in social expenditure. Yet there is in the EU, more importantly, a *public multi-level governance phenomenon*, involving the EU and the IMF, downgrading social spending and rights as a condition for obtaining sovereign debt loans. To leave this out is to overstate, and present as unmediated, the roles of both the state and the financial crisis in creating challenges for social rights.

Sovereign debt loan assistance is an important component of the broader category of euro-crisis law. By *euro-crisis law* I mean the law governing sovereign debt loans as well as the overhaul of EMU following in particular the wave of Eurozone bailouts which began with the first Greek bailout in May 2010. The term captures the unusual and multiple legal pedigree of euro-crisis law: it is used to encompass *EU* law relevant to the crisis as well as *international agreements* entered into by subsets of EU states and administered by EU institutions (such as some of the sovereign debt loan arrangements).⁵ While keeping the focus on sovereign debt states, the interaction of bailout states with broader euro-crisis sources before and after bailout⁶ is of great interest, as demonstrated in particular in this analysis in Hungary and Portugal.

National constitutional courts in a significant number of sovereign debt states responded to constitutional challenges taken against national measures downgrading social and work conditions in response to creditor requirements. Although there are other significant and highly interesting constitutional court euro-crisis challenges, especially in Italy and Spain,⁷ I focus here only on the seven states which had sovereign debt loan assistance. Not only is this a large comparative group already, the normative specificities of sovereign debt loan sources applied to EU Member States make this a group raising distinctive questions about EU constitutional interactions. The euro-crisis and sovereign debt loans context has meant that executive and legislative activity on social measures and resulting constitutional adjudication has taken place in a context marked by practices and arguments about what happens to social rights in a context of economic crisis or emergency. The engagement of certain constitutional courts with euro-crisis constitutional challenges has generated intense constitutional court critique. The core example is undoubtedly the Portuguese Constitutional Court. Its constitutional reasoning on equality and linked constitutional principles to evaluate cuts has been subject to intense, perhaps even unprecedented, criticism by Portuguese scholars. It has been accused in its bailout jurisprudence of erring ‘in virtually every dimension of its role’ committing the errors of ‘unfairness, unpredictability, illegitimacy and insularity’ in the respective dimensions of the substance of its reasoning (unfair), the coherence and guidance of its reasoning (unpredictable), its inter-institutional relations (illegitimate) and its EU relations (insular).⁸

I make five claims about how this new terrain expands and challenges existing constitutional and EU scholarship. Briefly elaborated below, they are developed more fully in the remainder of my analysis. A number of these claims challenge the critique set out above in relation to the Portuguese Constitutional Court which serves as a standard critique of social constitutional court judgments in times of economic crisis.

⁵ It is not intended to indicate that it covers only Eurozone Member States.

⁶ During bailout, the application of much of this broader EMU regime is suspended.

⁷ For analysis of Italy and Spain see the contributions in *European Journal of Social Law* (2014:1) special issue on *Social Rights in Times of Crisis: The Role of Fundamental Rights Challenges* (C. Kilpatrick and B. De Witte (eds)); see also C. Fasone, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective* EUI WP MWP 2014/15. A recent decision of the Italian Constitutional Court (70/2015 of 10 March 2015) holding unconstitutional a decree passed by PM Monti in 2011 as part of the ‘Save Italy’ legislative package which excluded pension increases in line with the cost of living for two years for those receiving more than three times the minimum exemplifies the issues addressed in this analysis.

⁸ G. De Almeida Ribeiro, ‘Judicial Activism Against Austerity in Portugal’ I-CON blog (reproducing an essay), December 2013. See also G. Coelho, P. Caro de Sousa, “‘La Morte dei Mille Tagli’”: Nota sulla Decisione della Corte Costituzionale Portoghese In Merito Alla Legittimità del Bilancio annual 2013’ 139 *Giornale di diritto del lavoro e di relazioni industriali* (2013) 527; M. Nogueira De Brito, ‘Putting Social Rights in Brackets? The Portuguese Experience with Welfare Rights Challenges in Times of Crisis’, *European Journal of Social Law* (2014) 87. For a collection of constitutional critiques see: G. de Almeida Ribeiro and L. Pereira Coutinho (eds) *O Tribunal Constitucional e a Crise: Ensaios Críticos* (Almedina, Coimbra, 2014). For a counter-critique see J. Reis Novais, *Em Defesa Do Tribunal Constitucional: Resposta aos Críticos* (Almedina, Coimbra, 2014).

Introducing a new constitutional terrain. Sovereign debt in Europe creates a new constitutional grouping of seven European states from the East and the West. Geographically, the states concerned are unfamiliar terrain in English language constitutional social scholarship. There is exceptionally little focus in this literature on continental European countries other than (occasionally) Germany and almost all focus is placed on the core Commonwealth, America, Africa, especially the interesting case of the South African Constitution, and India. The flurry of interest in Eastern European constitution-making after 1989 largely dissipated after these states were urged not to include social rights in their constitutions as they transitioned to becoming market economies.⁹

Further, it is distinctive in its broader definition of the social. Most constitutional social scholarship focuses on rights to housing, health, food, education and social assistance.¹⁰ Yet a fuller and broader definition of the social¹¹ to encompass work-related rights and entitlements is necessary to capture the range of potential and actual constitutional challenges in response to sovereign debt loan conditionality. As Cécile Fabre notes the European constitutional culture of social justice is ‘as it were, ‘complete’, delineating as it does principles for individuals’ status as citizens and workers’.¹²

I set out the rich and largely unexplored set of constitutional challenges in EU sovereign debt states. I look at the social ambitions of the sovereign debt states’ constitutions and set these alongside the loan conditions, on the one hand, and the constitutional challenges which occurred on the other. Hungary’s special constitutional transformation is treated separately. I argue that there are significant links to be explored between Hungarian constitutional crisis and euro-crisis (5 below).

Middle-class and public sector entitlements are a deeply problematic area for constitutional social scholarship. Euro-crisis constitutional challenges open questions about the current structure and points of focus of constitutional scholarship, in particular its social component. The current dominant normative paradigms are proportionality (‘age of balancing’) and a poverty-focused social constitutionalism. When new developments occur they come to be recognised and analysed within dominant contemporary scholarly paradigms. I show below how this has shaped the debate on the social dimension of euro-crisis constitutional jurisprudence. I take issue with social constitutional scholarship urging minimum core poverty protection as the acceptable content of social constitutionalism. I show in particular the neo-liberal default assumptions underpinning much analysis of social constitutional judgments protecting public sector workers and other ‘middle-class’ entitlements. I also consider why constitutional labour scholarship has neglected this issue.

Juristocracy charges cannot be the same in times of EU sovereign debt. Charges of judicial activism during the crisis have taken a traditional focus. They sustain that national constitutional courts which struck down measures taken to fulfil loan conditions were not sufficiently deferential to national parliaments and executives. My claim is that in a range of distinctive and interesting ways this focus is misplaced. It under-states the branches of government when examining constitutional interactions with the judicial branch: as will clearly be demonstrated these must be expanded in euro-crisis to include the EU institutions. It under-examines the actions and evolving decision-making of

⁹ C. Sunstein, ‘Against Positive Rights’ (1993) *Eastern European Constitutional Review* 35. The re-awakening of interest in Hungary and Romania as a result of constitutional crisis is discussed below at 5.

¹⁰ K.G. Young, *Constituting Economic and Social Rights* (OUP, 2012); H. Alviar García, K. Klare and L. Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2014). Tushnet instead investigates primarily the implications of doctrines on the application of constitutional rights between private parties for social and economic rights: M. Tushnet, *Weak courts, Strong rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton UP, 2008).

¹¹ See further C. Kilpatrick and B. De Witte, *A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone*, SIEPS European Policy Analysis Paper, November 2014.

¹² C. Fabre, ‘Social Rights in European Constitutions’ in G. de Búrca and B. De Witte (eds) *Social Rights in Europe* (OUP, 2005) 15 at 19.

the constitutional courts themselves. It assumes relationships between the branches of the state which do not prevail while a state is in bailout.

A structured EU, and a shared European, constitutional space? The loan conditions fully raised the issue of a clash between the loan conditions on the one hand and constitutional commitments related to social rights in EU and national constitutional law on the other. This should have led to one of two established paths for mediating such EU constitutional conflict being followed, one based on unmediated acceptance of EU primacy, the other based on national constitutional mediation of EU primacy. This is the structured EU constitutional space. Yet neither was. I consider what actually happened and a good explanation for why it did so.

This field of inquiry also opens questions about the extent to which these EU states constitute a shared European constitutional space. Such a shared space might include, in increasing order of intensity, *separate but similar* constitutional challenges, reasoning and responses to euro-crisis loan conditions, *horizontal sharing and utilisation* of relevant constitutional judgments, or *coordinated strategies* by those mounting constitutional challenge or of constitutional courts towards relevant EU and international institutions. The evidence so far, as we shall see, provides interesting data on sharing in this field. It provides some exceptional examples of the separate but similar order of sharing, the most interesting of which is the approach by constitutional courts to managing potential EU constitutional conflict. Horizontal sharing on euro-crisis constitutionalism takes place between the constitutional courts of Eastern Europe EU states but not within Western European states and not between East and West so that the shared constitutional space is an Eastern European rather than an EU one. There is no evidence of stronger co-ordinated strategic constitutional sharing.

Linking constitutional crisis with euro-crisis and social rights: Hungary under Orbán. While much has been written about the rule of law, constitutional revision, and constitutional crisis in Hungary under the Orbán government in power since 2010,¹³ my claim is that placing such changes within the context of euro-crisis law adds important new dimensions to the analysis. Moreover, bailouts raise broader issues of shifts and tensions in national constitutional structures.

Introducing a new constitutional terrain

Comparative constitutional scholarship brings out the distinctive and expressive functions fulfilled by written constitutions. Although constitutions without social and labour rights are today quite exceptional,¹⁴ the social ambitions of constitutions differ widely. It also focuses on the power, especially post-WW2, given to courts to review legislative acts for constitutional conformity. I introduce the social constitutional ambitions of the EU sovereign debt states and examine what constitutional challenges arose as a result of sovereign debt loan conditions.

The social ambitions of the bailout constitutions

From the written constitution perspective, the seven EU bailout states constitute an interesting new grouping.¹⁵ Euro-crisis law is brought into contact with very different constitutional sources, with wide variance in their social focus and ambitions. The Irish (1937) and Cypriot (1960) constitutions reflect

¹³ For two recent collections see A. von Bogdandy and P. Sonnevend (eds) *Constitutional Crisis in the European Constitutional Area; Theory, Law and Politics in Hungary and Romania* (Hart, 2015); C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge UP, 2015).

¹⁴ See D.M. Davies, 'Socio-Economic Rights' in M. Rosenfeld and A Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012) 1020.

¹⁵ For discussions of 'families' as a focus of comparative constitutional law see V. C. Jackson, 'Comparative Constitutional Law: Methodologies' in M. Rosenfeld and A Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012) 54.

both their age and their emergence from British rule. In Greece and Portugal the constitutions of 1975 and 1976 reflected their respective emergence from military dictatorship and fascism. Importantly, the EU bailout grouping contains three Eastern European states which acceded to the EU in 2004 (Hungary and Latvia) and 2007 (Romania). This is of especial interest when viewing the social ambitions of the original constitutional text since an important strand of the post-1989 constitutional debate was intense debate over whether Eastern European constitutions should exclude social rights.

By the measure of the social ambitions and range of the constitutional text, Portugal tops the scale of EU bailout states. Although significantly amended, it is a constitutional text with a marked socialist focus, its Preamble speaking of ‘opening up a path towards a socialist society’. While this underpins multiple provisions about organisation of the economy and worker management in Part II, it is also reflected in Part I devoted to Fundamental Rights and Duties. As the content of Part I has been part of the controversy surrounding the Portuguese Constitutional Court’s euro-crisis judgments, it is worth examining a little further. Preceded by a series of fundamental principles underpinning the Portuguese constitutional order such as the Rule of Law in Article 2, Part I is divided into three Titles. Whilst Title I covers General Principles including the principle of universality (Article 12) and of equality (Article 13), Title II is divided into three Chapters on rights, freedoms and guarantees. Dealing first with civil rights and then with political rights, the third chapter is entitled ‘Workers’ rights, freedoms and guarantees’. Five articles protect or institute respectively job security, workers’ committees, freedoms concerning trade unions, trade union rights and collective agreements, the right to strike and prohibition of lockouts. Title III is devoted to economic, social and cultural rights and duties. Economic rights and duties concern the right to work (including the duty of the state to promote full employment policies) and a range of other workers’ rights (such as to rest and leisure, wage protection measures, health and safety, social dignity), consumer rights, forms of enterprise ownership and management and private property. Social rights and duties concern social security and solidarity, health, housing and urban planning, environment, family, parenthood, childhood as well as protecting the young, the disabled and the elderly. Part of the controversy focused on the Court’s use of Title I in its constitutional euro-crisis jurisprudence, as well as fundamental constitutional principles, rather than the specific labour and social provisions of Titles II and III.

