Constitutions and social rights in times of European crisis

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To look at constitutions and social rights in times of European crisis is to open a field of inquiry which links to, but is distinctive or new in ways we consider important and enriching, a range of established areas of constitutional scholarship, comparative and EU.

This new field of inquiry arises because euro-crisis law has produced a large set of constitutional challenges concerning social rights especially in those states in receipt of sovereign debt loan assistance ('bailout states').[1] The EU sovereign debt group is a large one of, to date, seven states: Hungary, Latvia, Romania, Greece, Ireland, Portugal and Cyprus (in order of the date of their first bailout).

New occasions for constitutional challenges have arisen from the fact that the conditionality attached to all the bailout loans has entailed important changes to national social and employment law and policy. The priorities of fiscal consolidation and structural reform have led to dramatic changes to work and social rights and entitlements. The traction of the comparative analysis arises not least from the fact that all seven EU bailout states were subject to similar social loan conditions.

Crisis changes to work-related rights include changes to the substantive level of protection offered (such as cuts to minimum wages, public sector salaries and pensions, public sector dismissals, reduced dismissal protection and reduced young worker protection) but also, and a central element to changes to work rights in the crisis, are changes in how those substantive protections are set, most centrally the setting of wages through collective bargaining.

Changes in welfare rights include across-the-board reductions in financial benefits or benefits in kind, as well as the exclusion of categories of persons from certain social benefits (e.g. irregular migrants), and sharp reductions in funding of welfare services have led to indirect interferences with social rights. Examples include the closing of hospitals in remote areas, making urgent medical help unavailable; and the downsizing of scholarships schemes that allow access to higher education.

As noted, our inquiry into constitutions and social rights in times of European crisis can be linked to, indeed naturally resonates against, a range of established areas of constitutional, including EU constitutional, scholarship. In this far from fully worked through analysis, I begin to investigate this fertile new area of constitutional scholarship by setting it within and against these established areas. The established areas I juxtapose with constitutions and social rights in times of European crisis are:

[1] Although non-bailout (eg Italy) or sectoral bailout states (Spain) under intense EU pressures of various kinds are also of constitutional interest, this analysis focuses on full bailout states as this is already a large group. For analysis of Italy and Spain see the contributions in Kilpatrick & De Witte (eds) (2014 EUI WP and forthcoming *European Journal of Social Law* special issue on *Social Rights in Times of Crisis: The Role of Fundamental Rights Challenges*); see also C. Fasone, draft paper on file.

A. mainstream constitutional eurocrisis law scholarship;
B. comparative constitutional analysis of constitutional texts and their review;
C. social rights in comparative constitutional analysis;
D. constitutional reasoning on social rights in times of economic crisis – the basis of challenges, the structure of constitutional reasoning and judicial dialogue;
E. the inter-institutional dimension: constitutional courts and the political branches;
F. EU primacy claims, the loan conditions, and national constitutional review courts.

A. Mainstream constitutional eurocrisis law scholarship

Our area of inquiry can be set alongside the 'mainstream' of constitutional eurocrisis scholarship. In much eurocrisis law, the judicial focus is on the Court of Justice's decision in *Pringle* and the German Constitutional Court. By contrast, as noted, a social rights focus instead places in the spotlight particularly the seven EU bailout states. Hence to look at social rights in times of crisis is to shift our focus towards debtor states, and towards compliance with EU, constitutional and human rights norms relevant to their *social* implications rather than compliance with, say, EMU law or national budgetary requirements.

B. Comparative constitutional analysis of constitutional texts and their review

Our topic also links to comparative constitutional scholarship, especially that part of the scholarship which focuses on social rights. This scholarship grows from, and analyses, the dual global phenomenon post WW2 of countries (a) acquiring written constitutions containing constitutional rights and (b) the curtailment of legislative power by giving courts, often specialised constitutional courts, the power of constitutional judicial review. By constitutional judicial review is meant the power of a court to invalidate statutes and other acts of a public authority found to be in conflict with a constitution.[2] Constitutional legality, unlike ordinary legality analysis, often concerns the validity of norms involved and their justification, not simply the appropriateness of their application to the concrete case.

Yet each constitution in this new global trend evidently reflects its national origins and backdrop. Comparative constitutional scholarship brings out the distinctive and expressive functions fulfilled by constitutions, in particular by looking at the original constitutional text and the discussions surrounding its drafting. Our particular focus lies in the social ambitions of the constitutional text. From the written constitution perspective, the bailout states constitute an interesting new grouping. Euro-crisis law is brought into contact with very different constitutional sources, with very different social ambitions. As smaller states of Europe, and the EU, these states have been the subject of relatively little focus in comparative, and EU, constitutional scholarship.

Importantly, the grouping also 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 contain an extensive menu of social rights or not.[3] In Greece and Portugal the constitutions of 1975 and 1976 reflected the emergence from military dictatorship and

[2] See A. Stone Sweet, 'The European Court of Justice' in P. Craig/G. De Búrca (eds) *The Evolution of EU Law* (2nd edn, OUP, 2011) 121.
[3] C. Sunstein, 'Against Positive Rights' (1993) *Eastern European Constitutional Review* 35.

fascism while the Irish (1937) and Cypriot (1960) constitutions reflect both their age and their British background.