Ireland and Cyprus lie at the other end of the constitutional scale reflecting their age and their liberal common law constitutional origins. The Irish Constitution, apart from the right to education, contains no work or social rights. Its Directive Principles of Social Policy (Article 45) which broadly direct the state to promote the welfare of the whole people are expressly framed for the political branch only and ‘shall not be cognisable by any Court under any of the provisions of the Constitution’. For this, alongside a range of other reasons,¹⁶ the Irish bailout was not subject to social constitutional challenge. Nor has, to date at least, the Cyprus bailout¹⁷ under a constitution providing a limited range of social rights protection, mainly focused on work.¹⁸

The Greek Constitution has a similar work rights focus to Cyprus but is somewhat more expansive. Article 22 provides that ‘work constitutes a right and shall enjoy the protection of the State, which shall seek to create conditions of employment for all citizens’. It similarly enjoins the state to provide

¹⁶ On which see further the contributions of A. Nolan, ‘Welfare Rights in Crisis: The case of Ireland’ *European Journal of Social Law* (2014) 37 and A. Kerr, ‘Social Rights in Crisis in the Eurozone: Work Rights in Ireland’ *European Journal of Social Law* (2014) 50. It is worth noting, however, that in late 2014 the largest scale mobilisations took place since the crisis began against water charges, with these being explicitly couched as infringements of human and constitutional rights to water: <http://www.right2water.ie/>

¹⁷ See K. Pantazatou, ‘Cyprus’ at <http://eurocrisislaw.eui.eu/cyprus/>

¹⁸ Article 9 protects the right to a decent existence and to social insurance; Article 26 provides the possibility of preventing contractual exploitation by those wielding economic power and for the creation of collective labour contracts and some protection of the right to strike is guaranteed in Article 27. Article 28(2) provides a broad non-discrimination clause, listing many grounds.

for the general working conditions of its people and to care for the social security of its working people. The right to unionise, collect union dues and to strike are also constitutionally protected.¹⁹

The Eastern European Constitutions of those states with bailouts turn out, in the event, not to have followed advice not to protect social rights in their constitutions, with all of them providing significantly more constitutional protection than the liberal common law constitutions. Hence, the 1991 Romanian constitution protects the right to health and free state education.²⁰ As well as placing an obligation on the state to take measures of economic development and social protection of a nature to ensure a decent living standard for its citizens, it provides citizens with the constitutional right to pensions, paid maternity leave, public medical care, unemployment benefit and other forms of social security.²¹ Alongside protection of trade unions' freedom of association and the right to strike,²² Article 41 protects the right to work, social protection at work, limitations of working hours and the right to collectively bargain. Special provisions protect people on account of age and disability. The Latvian Constitution (which restores with amendments its 1922 text) has a smaller cluster of social rights covering alongside a full labour freedom of association guarantee (hence encompassing the right to bargain and strike) the right to freely choose employment, an adequate wage guarantee, right to weekly and annual holidays, the right to social security, human health and education.²³

An overall sense of the social orientation of the constitutional text matters in assessing euro-crisis constitutional challenges. Yet no neat links can be made between the social content of the constitutional text and the focus of constitutional challenges or the constitutional basis of constitutional courts' reasoning. Challenges, as explored below, on the whole do not exploit the constitutional space provided by most of the bailout constitutions. Moreover, the responses by constitutional courts in bailout states to constitutional challenges of social bailout measures are not always based on the social rights in constitutions, but are sometimes based on other broader constitutional principles such as equality and the rule of law.

Constitutional challenges in euro-crisis

Euro-crisis law provoked a series of significant judicial constitutional interpretations on the constitutional compatibility of changes to social rights required, more or less directly, to obtain euro-crisis sovereign debt loans.²⁴ These cases raise a number of further immediate questions: who took them, before which constitutional review courts, how many were there, what did they concern and what constitutional basis was used to decide them?

As to who took them, the existence of constitutional judgments on social aspects of the bailouts does not necessarily point to civil society mobilisation. In fact, in all these states other than Greece,²⁵

¹⁹ Article 23 Greek Constitution.

²⁰ Article 34 Romanian Constitution ('Right to health'); Article 32 Romanian Constitution ('Right to education').

²¹ Article 47 Romanian Constitution ('Living standards'). See also Article 135 on various principles underpinning the economy including fair competition and improving quality of life.

²² Article 9 Romanian Constitution ('Trade unions, employers' associations and vocational associations'), Article 40 ('Right of association') and Article 43 ('Right to strike').

²³ See Articles 106-112 Latvian Constitution.

²⁴ On the different kinds of social loan conditions see C. Kilpatrick, 'Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?' 10 *EuConst* (2014) 393.

²⁵ See, however, the challenge of measures upheld *ex-ante* in Romania in numerous *ex-post* challenges by individuals and their representatives. Moreover, unions in Romania and Portugal did challenge pay and pension cuts through other domestic courts which made preliminary references to the Court of Justice or which led to cases proceeding to the European Court of Human Rights. Romania and Court of Justice: C-434/11 *Corpul Național al Polițiștilor*, Order of 14 December 2011; C-134/12 *Corpul Național al Polițiștilor*, Order of 10 May 2012; C-462/11 *Cozman*, Order of 14

constitutional legal challenges occurred not through civil society mobilisation but rather through the use of political constitutional review mechanisms allowing designated politicians or other specially designated institutions to ask for *ex ante* or *ex post* review.

While Portugal, Latvia and Romania have specialised constitutional courts, Greek constitutional challenges have been decided by a range of different courts. The key constitutional judgments to date consist of a decision by the Greek Council of State (the highest administrative court) in 2012²⁶ and a decision with a different outcome and reasoning by the Greek Court of Auditors.²⁷ For some analysts the absence of a specialised constitutional court in Greece has affected the robustness of constitutional review in the face of bailout demands.²⁸

The Latvian and Romanian Constitutional Courts decided a range of constitutional challenges to the social measures taken to satisfy loan conditions attached to the bailouts. In Latvia eight key constitutional challenges on social measures were decided, six in 2009²⁹ and two in 2010.³⁰ In Romania a large number of emblematic decisions were taken between 2009 and 2011 on the constitutionality of a range of measures cutting pay, pensions and social benefits³¹ as well as collective bargaining and freedom of association rights³² and employment protection³³ although quantitatively the numbers of constitutional challenges were much higher.³⁴

(Contd.)

December 2012; C-258/14 *Florescu*, lodged on 26 May 2014. Portugal and Court of Justice: C-127/12 *Sindicato dos Bancários do Norte*, Order of 7 March 2013; C-264/12, *Sindicato Nacional dos Profissionais de Seguro v Fidelidade Mundial*, Order of 26 June 2014. European Court of Human Rights: Apps Nos 44232/11 and 44605/11 *Mihăieş v Romania*, Judgment (3rd section), 6 December 2011; Apps 45312/11, 45312/11, 45581/11, 45583/11, 45587/11, 45588/11 and 13902/11 *Frimu and others v Romania*, Judgment of 13 November 2012; Apps Nos 62235/12 and 57725/12 *Da Conceição Mateus and Santos Januário v Portugal*, Judgment (2nd section), 8 October 2013.

²⁶ Greek Council of State, Decision 668/2012; see also Decisions 1285 and 1286/2012, 2 April 2012 and Cases 1283 and 1284/2012, 2 April 2012. See also Decision 2192/2014, 23 June 2014 (wage cuts for military service personnel unconstitutional because of their special role in defending the state) and Decision 2307/2014, 27 June 2014 (constitutional compatibility of almost all work measures in the second Greek Bailout).

²⁷ Greek Court of Auditors, Proceedings of the 3rd and 4th special sessions of the plenary, 30 October 2012. Under Article 73(2) Greek Constitution, the Court of Auditors delivers non-binding opinions on draft pension bills. See E. Psychogiopoulou, 'Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges', *European Journal of Social Law* (2014) 32.

²⁸ A. Marketou/M. Dekastros, <http://eurocrisislaw.eu.eu/greece/>, 'despite the almost commonsensical character of the unconstitutionality of at least some of the statutes implementing eurocrisis law...in Greece there is no strong and independent constitutional court that could annul these acts'; similarly G. Katrougoulos, *The Greek Austerity Measures: Violations of Socio-Economic Rights*, Int'l J. Const. L. Blog, January 29, 2013.

²⁹ Latvian Constitutional Court: Case 2009-08-01 (cancellation of pension indexation); Case 2009-43-01 (reduction of pensions); Case 2009-44-01 (50% cut to benefit for working parents); Case 2009-76-01 (cuts to pensions of Ministry of Interior staff); Case 2009-88-01 (cuts to retirement pensions for military personnel not yet in receipt of old-age pension); Case 2009-11-01 (cuts in judicial pay).

³⁰ Latvian Constitutional Court: Case 2010-17-01 (changes to incapacity for work benefits); Case 2010-21-01 (cuts to funding of occupational pensions): see Z. Rasnača, <http://eurocrisislaw.eu.eu/latvia/>

³¹ Romanian Constitutional Court: Decision 1415/2009 (constitutionality of capping salary additions and a new regime for compensating overtime); Decisions 872/2010 and 874/2010 (constitutionality of cuts to pensions, public sector salaries, judges' salaries); Decision 873/2010 (constitutionality of cuts to judicial pensions); Decision 1237/2010 (constitutionality of changes to basis for calculating public pensions); Decision 1655/2010 (prolongation of salary cuts in 2011); Decision 1658/2010 (cap on bonuses for public employees); Decision 765/2011 (cut in maternity leave and monthly child-raising allowance); Decision 1533/2011 (compatibility of scheduling state compensation to those whose pensions had been unconstitutionally reduced).

³² Romanian Constitutional Court: Decision 575/2011 (replacing collective bargaining on teachers' salaries to setting them by law); Decision 574/2011 (outlawing right of association, collective bargaining and industrial action for liberal professions and magistrates; repeal of certain rights of unions to formulate proposals to local authorities).

³³ Romanian Constitutional Court: Decision 1414/2009 (constitutionality of various measures concerning public sector employment conditions); Decision 383/2011 (changes to labour code eg increase in probation period, possibility to

A significant series of Portuguese Constitutional Court decisions on social austerity measures have been taken as a result of loan conditionality: 1 in 2011,³⁵ 1 in 2012,³⁶ no fewer than five in 2013,³⁷ a highly politically resonant decision in May 2014³⁸ and further decisions following early bailout exit as a result of the May 2014 decision.³⁹ These cases are noteworthy because they provide a special example of a large series of cases which struck down a range of bailout measures on the grounds that they breach provisions in the Portuguese constitution. The range of successful constitutional challenges, the size of the bailout, and the fact, unlike Romania and Latvia at the time of their bailout, of Eurozone membership, combined to give these judgments and this Constitutional Court an exceptionally high political and media profile. As noted above, this was accompanied by intense scholarly critique of Portugal's Constitutional Court.

Perhaps the most striking comparative finding is the narrow clustering of most of the constitutional challenges around cuts to pay, pensions and benefits. These cuts are often work-related and often concern public sector workers, sometimes as a broad group and sometimes as a particular group, the most significant being judges. Although cuts may be expressed as suspensions, caps, freezes, in new calculation formulae or as the imposition of taxes or contributions on income, they all share the common feature of reductions (real or nominal) in the amount previously received. This is predominantly a crisis constitutional jurisprudence of monetary cuts. A number of possible explanations for this focus can be discounted. It cannot be explained by reference to the social loan conditions as these covered a much broader range of constitutionally relevant issues. These include interferences with health and education as well as changes to employment rights and degradation of rights to collectively bargain and freedom of association. Although some of these were the subject of challenges beyond the state (before the European Committee of Social Rights, the ILO and the other UN human rights organs), amongst the bailout states it is only in Portugal and Romania and under the second Greek bailout that we find a broader set of *national constitutional* challenges concerning changes to employment protection. Hence, for example, both constitutional courts and the Greek

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suspend labour contract, dilution of unions' rights during elaboration of labour norms): see V. Viță, <http://eurocrisislaw.eui.eu/romania/>.

³⁴ Note that these decisions are, quantitatively speaking, the tip of the constitutional challenge iceberg: these are the *ex ante* constitutional cases while many measures were challenged *ex post* by questions of constitutionality being raised in proceedings before other national courts which can then refer them to the Constitutional Court. For instance around 1/3 of the 1000 or so cases decided by the Court in 2012 concerned *ex post* social constitutional challenges triggered largely by euro-crisis measures.

³⁵ Judgment 396/2011, 21 September 2011 (Budget Law 2011: public sector pay-cuts. CONSTITUTIONAL)

³⁶ Portuguese Constitutional Court: Judgment 353/2012, 5 July 2012 (Budget Law 2012: suspension of 13th and 14th month of salary for public sector workers): UNCONSTITUTIONAL. Unconstitutional means at least one constitutional breach was found although not all provisions challenged may have been found to be unconstitutional.

³⁷ Portuguese Constitutional Court: Judgment 187/2013, 5 April 2013 (suspension of holiday payments in public sector; contributions obligations imposed on recipients of unemployment payments) UNCONSTITUTIONAL; Judgment 474/2013, 29 August 2013 (relaxing dismissal regime for public sector workers) UNCONSTITUTIONAL; Judgment 602/2013, 20 September 2013 (relaxing private sector employment protection) UNCONSTITUTIONAL; Judgment 794/2013, 21 November 2013 (increasing normal working hours of public sector) CONSTITUTIONAL; Judgment 862/2013, 19 December 2013 (cut in amount and calculation formula for public sector pensions) UNCONSTITUTIONAL.

³⁸ Portuguese Constitutional Court: Judgment 413/2014, 30 May 2014 (Budget Act 2014: pay reductions for public sector workers; taxation of unemployment and sickness payments; suspension of occupational pension supplements for public sector pensions) UNCONSTITUTIONAL.

³⁹ Portuguese Constitutional Court: Judgment 572/2014, 30 July 2014 (Budget Act 2014: extraordinary solidarity contribution for pensions; transfer of public sector employer contributions to general state funds) CONSTITUTIONAL; Judgment 574/2014, 14 August 2014 (norm providing for public sector pay cuts in 2016-2018 of unspecified amount) UNCONSTITUTIONAL; Judgment 575/2014, 14 August 2014 (Sustainability Contribution on all public pensions) UNCONSTITUTIONAL; Judgment 745/2014, 5 November 2014 (increase of public servants contributions to health fund) CONSTITUTIONAL.

Council of State evaluated when law could set limits on collective bargaining as a source of norms⁴⁰ as well as broader changes to employment protection in the public and private sector.⁴¹ Nor can it be explained by reference to limits in the constitutional text: the bailout states in which constitutional challenges were brought provided clear opportunities in their constitutional texts for a much wider range of challenges to changes to work and welfare measures. This means that the most striking absence in the sovereign debt states is challenge relating to rights that have been a central focus of contemporary constitutional social analysis: rights to education, health and housing.

Middle-class and public sector entitlements are a problematic touchstone for constitutional social scholarship.

The most fitting judicial approach to social rights has been the subject of contestation in recent crisis-focused writings. These illustrate how new developments get read through the prevailing theories of the day. Crisis constitutional social scholarship to date has focused around three connected normative claims. There is a discussion as to whether a minimum core approach or a proportionality approach is best used by courts in approaching such issues. A third distinctive argument, albeit with links to minimum core arguments, is made by Landau in his recent account of the lessons to be drawn from the social jurisprudence of the Colombian Constitutional Court ‘for courts around the world currently confronting the effects of governmental austerity’.⁴² He argues that the best way for courts to meaningfully review austerity measures without overstepping the bounds of the judicial role or causing macroeconomic havoc is to protect only the vital minimum needed to live in dignity. This links back to the unfairness critique levelled at the Portuguese Constitutional Court. In what follows I use the reasoning of sovereign debt constitutional judgments in European states to question these claims.

The minimum core and proportionality as master-narratives?

Contiades and Fotiadou argue that proportionality can do all the judicial work of determining when social rights can or cannot be limited in times of crisis.⁴³ Among other merits, they suggest that proportionality shields judges more effectively from controversy than a fixed core approach.

Bilchitz counters that a minimum core approach, whereby a base-line minimum for a right must always be secured by the state, is more fitting than a proportionality approach. More broadly, he argues for an approach which gives rights content and gives proportionality a more circumscribed role as a mechanism for deciding when limitations on rights can be permitted.⁴⁴ Yet the assumption underpinning his analysis - that crisis constitutional challenges are focused on meeting basic needs - is wrong in Europe. Contiades and Fotiadou rightly point out that the centre of gravity of Bilchitz’ analysis is wrongly premised on crisis jurisprudence being about meeting basic needs, the minimum core, to food, health, shelter and income.⁴⁵ While increasing numbers of people may indeed be unable

⁴⁰ Portugal: Judgment 602/2013 above n.37; Romania above n.32; Greece Council of State Decision 2307/2014 above n.26.

⁴¹ Portugal: Judgment 474/2013; 602/2013 and 794/2013 all above at n.37; Romania: Decision 1414/2009 and Decision 383/2011 above n.33; Greece: Council of State Decision 2307/2014 above n.26.

⁴² D. Landau, ‘The promise of a minimum core approach: the Colombian model for judicial review of austerity measures’ in A. Nolan (ed.) *Economic and Social Rights After the Global Financial Crisis* (CUP, 2014) 267.

⁴³ X. Contiades and A. Fotiadou, ‘Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation’ 10 I.CON (2012) 660. There is in fact very limited reference to EU bailout states constitutional litigation in this analysis: just one of the Latvian decisions (2009-43-01) above n.29.

⁴⁴ Above n.4.

⁴⁵ X. Contiades and A. Fotiadou, ‘Socio-economic rights, economic crisis and legal doctrine: A Reply to David Bilchitz’ 12 I.CON (2014) 740.

to meet their basic needs in EU bailout states, that is certainly not (to date) the focus of constitutional social or human rights contestation in Europe. Cuts to existing entitlements are the main focus of challenge rather than a failure to meet basic needs.

But the alternative proffered, proportionality as the one-size-fits-all solution to judicial management of social rights challenges in times of crisis, is reductive and unilluminating. There are real differences in approach between courts in relating the economic crisis with fundamental rights. Each court decides which constitutional provisions are engaged, takes a specific position on how fundamental rights apply in times of economic ‘emergency’ and develops distinctive analyses of proportionality. When we distinguish the basis from the standard of review and carry out a comparative analysis, we are in a better position to evaluate the criticism that use of the constitutional equality principle to review monetary cuts in Portugal was entirely inappropriate. Equality and the rule of law as the basis for review are argued to ‘surely confirm that Court’s resistance to review the austerity measures on the basis of the constitutionally entrenched social rights’.⁴⁶

Basis of review

The Portuguese reasoning is well set out in the official English summary of the first case in which public sector salary cuts were found to breach the constitutional equality guarantee in Article 13: Judgment 353/2012. The Court first introduced the principle of equal sacrifice as a parameter:

The Court recalled that the principle of equality with regard to the just distribution of public costs, as a specific manifestation of the principle of equality, is a necessary legislative parameter which the legislator must consider when it decides to reduce the public deficit in order to safeguard the state’s solvency. The sustainability of the public finances is of interest to everyone and, to the extent of their capacity to do so, everyone must contribute to the burden of the readjustments that are indispensable if that sustainability is to be ensured. The fact that the measures contained in the norms before the Court were not universal meant that they did not distribute the sacrifices equally between all citizens, in proportion to each one’s financial capacity. They required an additional effort exclusively from certain categories of citizen.

Is this an unacceptable constitutional basis for evaluating monetary cuts? In fact, the constitutional basis for challenges to cuts differed on a broad East-West axis. Eastern European challenges were brought using distinctive constitutional *social* provisions; Western European challenges were not. Hence, in Latvia and Romania challenges to pension and benefit cuts were brought under the constitutional guarantee to social security.⁴⁷ Challenges to pay cuts, brought in Romania but not in Latvia, were brought on a different constitutional basis, the right to work (Article 41 Romanian Constitution). By contrast, cuts to both pay and pensions were dealt with on distinct but *non-social* constitutional bases in Greece and Portugal. In Greece this was the right to property (Article 17 Greek Constitution), the principle of proportionality (Article 25(1) Greek Constitution), equal participation of citizens in public burdens⁴⁸ (Article 4(5) Greek Constitution) and respect for human dignity (Article 2(1) Greek Constitution). In Portugal, the primary basis for the cuts jurisprudence was the Rule of Law in Article 2, used to underpin the principles of trust and legitimate expectations,⁴⁹ and the principle of

⁴⁶ Nogueira de Brito above n.8.

⁴⁷ Article 47(2) Romanian Constitution: ‘Citizens have the right to pensions, paid maternity leave, medical care in public health centres, unemployment benefits, and other forms of public or private social securities, as stipulated by the law. Citizens have the right to social assistance, according to the law.’ Article 109 Latvian Constitution: ‘Everyone has the right to social security in old age, for work disability, for unemployment and in other cases as provided by law.’

⁴⁸ ‘Greek citizens contribute without distinction to public charges in proportion to their means’.

⁴⁹ ‘The Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organisation, respect for and the guarantee of the effective implementation of the fundamental

equality in Article 13(1): ‘All citizens possess the same social dignity and are equal before the law’. That is to say, the use of equality as a basis for reviewing monetary cuts is shared by some other, but not by all, European constitutional courts. Although this substantially blunts the criticism of the use of equality as exceptional, it leaves the question of whether those courts which used equality and related broad constitutional principles to evaluate monetary cuts ‘mis-used’ their constitutional text. This depends on whether one thinks there is an obviously better-suited provision available in constitutional texts for evaluating such cuts. Is the right to work, used in Latvia to evaluate pay cuts, an obviously better fit?

Moreover, the trenchant critique of avoiding the social rights basis in the constitution is based only on a partial assessment of the Portuguese Constitutional Court’s record. It ignores a substantial body of its jurisprudence applying specific constitutional labour and social provisions, especially in Part 1, Title II of the Constitution dealing with workers’ rights, to constitutionally review a significant range of other changes driven by the bailout programme. Take for instance the integrity of collective bargains, protected in all the bailout constitutions other than Ireland. The Portuguese Constitutional Court took the following starting point as the basis for careful examination of a series of legislative interventions into collectively agreed norms:

...under the Constitution workers are the holders of the right to enter into collective labour agreements, albeit they can only exercise it via trade unions. This exercise is guaranteed “under the terms laid down by law”. Because this guarantee is founded in the Constitution, the fact that the details are left to “the terms laid down by law” cannot mean that the guarantee itself is placed in the hands of the ordinary legislator.

Portuguese constitutional jurisprudence has leant towards the interpretation that the right to collective agreements is a right which it is up to the ordinary law to format, but that in doing so the latter can neither empty the right of its content, nor itself decide every aspect of labour law in ways that cannot be opted out of by collective agreements. The ordinary law cannot delimit the untouchable core of the right to enter into collective labour agreements, because otherwise one would be inverting the normative hierarchy and emptying the constitutional precept of its legal force.⁵⁰

Compare this to the Romanian Constitutional Court’s position that prohibiting collective bargaining for teachers to deviate from law was not a breach of the constitutional right to collectively bargain as:

The Constitutional Court has consistently held that the right to collective bargaining and the binding nature of collective agreements are guaranteed by the Constitution, under the provisions of Article 41(5), but that the conclusion of collective agreements must be subject to the law. These agreements are a source of law, but their legal force cannot be superior to the law. Consequently, collective agreements are guaranteed insofar as they do not go against the law in force. To hold otherwise, ‘would violate a fundamental principle of the rule of law, namely the primacy of law in regulating social relations. [...]’.⁵¹

The constitutional basis for reviewing monetary cuts varied across Europe. Rather than providing simple answers about the ‘right’ basis for review, it raises further questions about the criteria by which that might be ascertained. By focusing constitutional social evaluation and analysis only on the basis of monetary cuts, the evaluation is skewed and an important constitutional hinterland of jurisprudence on other social issues remains unexplored.

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rights and freedoms, and the separation and interdependence of powers, with a view to achieving social, economic and cultural democracy and deepening participatory democracy.’

⁵⁰ Judgment 602/2013 above n.37: taken from the official English summary of the judgment by the Portuguese Constitutional Court.

⁵¹ Decision 575/2011 above n. 32. Personal unofficial translation. See also Greek Council of State Decision 2307/2014 above n.26.

Standard of review

Portuguese and Greek constitutional review show just how much the standard of review can vary despite their reliance on very similar constitutional provisions as the basis for review. Greece placed much more emphasis on exceptional fundamental rights protection in extreme situations, with the assumption that responding to the economic crisis defines the public interest; while Portugal placed constitutional commitments in a more central position and used them to develop more extensive guarantees of review of the distribution of the burdens of adjustments. This raises the question of whether it is in fact primarily the standard (strict vs. deferential) rather than the basis of review (equality, rule of law) that is the subject of attack.

Take the key judgment of the Greek Council of State which was in turn heavily relied upon by the European Court of Human Rights in the decisions of both courts on the same case: *Koufaki* decided in Greece in February 2012 and by the ECtHR in May 2013.⁵² These courts reasoned that the monetary cuts were in the general interest and also coincided with those of the euro area Member States, in view of the requirement under EU legislation to ensure budgetary discipline and preserve the stability of the euro area. It only remained to determine whether Ms Koufaki's pay cut struck a fair balance between this general interest and protection of her fundamental rights. Both courts dismissed several arguments that the salary cuts breached the proportionality principle. The fact these cuts were not temporary was justified, since the legislature's aim had been not only to remedy the acute budgetary crisis at that time but also to consolidate the State's finances on a lasting basis. Nor did Ms Koufaki risk falling below the subsistence threshold.

Unlike the Greek Council of State, but like the Latvian and Romanian Constitutional Courts, the Portuguese Constitutional Court found that the extremely serious economic/financial situation and the need for measures that are adopted to deal with it to be effective cannot serve as grounds for dispensing the legislator from being subject to the fundamental rights and key structural principles of the state based on the rule of law. While the Constitution clearly cannot distance itself from economic and financial reality, it does possess a specific normative autonomy that prevents economic or financial objectives from prevailing in an unlimited way over parameters such as that of equality, which the Constitution defends and with which it must ensure compliance. Such a *prima facie* breach of the constitutional equality principle required therefore evaluation of the legislator's justification:

The Court considered that the only justification for the measure included in LOE 2012 that it could deem proven was the measure's efficacy, given that it was certain to produce effects and to do so quickly in the search for a result that would be of important public interest. However, the Court also recalled that even within the framework of a serious economic/financial crisis, the legislator's freedom to resort to cutting the remuneration and pensions of persons who receive them from public funds, with a view to achieving a budgetary balance, cannot be unlimited. The difference between the degree of sacrifice undergone by those who are affected by this measure and that of those who are not must be subject to limits.

Legal equality is always a proportional equality, so any inequality that is justified by a difference in situations cannot be immune from a judgement of proportionality. The Court said that the difference in treatment in the case before it was so substantial and significant that the efficacy-related reasons advanced for the measure were not valid enough to justify such a large difference, all the more so in that it was possible to resort to alternative solutions.

Further comparison shows there are still other ways to structure constitutional reasoning on cuts. The Romanian Constitutional Court decided that pay cuts should be subject to a different constitutional regime than pensions' cuts. It is possible for the Romanian Constitutional Court to choose which constitutional guarantees can be subject to public interest restrictions. Pay cuts, including judicial pay

⁵² See above nn.26 and 25.

cuts, were constitutional because they were found to be subject to the public interest provision in the Romanian Constitution.⁵³ However, pension cuts were unconstitutional because they were not subject to the public interest provision: being pre-constituted rights based on the contribution principle such limitations were not permitted in the Romanian constitutional order.⁵⁴ Where the public interest provision applied, however, it provided an easy path towards constitutionality. The Court found that the reference to the ‘defence of national security’ in the public interest provision covered not just military but also economic and social security. It was possible to restrict rights on this basis without it being necessary to officially declare a state emergency (under Article 93 Romanian Constitution) and it was easy to establish proportionality, especially given the temporary nature of the cuts:⁵⁵

The Court finds that there is proportionality between the means employed (25% reduction pay/benefits) and the legitimate aim pursued (reducing budget expenditures /rebalancing the state budget) and that there is a fair balance between the requirements of the general interest of the community and the protection of fundamental rights of the individual. The Court also notes that the challenged legislative measure is applied without discrimination, in the sense that the 25% cut applies to all categories of public sector staff in the amount and method.

The Latvian Constitutional Court subjected each interference with specified social rights to proportionality analysis. This required asking whether the constitutionally suspect measure (1) was duly established by law; (2) pursued a reasonable and legitimate objective; (3) was proportionate (in the double sense of being the least restrictive alternative and balancing). The reasoning turned on the last of these, as securing the sustainability of the social insurance budget by balancing its budget was a reasonable and legitimate objective contributing to societal welfare.

As far as the least restrictive limb of proportionality was concerned, the Court examined carefully the time and effort expended by the other branches of the state on investigating alternatives commensurate with both the financial crisis and the interests affected by the challenged measures. Hence, a reduction of pensions by 70% for those in employment failed the least restrictive test as the other branches had failed to carry out adequate analysis of alternatives, whilst non-indexation of pensions satisfied this limb as the alternatives (reduction of pensions or an increase in contributions) were less favourable.

The last part of the analysis is balancing the benefits to society against the detriments to those affected. Here again, the 70% pensions reduction failed this limb on both procedural (insufficient time given to those affected to assess how to respond to their change in position; inadequate transitional period) and substantive (insufficiently differentiated approach applied to all those affected and no subsequent compensation envisaged for the cuts) whilst the non-indexation of pensions was found to strike a constitutional balance. Given that the measures involved a non-increase and were temporary, the benefit gained by society from the contested norm outweighed the infringement of rights of those affected.

While the Portuguese Constitutional Court’s reasoning and standard of review is certainly not beyond reproach or critique, it is best viewed as in the company of its fellow bailout constitutional courts, not

⁵³ Article 53 Romanian Constitution provides: (1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.

(2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.

⁵⁴ Special Magistrates’ pensions were not pre-constituted in this way but were instead found unconstitutional on the basis of breaching the constitutional principle of judicial independence in Article 123(3) Romanian Constitution (Decision 873/2010).

⁵⁵ Decision 872/2010.

in a constitutional corner of shame on its own, as much of the exceptionally critical commentary asserts. The blunt and non-textually evident distinction operated by the Romanian Constitutional Court to sharply differentiate the standard of review on pay and pensions can certainly be questioned as much as the comparison between public sector workers and others not affected by measures operated by the Portuguese Constitutional Court in applying the equality principle. The Latvian Constitutional Court was criticised for the coherence of its judgments when it found pensions' cuts unconstitutional but cuts to benefits for working parents' constitutional. The very light touch review operated by the Greek Council of State can be seen as providing insufficient constitutional restraint. These examples also underline that analysis and evaluation of the standard of review is not best served by a global proportionality analysis in which one common method or basic tool, a 'constitutional Esperanto' in Contiades and Fotiadou's language, is and should be applied everywhere. As can be seen, the differences between the standards developed and applied are at least as significant as their similarities. Moreover, the particular issue of how to accommodate constitutional review of social measures with economic crisis or emergency, or even more specifically entry into sovereign debt loans, merits specific attention and analysis.

Unfair and ill-advised to protect the middle-class?

The real nub of the constitutional critique of the Portuguese Constitutional Court's equality cuts jurisprudence centres on the unfairness of constitutional protection of public sector workers.⁵⁶ Taking a telling 'imaginary example' of a state tripling public sector salaries while placing the burden of debt adjustment solely on tax increases, De Almeida Ribeiro argues that the Portuguese Constitutional Court's position means that 'private sector employees are expected to subsidize excessive earnings in the public sector'. This underpins his other assertions underpinning the unfairness charge: that those public sector workers with greater job security than private sector workers should bear the burden of adjustment; and that the Court should have proceeded on the assumption (without the need for careful data) that private sector workers have already suffered wage cuts in the crisis and therefore public sector workers needed too to suffer in a roughly similar way.⁵⁷ There is much to be said about this line of constitutional attack. My goal here is simply to open some profitable lines of further inquiry and debate.

First, it fits comfortably into a series of current 'common-sense' positions in European elite discourse: of cushioned public sector jobs; of over-protected labour market 'insiders'; and of the shift in European social policy from social protection in work to a minimal safety net for the avoidance of social exclusion and encouraging states to invest in labour-market enhancing skills acquisition.⁵⁸

Second, as noted above, this is where the focus of challenges - to cuts to public sector workers pay and pensions and to labour protections - differs from the typical focus of constitutional social scholarship to rights for those in poverty. This leaves the ground, if not entirely open, certainly with scant ammunition against attacks on the constitutional protection of those with – albeit typically modest - resources. Yet this is the central group at issue in EU bailout constitutional challenges.

Thirdly, two very different strands, one '(neo-)liberal' and one 'critical', of constitutional social scholarship expressly warn against conflating constitutional social victories with the protection of those in need rather than 'the middle-class'. Many expressly state that the only viable judicial social constitutionalism is the protection of a minimum core for the least advantaged. Accordingly, the critique of the Portuguese Constitutional Court draws on an established set of positions in constitutional social scholarship. The key sites for this discussion to date have been judgments of the

⁵⁶ See Nogueira de Brito above n.8: 'the Court is engaged in a judicial activist path.. [which]..has little to do with the enforcement of social or work rights but is specially aimed at the protection of public sector employees'.

⁵⁷ Above n.8.

⁵⁸ See for a recent example *Social Agenda No 40 4/2015, EU Economic Policy in the Making* (EU Commission, 2015).

Hungarian Constitutional Court in the mid-1990s on the sovereign debt loan conditions set by the IMF and judgments of the Colombian Constitutional Court around the millennium.

The closest antecedent of contemporary criticism of the Portuguese Constitutional Court is undoubtedly Andras Sajó's robust attack on the Hungarian Constitutional Court in the mid-1990s.⁵⁹ It struck down as unconstitutional Hungarian laws cutting pensions and sick pay and means-testing maternity support at the IMF's behest by relying on legal certainty as the most important conceptual element of the Rule of Law.⁶⁰ These decisions were bad, in his view, because:

1. They created fierce and destabilizing conflict between the branches of government;
2. The Court took a hasty and populist stance, obstructing vital economic modernization, behaving in a fiscally irresponsible fashion, shoring up an unaffordable welfare state, and undermining the market economy;
3. The status quo protected by the Court was inefficient (ill-suited to a free-market economy) and unfair (middle-class oriented to the detriment of the poor and victims of the transition).⁶¹

A much less red-blooded neo-liberal critique, albeit coming up with the same policy outcomes, is provided by Landau. He contrasts two waves of Colombian Constitutional Court jurisprudence. In the first wave, the Court protected pensioners and mortgagees without carrying out an assessment of whether the measure affected their minimum level of subsistence. Similarly, it also protected all public sector workers against real wage cuts, when the government proposed protecting only those earning less than twice the minimum wage. Landau argues that, like the Hungarian decisions in the mid-90s, such decisions are vulnerable to charges that they have substantial budgetary effects, overstep the judicial role and raise substantial equity concerns where they protect pensions and other assets owned by the relatively affluent rather than the poor. He contrasts this first wave unfavourably with the second wave,⁶² in which the Court upheld public sector wage cuts which protected the lowest paid and focused its constitutionality assessment on whether measures harmed the poorest and most vulnerable members of the population.

While the careful and rigorous analysis of the distributive effects of social rights, including the judgments of constitutional courts, more often urged in the critical strands of this literature, is certainly to be fully embraced, used without care this kind of analysis is deeply problematic, not least because its 'easy' arguments for the unfairness of protecting the entitlements of workers in general, or public sector workers in particular, are at risk of becoming 'common-sense'.

⁵⁹ A. Sajó, 'How the Rule of Law Killed Hungarian Welfare Reform', 5 *East European Constitutional Review* (1996) 31; see also his similar arguments a decade later, 'Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court' in R. Gargarella, P. Domingo and T. Roux (eds) *Courts and Social Transformations in New Democracies. An Institutional Voice for the Poor?* (Ashgate, 2006) 83.

⁶⁰ Kim Lane Scheppele, 'A Real-Politik Defense of Social Rights' 82 *Texas Law Review* (2004) 1921 provides an analysis of these decisions some of which (No 43/1995, No 56/1995) are found in English translation in L. Sólyom and G. Brunner (eds) *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press, 2000). The Court found *inter alia* that abrupt changes to social security payments violated the Rule of Law clause in the Constitution.

⁶¹ Note the telling detail, providing a clear dividing line with progressive critical critiques, that he criticises the distributive outcome whereby to comply with the judgments without further increasing the budget deficit the socialist majority in Parliament increased the personal income tax for the highest income bracket (48% for the top 10% of tax-payers).

⁶² When an effective attack by neo-liberal economists in prominent official positions in Colombia (notably Salamon Kalmanovitz of the Colombian Central Bank) had fed into a change of judicial personnel and approach by the Colombian Constitutional Court: see Landau above n.42 at 279-81. Alviar García (2014, above n.10) notes that this powerful neo-liberal opposition led to a constitutional reform in 2011 geared towards forcing courts to take into account budgetary restrictions (p.70).

First, there is a risk that *default neo-liberal assumptions* take the place of searching analysis of distributive effects.⁶³ Indeed, contrary to those assumptions, it seems highly unlikely that appropriate enforcement of constitutional safeguards for workers is a straightforward zero-sum trade-off with appropriate constitutional safeguards for the least advantaged. While the relationships between these differing social components certainly deserve further investigation, it may well often be the case that protecting both is mutually beneficial and promotes an overall package lessening societal inequalities. Arguments that it is unfair to protect workers *rather than* the poor are often therefore simply arguments that a constitutional court is obstructing the author's preferred economic model: a free-market economy in which social protection is restricted to a means-tested minimum.

Second, there is a risk of *default neo-liberal assumption extension* in which one moves from criticism of carefully focused examples of constitutionally adjudicating particular wage/benefits cuts for public sector workers to assuming that all constitutional protection of workers is so fraught with difficulties of judicial role, empirical assessment, and obstructing macro-economic adaptation, that it is best not undertaken. Hence, Landau moves directly from applauding new-found judicial deference to monetary cuts to endorsing the deference shown by the Colombian Constitutional Court to 'sweeping changes to the laws governing workers' rights...the law made the hiring, firing and regulation of workers more flexible by, for example, making workers easier and less expensive to terminate and altering the definition of a working day'. Such measures 'require courts to undertake difficult line-drawing exercises', confront 'the empirical difficulty of determining the effect of the changes in question on the economy...' create 'political pushback' and 'threaten to leave petitioners with either no protection or rigid protection that makes it impossible for the State to respond to changing macro-economic circumstances'.⁶⁴

Third, there is also an important question of *constitutional integrity*. A question is raised about the meaning of the extensive constitutional commitments relating to workers we have seen above are a hallmark of many European constitutions. Should the 'poverty-only' role of social constitutional review be endorsed, the outcome is that the extensive social constitutional commitments relating to work, including work-related benefits, are to be denied any autonomous constraining effect. Yet this puzzling and surely controversial constitutional outcome is never justified by the proponents of the 'poverty-only' social constitutional reading.

Fourthly, one might imagine that the field could be occupied, or contested, by *constitutional labour law* scholars. Yet the focus of this scholarship lies elsewhere. One strand lies in emphasising collective autonomy and worker democracy: on this understanding the 'labour constitution' democratizes capitalist economies by providing for the collective regulation of the economy through unions, works' councils, employers and their associations.⁶⁵ Another part of the scholarship focuses on constitutional adjudication hampering legislative introduction of labour and social protection by use of federal/state boundaries or constitutional protections.⁶⁶ Others engage cautiously and sceptically with judicial constitutional rights protection of (mainly) freedom of association rights.⁶⁷ Although bridges can

⁶³ For an interesting account of this phenomenon see David Kennedy's analysis of Deepak Lal's work and its influence on the policies of international financial institutions: 'Political Choices and Development Common Sense' in D. Trubek and A. Santos (eds) *The New Law and Economic Development: A Critical Appraisal* (CUP, 2006) 95 at 133-137.

⁶⁴ Landau (2014) above n.42 at 284-5.

⁶⁵ For a highly interesting recent analysis developing this collective democracy reading see R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP, 2014).

⁶⁶ An exemplary comparative analysis developing such themes is O. Kahn-Freund, 'The Impact of Constitutions on Labour Law' 35 *Cambridge Law Journal* (1976) 240.

⁶⁷ See eg H. Arthurs, 'Labour and the 'Real' Constitution' 48 *Cahiers de Droit* (2007) 43: the economic structure (the 'real' constitution) matters more than the formal constitution which is vague and leaves ample room for challenge and for change. A recent intense focus for such discussions has been a series of Canadian Supreme Court decisions on freedom

certainly be built from these concerns to the bailout constitutional jurisprudence, extensive building work is needed especially in relation to: the specificities of social loan conditionality and the role of constitutional courts; economic crisis and social constitutionalism; and the position to be taken in relation to monetary cuts for workers especially in the public sector.

If only one adjustment to the field of constitutional social scholarship could be proposed as an important and productive one in the Europe of today, this would be my choice.

Juristocracy charges cannot be the same in times of EU sovereign debt.

The inter-institutional dimension provides an opportunity to consider another of the charges levelled against the Portuguese Constitutional Court: that of illegitimacy or juristocracy or judicial activism. Its judgments certainly attracted exceptional media coverage and analysis. One *Financial Times* example from 24 October 2013, headlined ‘Portugal’s constitutional court threatens bailout’, gives the flavour. It begins:

Robed in black and accustomed to the quiet of their Lisbon Chambers, the 13 judges of Portugal’s constitutional court have found themselves propelled unexpectedly into the cut and thrust of high European politics.

Defenders of the inviolability of national laws for some, enemies of reform to others, the seven men and six women have become critical to the success or failure of Portugal’s 78 billion euro bailout programme and, by implication, the resolution of the Eurozone crisis.

Charges of judicial activism during the crisis have taken a traditional focus. They sustain that national constitutional courts which struck down measures taken to fulfil loan conditions were not sufficiently deferential to national parliaments and executives.

A key purchase of comparative constitutional social literature is its inter-institutional awareness. It is alert to whether and how courts attract constitutional and political controversy when they accept constitutional challenges to social rights and when and how they can take steps to diminish such controversy. The argument is made that courts carrying out constitutional review of social rights can weaken objections of judicial over-reach by engaging in forms of constitutional review other than strong-form review. This can exist through formalized constitutional mechanisms which combine constitutional judicial review with giving the final word to the legislature⁶⁸ or through constitutional review practices developed by specialised constitutional courts which engage in a more dialogic fashion with the parties to the case or other branches of government.⁶⁹ My analysis builds on such work in the specific European sovereign debt context to claim that in a range of distinctive and interesting ways the traditional focus is misplaced. It under-states the branches of government when examining constitutional interactions with the judicial branch: as will clearly be demonstrated these must be expanded in euro-crisis to include the EU institutions. It under-examines the actions and evolving decision-making of the constitutional courts themselves. It assumes relationships between the branches of the state that do not prevail while a state is in bailout.

(Contd.) _____

of association rights: see eg J. Fudge, ‘Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* case’ 41 *Industrial Law Journal* (2012) 1-29.

⁶⁸ See M. Tushnet, *Weak courts, Strong rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton UP, 2008). He distinguishes between weak-form and strong-form judicial review, arguing that the former weakens certain objections to constitutional enforcement of social rights.

⁶⁹ K.G. Young, *Constituting Economic and Social Rights* (OUP, 2012); W. Forbath, ‘Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa’s Treatment Action Campaign’ in L.E. White and J. Perelman (eds) *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford UP, 2011) 51.

Expanding the relevant branches

A first unusual development is the explicit interaction between the judgments of the Portuguese Constitutional Court and EU legislative sources. Hence the Council Implementing Decisions setting out the changing loan conditions for the Portuguese bailouts cite these Constitutional Court judgments and note the ‘budgetary gap’ they create. The Decisions addressed to Portugal after these decisions consider how to manage ‘political and legal risks in the implementation process’.⁷⁰ National constitutional court decisions on fundamental constitutional principles have accordingly explicitly become for the EU legislature ‘legal risks’ to be managed.

The Portuguese Constitutional Court decision of 30 May 2014⁷¹ provoked a series of *multi-level* institutional and political communications and consequences. The most important consequence was the Portuguese government’s early exit from the loan assistance programme. This can be framed, as in the troika statement set out below, as a decision by the Portuguese government not to seek an extension of the programme. It can also be read as a failure by the Portuguese state to meet the loan conditions required by the EU (and IMF) for disbursement of the final tranche of the loan: €2.6 billion. In any event, the troika statement also urged the government to press on regardless with reform and to bridge the gap created by its Constitutional Court:

The European Commission, the European Central Bank and the International Monetary Fund take note of the Portuguese government's intention to await the pending Constitutional Court rulings concerning adopted budgetary measures before formulating a comprehensive response. These rulings are not expected before the IMF and EU programme expires at the end of June. We take note of the government's decision not to seek an extension of the program and to allow its expiration without completing the 12th and final review and without receiving the associated final tranche.

We welcome the government's firm commitment to identify the measures needed to fill the fiscal gap created by the Constitutional Court rulings, in order to reach the budgetary targets agreed under the programme. We encourage the government to continue with the on-going process of structural reform. Sound economic policies for the medium term will be essential to reinforce the economic recovery and ensure sustainable growth and job creation. We remain ready to assist the authorities and the Portuguese people as they continue in this effort.⁷²

A further triangular institutional interaction was also provoked between the Portuguese government, the Constitutional Court and the troika. As also noted in the troika statement, the Portuguese Government had cited its supposed need for clarification from the Constitutional Court – before tabling alternative savings to replace those struck down by the court in May 2014 – as one of the justifications for forgoing the last tranche of the euro-zone bailout.⁷³ Yet the Constitutional Court in a subsequent judgement rejected the Government’s request to clarify its decision on the 2014 state budget. It dismissed the idea that its original ruling had contained any obscurity or ambiguities – the two words used by the government in justifying its request for clarification. It was not up to the Constitutional Court to clarify to other state organs the terms on which these other branches must exercise their legislative or administrative competences.⁷⁴

While this notable inter-institutional episode certainly underlines the multi-level branches of public authority which need to be modelled in EU sovereign debt episodes, it may also seem to give considerable force to the charge of illegitimacy or judicial activism or juristocracy levelled against the

⁷⁰ Council Implementing Decision 2013/323/EU of 21 June 2013 amending Implementing Decision 2011/344/EU on granting Union financial assistance to Portugal [2013] OJ 175/47.

⁷¹ Above n.38.

⁷² 12 June 2014 - Statement by the European Commission, ECB, and IMF on Portugal.

⁷³ Portuguese News Agency, 19 June 2014.

⁷⁴ Judgment 468/2014, 18 June 2014.

Portuguese Constitutional Court. Yet other elements must be considered and evaluated before any assessment can be made.

Expanding consideration of constitutional courts and their interactions

The measuring and mapping of inter-institutional relations can also usefully be traced in a range of ways inside the constitutional courts themselves. Such analysis can include qualitative and quantitative analysis of the judgments themselves,⁷⁵ tracking evolution of dissent within the court across the arc of euro-crisis challenges⁷⁶ or across different issues or between different judges.⁷⁷

These courts did not ignore the difficult situation in which their decisions placed the political branches. The Portuguese Constitutional Court had earlier, at the cost of significant internal dissent, introduced a constitutional innovation to accommodate the difficult position of the Portuguese Government. Indeed, its jurisprudence can be read as a series of warnings followed by action. Its first Budget Law judgment found the 2011 pay cuts to be constitutional but made clear the delimited boundaries making that finding possible. Its second Budget Law judgment found the 2012 pay cuts to fall outside the constitutional limits set out in 2011. However, it exceptionally suspended the effects of its judgment to protect the execution of the budget which had already been implemented for over six months as not to do so could, it explicitly reasoned, put in danger the continued financing of the Portuguese State by the Troika.⁷⁸ The Latvian Constitutional Court acted similarly.⁷⁹

Moreover, in considering the juristocracy charge, it is important to underline that these cases were brought before the Portuguese constitutional court (and the others) using political constitutional review mechanisms. Hence, it is the President of the Portuguese Republic, Portuguese elected representatives and the Ombudsman who maintain that the challenged measures fail to respect the Portuguese Constitution. That is to say, constitutional review operates in these challenges as national politics by other means framed and channelled by the constitutional text. Such review is to ensure that the legislature acts within its constitutional limits.

The assumptions of juristocracy in times of sovereign debt

Much of the force of the juristocracy charge derives from the argument that courts are interfering with more legitimate and democratically accountable choices within a state. But this, it is important to stress, is a state of affairs which does not prevail while a state is in bailout. During bailout, a wide range of national democratic choices become suspended as external lenders set the terms for loan disbursements. Indeed, one of the primary characteristics of the national measures in response to euro-crisis loan conditionality is the use of emergency procedures such as special executive powers and the

⁷⁵ For example, if we look at the length of the judgments there are two clear peaks in the Portuguese Constitutional Court's euro-crisis judgments: while most of the judgments range between 20-30 pages the two most controversial (187/2013 and 413/2014) are both over 90 pages long with dissenting opinions making up between 20-30 pages of the total length.

⁷⁶ Dissents in the Portuguese Constitutional Court bailout decisions had three peaks: in its first decision finding unconstitutionality (187/2013 with eleven out of a possible thirteen judges dissenting), in Judgment 602/2013 on relaxing private sector employment protection (twelve out of a possible thirteen judges dissent) and in Judgment 413/2014 which prompted early bailout exit (each judge dissented on at least one issue).

⁷⁷ Because of expiring mandates 19 different constitutional court judges participated in the Portuguese Constitutional Court decisions and only six judges participated in all twelve decisions listed above. Of these dissents ranged from 3/12 (Judge Guerra Martins) to 8/12 (Judge Cunha Barbos).

⁷⁸ Judgment 353/2012, para 6.

⁷⁹ In Judgment 2009-111 the Latvian Constitutional Court temporarily suspended (until 1 January 2011) its finding that cuts of 15% to judicial pay were unconstitutional on the basis that their immediate repeal would endanger budget stability and societal welfare.

shortcutting of normal Parliamentary procedures and debates.⁸⁰ Hence, constitutional court judgments *can* become a new resource for governments in dealing with lenders to argue for renegotiations of terms in order to maintain constitutionality.⁸¹ Yet this does not seem to be a feature of national government responses to successful euro-crisis constitutional challenges. Empowerment of the national vis-à-vis the EU/IMF is not a discernible outcome of findings of unconstitutionality. Rather than re-opening the global figure of cuts required to the national budget in return for loans, the outcome was rather the governmental search for alternative acceptable measures delivering equivalent savings to satisfy the EU Commission, the IMF and (for Eurozone states) the European Central Bank.

A structured EU, and shared European, constitutional space?

A structured EU constitutional space? EU primacy claims, the loan conditions and national constitutional review courts.

Given that the loan conditions emanated from the EU,⁸² an important question is raised as to how these national constitutional decisions mesh with EU law. Assume that the loan conditions are straightforwardly EU law, bracketing doubts which exist on this issue, to which we return below.⁸³

Loan conditions based on EU law sources make its national execution an implementation of that EU law. Although those EU sources are often acknowledged in these national constitutional court decisions, and the specific instructions of the MoUs are often referred to in constitutional judgments, the legal implications of that EU connection are entirely ignored. To see how this matters we need to consider the bases for EU law supremacy over national constitutions. We shall see that neither of the two key characterisations of the foundations of EU-national constitutional interactions explains what happened in the national decisions finding national laws implementing EU loan conditions to be unconstitutional. Departing from this interesting and puzzling finding, we consider other possible explanations.

Characterisation 1: National constitutional review courts accept the EU account of supremacy

From the Court of Justice's perspective, as Steve Weatherill states, 'even the most minor piece of technical Community legislation ranks above the most cherished constitutional norm'.⁸⁴ Central for fundamental rights or constitutional principles is *Internationale Handelsgesellschaft*⁸⁵ in which the Court of Justice had to deal with a challenge to a Community Regulation which conflicted with the German Basic Law. The Court found that 'the validity of a Community measure or its effect within a

⁸⁰ See eg Romania the use of emergency delegated legislation under Article 115(5)-(8) of the Constitution as well as extensive use of a special legislative procedure under Article 114 Constitution, relying on a confidence vote before Parliament rather than the normal processes of Parliamentary debate and amendment: see further V. Viță, <http://eurocrisislaw.eu.eu/romania/III.9>. For Greece see A. Marketou and M. Dekastros, <http://eurocrisislaw.eu.eu/greece/III.1> who note in euro-crisis the 'extensive use of a sui generis legal instrument, the so-called "administrative acts of legislative content"'. These are executive administrative acts, normally issued under exceptional circumstances, having a content which normally belongs to the competence of the Parliament' using a special power in Article 44(1) Greek Constitution.

⁸¹ See further Kim Lane Scheppele, 'A Real-Politik Defense of Social Rights' 82 *Texas Law Review* (2004) 1921.

⁸² The cases of Greece and Cyprus are more complex as the primary loan sources were agreed by the Member States acting intergovernmentally. However, this does not straightforwardly preclude EU review for a series of reasons not explored here. For discussion see C. Kilpatrick (2014) above n.24.

⁸³ Ibid.

⁸⁴ *Law and Integration in the European Union* (OUP, 1995) 136.

⁸⁵ Case 11/70, [1970] ECR 1125.

Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure'. If the national court has doubts about the legality *under EU law* of the EU norm the Court of Justice's supremacy jurisprudence requires it to apply, it cannot evaluate or set aside the dubious EU norm but is required by the Court of Justice to make a validity reference.⁸⁶

On this characterisation the EU bailout norm should be applied even if it conflicts with the national constitution because of full and unmediated acceptance of the EU understanding of EU supremacy. However, national constitutional courts considering the loan conditions raised concerns should consider whether EU bailout norms complied with *EU norms*. This should have led to preliminary references to the Court of Justice from national constitutional review courts on the validity under EU law, including the social commitments in the Treaties and the EU Charter of Fundamental Rights, of the bailout sources as well as more general constitutional principles such as the principle of equality or of legitimate expectations, both of which are key features of the national constitutional decisions. Yet this clearly did not happen.

Characterisation(s) 2: nationally mediated reception of supremacy and its implications

An alternate characterisation, when we speak of constitutional courts in Europe contesting EU sources, is based on analysis of an inter-court relationship with the Court of Justice asserting different bases for EU law supremacy from some national constitutional courts.⁸⁷ It is well-known that many, indeed most, national constitutional systems do not accept the Court of Justice's asserted monopoly on the nature of validity and primacy. National courts by and large have not accepted the EU version of primary whereby it is inherently supreme as a matter of EU law but rather have given effect to primacy via a *national constitutional basis*.⁸⁸ While this works straightforwardly when the primacy of EU law is asserted over conflicting national legislation, the national constitutional basis for EU law primacy clearly means constitutional incompatibilities are more difficult to resolve when this characterisation is adopted. As Bruno De Witte notes, 'If the national courts (and other national authorities) think that European law ultimately derives its validity in the domestic legal order from the authority of the constitution, then they are unlikely to recognize that EU law might simply prevail over the very foundation from which its legal force derives'.⁸⁹ Constitutional courts have often allowed small modifications to the national constitutional settlement but not allowed EU law to override essential elements of the national constitution. These typically include fundamental rights but also national constitutional identity and competence limits. Hence while the first characterisation espouses a hierarchical view of supremacy, on this characterisation it is best seen as a heterarchical relationship, raising questions about how to manage these competing views when concrete conflicts arise.

Because the loan conditions are found unconstitutional on a range of grounds, including constitutionally protected rights and principles, it is extremely interesting to try to place these national constitutional cases inside this kind of analysis. Yet they do not fit the prototypical manifestations of this characterisation of EU constitutional interactions. It is difficult to convincingly read these cases as an instance of explicit constitutional interaction through dialogue, co-operation or conflict.

⁸⁶ Case 314/85 *Fotofrost* [1987] ECR 4199.

⁸⁷ For an extended analysis see B. De Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P. Craig and G. de Búrca (eds) *The Evolution of EU Law* (2nd edn, OUP, 2011) 323.

⁸⁸ For a relevant recent example see the Romanian Constitutional Court's rejection of a constitutional amendment in 2014 (Decision 80/2014, 16 February 2014) which would have had the effect of making EU law prevail over all Romanian law including its constitution on the basis that this would breach Article 152 Romanian Constitution provision that 'no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof.'

⁸⁹ De Witte above n.87 at 352.

We can underline the contrast by setting these euro-crisis constitutional fundamental rights interactions against the most highly developed national constitutional model for managing such EU-national constitutional tensions on fundamental rights, that of Germany.⁹⁰ Imagine if these cases concerning constitutional breaches of fundamental rights or principles had come before German courts. Those courts would have found themselves inside a richly developed and highly nuanced national constitutional jurisprudence on how to manage possible conflicts between national constitutional requirements and EU legislation. It is an extensively elaborated and evolving jurisprudence on constitutional dialogue, co-operation and review in an EU-national constitutional system for protecting fundamental rights. According to that jurisprudence, national courts should first make references to the Court of Justice to check compliance of the suspect EU norm with EU fundamental rights and principles. The national constitutional court retains a reserve review power to change this system should EU Fundamental Rights protection depart radically from the level in place when this constitutional jurisprudence was put in place.⁹¹

By contrast, although our cases involve a conflict between EU-authored loan conditions and national constitutions, there is no open conflict or dialogue with the Court of Justice and indeed no consideration of how such fundamental rights tensions should be judicially managed. Because the Portuguese, Latvian and Romanian Constitutional Courts base their decisions on assessing the constitutionality of the national laws rather than their EU foundations, they avoid any open EU conflict. They do not say, for example, that the national constitution cannot permit EU law containing loan conditions to operate because that EU law fails to respect fundamental elements of the national constitution, and that the basis for EU law supremacy requires EU law to so respect its constitution. Nor do they consider whether their constitution requires a different reading in light of E(M)U developments: indeed some of the invective directed at the Portuguese Constitutional Court decisions was to the effect that it had failed to understand that its constitutional settlement needed ‘re-reading’ to adjust to the commitments of Eurozone membership with a new ‘eurozone’ constitutional orientation,⁹² or as part of the constitutional duty to participate in EU integration,⁹³ leading to different outcomes on these constitutional challenges. Yet none of these constitutional courts read the bailout sources through either classical EU constitutional or ‘euro-crisis’ EU constitutional lenses.

⁹⁰ For a useful recent overview of the German Federal Constitutional Court’s position see E. Vranes, ‘German Constitutional Foundations of, and Limitations To, EU Integration: A Systematic Analysis’ 14 *German Law Journal* (2013) 75.

⁹¹ Failing that constitutional fundamental rights review of EU-implementing norms can exceptionally be exercised should: (a) It be demonstrated that there is a *general decline* in EU fundamental rights protection leading to inadequate protection in the specific case; (b) National acts implementing EU law leave no margin of discretion to national organs.

⁹² This was a feature of some of the dissenting judgments in the Portuguese Constitutional Court. See eg Judge Pedro Machete in Judgment 187/2013: national constitutional commitment to European integration demands heed to Eurozone integrity, respect for the principle of loyal cooperation, and constraints resulting from measures adopted under Articles 122(2) 123 and 125 TFEU; Judge Lúcia Amaral’s dissent in Judgment 353/2012 stating that the challenged measures have to be read in light of the constitutional mandate to participate in European integration (Article 7(5) and (6) Portuguese Constitution) and in particular respect for the obligations resulting from membership of the Eurozone that came with the financing of the Member States in debt.

⁹³ See Judge Lúcia Amaral’s dissent in Judgment 574/2014 in which she argues that the balancing test incorporated into the constitutional equality principle should incorporate the constitutional value of EU integration. This duty was arguably strengthened by the inclusion of ‘EU integration’ clauses in some constitutions as a consequence of various Treaty developments: the Maastricht Treaty and following ratification in some countries of the (ultimately abandoned) Treaty for a Constitution for Europe. Hence, the Portuguese constitution was amended in 2004 to add a new basis for EU integration, Article 8(4): ‘The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law’.

Alternative readings – avoiding undesired EU judicialization of constitutional conflict

We now need to unbracket discussions about the nature of these sources. Consider two possible ways of characterising them:

1. International ‘bailout’ sources/national engagement with those international sources
2. EU ‘bailout’ sources/national implementation of those EU sources

What is most significant is that the bailout measures are never fully articulated in national constitutional challenges as either an implementation of EU law or as acts of EU institutions. Either explicitly, as in the case of Latvia⁹⁴, or implicitly and partially, as in the cases of Portugal⁹⁵ and Romania⁹⁶, the non-EU characterisation of the bailout sources is adopted, clearing the way for national constitutional review.

The complex and variegated legal nature of the bailouts, both their hybrid EU/international nature and the prominent position given to Memoranda of Understanding (MoUs) as a bailout component, may indicate that national actors did not consider that the normal regime for considering EU sources in their national legal order applied to these sources.⁹⁷ Yet there are overwhelming arguments in the case of the bailout sources applied to Latvia, Romania and Portugal that the loan conditions were contained in EU sources.⁹⁸ Accepting this as the sole reason for the exit from EU constitutional interactions accordingly raises questions about the grasp of EU law by national constitutional courts.⁹⁹

Yet there is an alternative, and also complementary, explanation. This is that not addressing the EU nature of the bailouts may have served to avoid what promised to be an open and highly charged conflict with the EU institutions and legal order, including the Court of Justice, by taking validity challenges against the EU components of bailout programmes. While the Portuguese Constitutional Court’s findings that national bailout measures were unconstitutional provoked intense national and EU institutional responses, the nature of the conflict and controversy would have been very different had it been openly framed by that constitutional court as EU (bailout) sources breaching fundamental

⁹⁴ See Latvian judgment 2009-43 (finding 10% and 70% pension cuts unconstitutional) which notes that the MoU of 13 July 2009 contains a pledge by the Latvian Government to make these cuts but appears to consider that it is not legally binding: ‘the fact that the above documents contain the pledge of the Government to adopt the challenged provisions does not mean that the international creditors have stipulated these particular conditions...The Constitutional Court did not receive any information attesting that the international creditors stipulated the adoption of the impugned provisions as a prerequisite for granting the loan...The measures in the [MoU] are to be characterised as an action of the State with the aim to reduce budget expenditure and, consequently, to be eligible for the international loan’.

⁹⁵ In Portugal the bailout sources, and broader EU commitments to fiscal limits, are acknowledged and their EU nature and compliance is seen as an element of the public interest eg Judgment 413/2014 para. 30. In Judgment 574/2014, perhaps not coincidentally post bailout exit, the Court develops its views further. It takes the view that the Fiscal Compact Treaty, as a non-EU law source, cannot be read in light of the Portuguese Constitution’s European Integration clause (Article 8(4)) and the SGP Recommendations are subject to a similar reading on the basis that they set only ends not means. It further states that national legal norms must comply with the Portuguese Constitution as recognised by Article 4(2) TEU which provides for respect of the national identity of the Member States, including their fundamental political and constitutional structures. Finally it finds that the reasoning it has used in its bailout jurisprudence on cuts (on equality, proportionality and legitimate expectations) are part of the hard core of the Rule of Law and constitute part of a common legal heritage to which the Union is also bound (para 12).

⁹⁶ The Romanian Constitutional Court barely elaborates on the legal nature of the bailout measures, limiting itself to noting the Government was responding in a timely manner to the IMF.

⁹⁷ For other reasons, see C. Kilpatrick, ‘On the Rule of Law and Economic Emergency: the Degradation of Basic Legal Values in Europe’s Bailouts’ *Oxford Journal Legal Studies* (2015).

⁹⁸ See C. Kilpatrick (2014) above n.24 for further analysis. The situation in relation to Greece is more complex.

⁹⁹ There are reasons to doubt such an explanation, particularly in relation to the Portuguese Constitutional Court, where eg the President of the Constitutional Court until late 2012, Rui Moura Ramos, was a judge of the Court of First Instance (now the EU’s General Court) from 1995 to 2003.

rights and principles in the Portuguese Constitution.¹⁰⁰ Hence these constitutional court responses to bailout sources are perhaps better viewed as efforts to avoid an *undesired EU judicialization* of the conflict between bailout sources and national constitutional rights. Failure to fully legally characterise the bailout sources as EU sources allowed a space for national constitutional review to occur without such an undesired EU judicialization of the conflict between bailout sources and national constitutional guarantees.

If this is an insular response, the last of the charges levelled at the Portuguese Constitutional Court by its critics, then it is an insular response taken by every single constitutional review court in the EU faced with constitutional challenges to social measures taken in response to bailout conditions. In any event, a closer comparative reading suggests quite the opposite characterisation: the judgments are carefully cosmopolitan, involving an astute analysis of the consequences for EU judicial-constitutional interactions of alternate readings and a determination to avoid those consequences. Of course, at the same time it surely demonstrates that a robust and open constitutional judicial dialogue between national constitutional courts and the Court of Justice of the European Union is far from guaranteed to occur even when it is an acutely needed input into the legality of the EU's social constitutional crisis.

A shared European constitutional space?

Indicators of developments of such a shared space between the EU sovereign debt states might include, in increasing order of intensity, *separate but similar* constitutional challenges, reasoning and responses to euro-crisis loan conditions, *horizontal sharing and utilisation* of relevant constitutional judgments, or *coordinated strategies* by those mounting constitutional challenge or of constitutional courts towards relevant EU and international institutions.

Sovereign debt constitutional practice provides some exceptional examples of the separate but similar order of sharing, the most interesting of which is the approach by constitutional courts to managing potential EU constitutional conflict, explored above. We saw too that the focus of constitutional challenges provides a further intriguing example of the separate but similar manifestation of a shared European constitutional space: in each state, similar challenges were brought to euro-crisis measures though without any inter-state co-ordination of such challenges.

The reasoning of constitutional courts is traditionally a central focus of a shared transnational constitutional space. I look first at horizontal inspiration of constitutional courts by each other's judgments in euro-crisis or related episodes of constitutional jurisprudence on social measures in times of economic emergency or sovereign debt and, second, at recourse by constitutional courts to relevant shared norms: from the Council of Europe, the ILO or UN instruments.

The crisis prompted a new reaching out to constitutional courts of other Member States. However, it also demonstrates the limited geographical and substantive nature of such horizontal dialogue even in circumstances when the terrain for comparison was very fertile indeed. In Decision 872/2010 the Romanian Constitutional Court decided that a reduction of 15% in pensions was unconstitutional. In order to underline this idea, the Court looked at '*some considerations made by other Constitutional Courts with regard to the right to pension.*' What is interesting is how exceptional this recourse by the Romanian Constitutional Court to comparative constitutional law was: out of around 13,000 decisions issued by the Romanian Constitutional Court from 1991 only 14 have referred to foreign

¹⁰⁰ See M.L Pires, 'Private versus Public or State versus Europe? A Portuguese Constitutional Tale' *Mich J. Int'l Law Emerging Scholarship Project* (2013) 101 who sustains that deciding the cases on a purely internal basis 'was very typical of Portuguese constitutional thought, which avoids open confrontation with European law' (p.102) and 'The Court did not want to enter a battle, which it does not feel comfortable fighting, preferring to deal with the issue in a national perspective' (p.106). Though note carefully the Portuguese Court's more robust engagement with EU sources post bailout exit in Judgment 574/2014 discussed above at n.95.

jurisprudence. Four of these fourteen judgments concern euro-crisis law.¹⁰¹ This makes it an interesting example of new kinds of transnational judicial communications provoked by the bailouts. It is also noteworthy that in these cases the Romanian Constitutional Court's comparative constitutional interpretation came *almost exclusively* from Central and Eastern European EU Member States: the Hungarian decisions from the mid-1990s discussed above,¹⁰² a number of social rights in bailout decisions of the Latvian Constitutional Court¹⁰³ and decisions of the Czech and Lithuanian Constitutional Courts on cuts to judicial benefits. The single example to date of use by Eastern European constitutional courts of Western constitutional court euro-crisis jurisprudence is also instructive. The Romanian state, responding to those constitutional judgments finding pension cuts unconstitutional, had scheduled compensation payments amounting to over 1% of Romanian GDP to public sector workers. When the scheduling of these payments was constitutionally challenged the Romanian Constitutional Court operated a constitutional control limited to obvious infringements of the constitutional text in order to leave Parliament an appropriate margin of appreciation in the area of budgetary policy. This was backed up by reference to the German Constitutional Court's first euro-crisis judgment of 7 September 2011 on the package of measures on financial aid granted to Greece and funds made available for saving the Euro.¹⁰⁴ At the same time, there was no use by Western European bailout courts (Portugal, Greece) of the first wave of Eastern European constitutional court bailout jurisprudence. As we pass the tenth anniversary of eastern enlargement this is a new and interesting strand of analysis. It raises questions about the existence of two rather separate European spheres of comparative constitutional influence.

The use of international human rights sources in these judgments is also an interesting point of comparison. The Latvian Constitutional Court quotes extensively from the General Comments issued by the UN Economic and Social Rights Committee. All of the constitutional review courts bar Portugal drew extensively on the ECHR and Strasbourg Court jurisprudence while the Portuguese Constitutional Court drew on the EU Charter of Fundamental Rights.¹⁰⁵ There is scarce invocation of ILO or European Social Charter text or supervisory bodies' findings.¹⁰⁶

Linking abusive constitutionalism with euro-crisis and social rights: Hungary under Orbán.

While much has been written both about euro-crisis and the role the EU could play in resolving the Hungarian constitutional crisis, these discussions remain separate.¹⁰⁷ I suggest that focusing on constitutional reform, euro-crisis and social rights shows linkages between these phenomena deserving further exploration as part of broader discussions of the causes, channels and consequences of democratic crisis in Hungary. Although I limit myself to a preliminary exploration of one central example, Romania would be an obvious further candidate for this kind of analysis.¹⁰⁸ I do not claim

¹⁰¹ See also Decision 873/2010, Decision 874/2010 and Decision 1533/2011 all above at n.31. See further E.S. Tanasescu and S. Deaconu, 'Romania: Analogical Reasoning as a Dialectical Instrument' in T. Groppi and M-C. Ponthereau (eds) *The Use of Foreign Precedents by Constitutional Courts* (Bloomsbury, 2013) 321.

¹⁰² See n.60.

¹⁰³ Latvian Judgments 2009-43-01 and 2009-11-01 above n.29.

¹⁰⁴ Decision 1533/2011 above n.31.

¹⁰⁵ See eg Judgment 474/2013 citing Article 30 EUCFR (protection of unjustified dismissal).

¹⁰⁶ See eg Judgment 474/2013 Portuguese Constitutional Court invoking Article 24 European Social Charter.

¹⁰⁷ See eg Jan-Werner Müller's analyses of both phenomena with no links drawn between them: 'Europe's Perfect Storm: The Political and Economic Consequences of the Euro-crisis' *Dissent* (2012); 'Hungary and the EU' *Aspen Review* 4 (2013) 46.

¹⁰⁸ In mid-2012 the Romanian government tried to oust the President, dismissed the Ombudsman and its Constitutional Court rejected as unconstitutional a law amending its organisation and functioning: Venice Commission

that sovereign debt loan assistance or the related broader context of EMU constraints are necessarily dominant or unvarying explanations for constitutional crisis. However, I do suggest that this entirely overlooked aspect really deserves focused attention as it suggests certain important linkages between economic instability, sovereign debt management and constitutional crisis in Europe.

The Hungarian bailout took place under the post-1989 constitutional settlement which amended but did not replace the 1949 Constitution. Hungary obtained an EU loan in November 2008.¹⁰⁹ Hungary under the post-1989 Constitution had a strong constitutional court,¹¹⁰ easy to directly access. It had developed a strong constitutional jurisprudence including on social rights which had fairly extensive protection in the constitution.¹¹¹ Importantly, that social rights constitutional jurisprudence had been forged in the crucible of a wave of challenges to social cuts imposed by IMF austerity lending policies to Hungary in 1995 in the transition period.¹¹² Despite this backdrop it appears that no constitutional challenges were brought to the measures introduced to comply with sovereign debt loan conditions.¹¹³

However, austerity and the focus on levels of public debt played a role in highly significant constitutional, social and political developments since entry into bailout in November 2008. A technocrat government was installed in April 2009, to be replaced by the Fidesz government of Viktor Orbán in April 2010 with 52% of the vote and, as a result, over two-thirds of Parliamentary seats. This constitutionally significant parliamentary majority provided it with a platform to alter the constitutional revision rule from one requiring 4/5th vote in favour to one requiring 2/3rds vote in favour and it subsequently replaced the post-1989 constitution with a Fundamental Law which entered into force on 1 January 2012 although it has been amended in highly significant ways since then.¹¹⁴

There are links worth exploring between the timing, conditions and politics of the 2008 bailout and the election of Fidesz in 2010.¹¹⁵ There are links between the demands of EU macro-economic governance (particularly the Excessive Deficit Procedure with its headline reference values of 3% deficits and 60% debt)¹¹⁶ and the budgetary measures inserted in the Fundamental Law. One of the central constitutional changes introduced by the 2012 Fundamental Law is to lower the public debt below

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[http://www.venice.coe.int/webforms/documents/CDL-AD\(2012\)026-e.aspx#](http://www.venice.coe.int/webforms/documents/CDL-AD(2012)026-e.aspx#). Although Bogdan Iancu notes that there was no link between popular protest in 2012 and the drastic cuts to public servants' salaries in 2010 he stresses the contested role of sovereign debt programmes in pushing through privatisations, 'Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts' in A. von Bogdandy and P. Sonnevend (eds) above n.13 153-4.

¹⁰⁹ Council Decision of 4 November 2008 providing Community medium-term financial assistance for Hungary (Decision 2009/103/EC) under what is now Article 143 TFEU. The EU balance of payments loan was up to 6.5 billion euros (while the IMF's was up to 12.5). The actual loan amount was lowered (5.5 out of 6.5 from the EU and 9.1 out of 12.5 from the IMF) and the loan period (November 2008-October 2010) was shortened by one year.

¹¹⁰ See the Tavares Report of the European Parliament which notes that 'since the start of the democratic process in Hungary the Constitutional Court has been recognised as an outstanding constitutional body throughout Europe and the world': *Report on the situation of fundamental rights: standards and practices in Hungary* (pursuant to the European Parliament resolution of 16 February 2012), 25 June 2013, (2012/2130(INI)).

¹¹¹ See especially Articles 70A to J of the 1949 Constitution (as amended): rights include the right to work, to time off work, to freely associate and strike, wage income protections, to health, social security and education.

¹¹² See above n.60.

¹¹³ Dalma Dojcsák, 'Hungary': <http://eurocrisislaw.eu.eu/hungary/>.

¹¹⁴ The Fundamental Law of 2012 is very different in content and tone from its predecessor. Although it continues to protect, albeit in extensively redrafted terms, a similar range of social and work rights, the overall detail is highly important.

¹¹⁵ Note further that in 2011, Hungary requested further precautionary financial assistance; this was made politically conditional by the EU on the Orbán Government committing to central bank independence and the judicial reforms recommended by the Venice Commission, European Commission - IP/12/407 25/04/2012. This financial assistance was not taken up.

¹¹⁶ For the functioning of the EDP see especially Article 126 Treaty on the Functioning of the European Union, Protocol 12 attached to that Treaty and Regulation 1467/97 (part of the Stability and Growth Pact as amended in 2011 to include public debt as well as public deficit in the EDP). Note also the veto power on the budget given by the Hungarian Fundamental Law to a Budget Council: Article 44(3).

50%¹¹⁷ and a key political priority of the newly elected Orbán government was to reduce public debt and deficit without resorting to typical austerity measures.

The atypical deficit reduction measures taken had dramatic effects on social rights. They entailed, *inter alia*, suspension of transfer payments from the state to the mandatory private pension pillar (reducing deficit), a 2010 law requiring individuals to transfer to the state their private pension assets (again to reduce its deficit, by over 10% in 2011) or face penalties although the latter were subject to extensive amendment over time. It also entailed special taxes, including exceptionally high (98%) and retroactive taxation of severance payments for public sector employees alongside a constitutional amendment aiming to protect it from constitutional challenge. When the Constitutional Court condemned this first iteration from July 2010 Parliament promptly reintroduced the tax with a much longer period of retroactive effect accompanied by a much more extensive constitutional amendment excluding full review. With these more restricted powers, the Constitutional Court found that the 5 year retroactivity of the taxation of public servants severance payments contravened the constitutional right to human dignity but that it was unable to review the taxation itself.¹¹⁸

One apparent goal of such measures was to exit the Excessive Deficit Procedure by taking the deficit below 3%. Hungary was in an Excessive Deficit Procedure from its EU accession in May 2004 until June 2013.¹¹⁹ Yet this goal failed. The EU refused to accept the budget surplus in 2011 resulting from pension nationalization as compliance with the EDP. Noting that the pensions' nationalization meant Hungary recorded a surplus in 2011 this was regarded as only 'formal respect' of the 3% excessive deficit value and still a breach of the EDP because it was not respected on the basis of a structural and sustainable correction. Indeed, this Hungarian action provoked a very different EU response as it became the only state to date to have the clause in the European Structural and Investment Funds from 1994 permitting suspension of payments because of excessive deficit invoked against it. In March 2012, the maximum amount (0.5% GDP) of ESI funds was suspended from Hungary from January 2013 onwards, although this suspension was lifted before coming into effect.¹²⁰

At the same time, parallel reforms curtailed the possibility of successfully mounting constitutional challenges to these social rights changes driven by political budgetary goals. The Constitutional Court's composition has been changed and its role dramatically restricted in the new constitutional settlement. No longer can cases easily be brought before it. More specifically its fundamental rights jurisdiction is expressly constitutionally limited in the area of budgetary reforms. Under the Fundamental Law the Constitutional Court's powers of ex post review of the constitutionality of budget-related laws from a substantive point of view have been substantially limited to violations of an exhaustive list of rights,¹²¹ thus obstructing the review of constitutionality for breach of other

¹¹⁷ See Article 36(4): 'The National Assembly may not adopt an Act on the central budget as a result of which state debt would exceed half of the Gross Domestic Product'; Article 36(5): 'As long as state debt exceeds half of the Gross Domestic Product, the National Assembly may only adopt an Act on the central budget which provides for state debt reduction in proportion to the Gross Domestic Product'; Article 36(6): 'Any derogation from the provisions of Paras (4) and (5) shall only be allowed during a special legal order and to the extent necessary to mitigate the consequences of the circumstances triggering the special legal order, or, in case of an enduring and significant national economic recession, to the extent necessary to restore the balance of the national economy'.

¹¹⁸ Subsequently found to breach the right to property in the ECHR in *NKM v Hungary*, judgement of the European Court of Human Rights, 14 May 2013: taxation level constituted a breach. Although the Hungarian authorities had a wide margin of discretion in tax matters, especially in times of economic instability, and therefore had a legitimate aim, the tax imposed was not proportionate.

¹¹⁹ Council Decision 2013/315/EU of 21 June 2013 abrogating Decision 2004/918/EC on the existence of an excessive deficit in Hungary [2013] OJ L 173/43.

¹²⁰ The suspension was lifted in June 2012: CID 2012/156 of 13 March 2012 suspending commitments from the Cohesion Fund for Hungary from 1 January 2013 [2012] OJ L 78/19.

¹²¹ Article 37(4) Hungarian Fundamental Law: 'As long as the state debt exceeds half of [GDP], the Constitutional Court may ...review the Acts on the central budget, the implementation of the central budget, central taxes, duties and

fundamental rights such as the right to property, the right to a fair trial and the right not to be discriminated against.¹²² Moreover, its jurisprudence under the post-1989 Constitution, including its important judgments on austerity and social rights, is expressly repealed by the Fundamental Law. Although the Constitutional Court continued, while adapting when required to its reduced mandate, to issue judgments condemning the constitutionality of central measures, the pensions' reforms were not the subject of a constitutional ruling. Kim Lane Scheppele who has closely followed the changing constitutional situation in Hungary comments:

The Constitutional Court then never issued the decision it had said it would publish on the effective nationalization of Hungarian's private pensions. The pension law, passed last spring, eliminated the state-provided pensions that Hungarians had paid into all of their working lives, in a move equivalent in the US to the abolition of social security. But the law abolished social security payments only for those who refused to transfer their private pension funds into state hands. Given that prior decisions of the Constitutional Court had said that people had a property interest in the payments they had made into the state pension system, the new pension law was surely unconstitutional under the standards that the Court had previously set. But rather than reiterate its previous arguments, the Court simply said nothing.¹²³

Challenges to the new pension regime therefore went instead to the European Court of Human Rights. Close to 8000 complaints were lodged, prompting the Registrar to require all new applications to be channeled via trade unions.¹²⁴

This outline has certainly not identified or sufficiently analysed all the issues or linkages. Yet I hope it suffices to demonstrate that reading the new Hungarian constitutional settlement and politics through the twin lenses of euro-crisis law and social rights adds new perspectives to both the study of comparative and EU constitutionalism in times of euro-crisis and the 'abusive constitutionalism' of which Hungary is a significant European example.¹²⁵

Moreover, a broader theme of constitutional revision, linked to the Hungarian experience, is the 'hidden' revision and very substantial strains placed on the deep structure of the constitutional settlements of bailout states. The quantity and nature of the gaps opened between constitutional commitments and lived political and social reality shows that no matter how significant some constitutional courts' interventions may be in addressing some of these constitutional gaps in the EU bailout states, overall they have a very limited role. Such constitutional gaps can, at best, become a broadly agreed or accepted adjustment, longer-term or expressly temporary, of the constitutional settlement.

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contributions, customs duties and the central conditions for local taxes for conformity with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights..' It is also, and quite astonishingly, provided that such review is excluded for any Act passed while state debt exceeded 50% even when state debt goes below that figure: that is to say, a perpetual restriction on constitutional review for budgetary Acts passed during times of excessive debt: Article 37(5) Hungarian Fundamental Law.

¹²² See Tavares Report above n.110; also Kim Lane Scheppele, "Hungary's Constitutional Revolution," *The Conscience of a Liberal* post, 12/19/11; <http://krugman.blogs.nytimes.com/2011/12/19/hungarys-constitutional-revolution>.

¹²³ K. Lane Scheppele, 'The Unconstitutional Constitution' 1.2.2012, available at <http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/#more-27941>. And id 'Constitutional Revenge' 1.3.2013 http://krugman.blogs.nytimes.com/2013/03/01/guest-post-constitutional-revenge/?_r=0

¹²⁴ EurActiv, 'Human Rights Court inundated with Hungary complaints', 16.01.2012. The Court found an application by an individual opting to stay in the private system, and claiming breach of her right to property under the ECHR, manifestly unfounded: *E.B. v Hungary*, App. No 34929/11, judgment of 15 January 2013. It is worth noting that the Hungarian Government had by then made modifications to the pension regime applied to those retaining their private pension (only 2%, 98% having moved to the state regime) so that they could obtain entitlements based on both their private and state sector contributions.

¹²⁵ D. Landau, 'Abusive Constitutionalism' 47 *UC Davies Law Review* (2013) 189.

Conclusion

This paper has shown the rich new sources and questions raised by considering the interaction of constitutions, sovereign debt and social rights in Europe today. Through its five claims it illuminates a range of implications this new area of inquiry has for scholars working in comparative constitutional law, EU constitutional law and social and labour law. It identifies and begins to fill a range of gaps in the current literature, reorients its emphases, critiques some dominant critiques of constitutional courts and social rights and develops alternative readings.