In terms of the social ambitions and range of the constitutional text, at one end of the spectrum of the EU bailout states lies Portugal. Although it has been 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, Part I devoted to Fundamental Rights and Duties also reflects this in its extensive suite of social and labour rights. Part I is divided into three Titles. Whilst Title 1 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.

At the other end of our set lie Ireland and Cyprus 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,[4] the Irish bailout was not subject to social constitutional challenge. Nor has, to date at least, the Cyprus bailout[5] under a constitution which provides a limited range of social rights protection, mainly focused on work.[6]

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 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.[7]

[4] On which see further the contributions of A. Kerr and A. Nolan to C. Kilpatrick/B. De Witte (eds) *Social Rights in Times of Crisis: The Role of Fundamental Rights Challenges*, a special forthcoming issue of the *European Journal of Social Law*.

[5] See K. Pantazatou, 'Cyprus' at http://eurocrisislaw.eui.eu/cyprus/

[6] 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.

[7] Article 23 Greek Constitution.

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.[8] 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.[9] Alongside protection of trade unions' freedom of association and the right to strike, Article 41 protects the right to work, social protection at work, limitations of working hours and the right to collectively bargain. Special provisions apply to 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.[10]

The Hungarian social-constitutional-political context is complex and important. The bailouts 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.[11] Although Hungary under the post-1989 Constitution had a strong constitutional court,[12] easy to directly access, which had developed a strong constitutional jurisprudence including on social rights which had fairly extensive protection in the constitution[13], the Hungarian report for the euro-crisis project states that no constitutional challenges were brought to the measures introduced to comply with loan conditions.[14]

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.

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[8] Article 34 Romanian Constitution ('Right to health'); Article 32 Romanian Constitution ('Right to education').
[9] Article 47 Romanian Constitution ('Living standards').
[10] See Articles 106-112 Latvian Constitution.
[11] 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.
[12] 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)).
[13] 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.
[14] Dalma Dojcsák, 'Hungary': http://eurocrisislaw.eui.eu/hungary/

Here, I highlight only those developments closely related to the theme of this inquiry.[15] The Constitutional Court's composition has been changed and its role dramatically curtailed in the new settlement. No longer can cases easily be brought before it. Indeed in a highly relevant area of constitutional change its fundamental rights jurisdiction is excluded. That area is 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,[16] thus obstructing the review of constitutionality for breach of other fundamental rights such as the right to property, the right to a fair trial and the right not to be discriminated against.[17]

This is highly and directly relevant to changes to social rights in Hungary. One of the central constitutional changes introduced by the 2012 Fundamental Law is to lower the public debt below 50%[18] and a key political priority of the Orbán government has been to reduce public debt and deficit[19] without resorting to typical austerity measures. This has 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)[20] or face penalties although

[15] 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. Hence while it introduces for the first time a right to housing flanking laws introduced measures to clear public areas of homeless people: see *Mate Szabo v Hungary*, judgment of the Hungarian Constitutional Court of 12 November 2012 finding this violated human dignity and the rule of law.

[16] 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 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..'

[17] See Tavares Report above n.XX; 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. In 2011, Hungary requested precautionary financial assistance; this was made politically conditional on Orbán's 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.

[18] 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'.

[19] The EU has placed pressure on Hungary in this regard. Hungary has been in an EDP since accession. It is the only state to date to have had 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. 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.

[20] 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.

the latter were subject to extensive amendment over time. It also entailed special taxes, including exceptionally high taxation of severance payments for public sector employees.[21]

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.[22]

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.[23]

Leaving the special and important case of Hungary to one side, as the text lives through constitutional interpretation, in particular where judicial constitutional review is both available and utilised, that original constitutional text will require new analysis and reflection. One signal constitutional contribution of euro-crisis law was to provoke a series of significant judicial constitutional interpretations on the constitutional compatibility of changes to social rights.

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 constitutional challenges on social measures were decided, six in 2009[24] and two in 2010.[25] In Romania at least four decisions were taken in 2009 and 2010 on the constitutionality of a range of measures cutting pay and pensions as well as employment protection.[26]

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[21] 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 at 52% 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.

[22] K. Lane Scheppele, 'The Unconstitutional Constitution' 1.2.2012 available at http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/#more-27941

[23] 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.

[24] 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 2009-111-01 (cuts in judicial pay).

[25] 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.eui.eu/latvia/

[26] Romanian Constitutional Court: Decision 1414/2009 (constitutionality of various measures concerning public sector employment conditions); Decision 1415/2009 (constitutionality of capping salary additions and a new regime for compensating overtime); Decision 872/2010 (constitutionality of cuts to pensions, public sector

A significant series of Portuguese Constitutional Court decisions on social austerity measures have been taken as a result of loan conditionality: 1 in 2011,[27] 1 in 2012,[28] no fewer than five in 2013[29] and a final highly politically resonant decision in May 2014.[30] 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. The Portuguese Constitutional Court's constitutional reasoning on equality to evaluate cuts has been subject to intense, perhaps even unprecedented, criticism by Portuguese scholars. It has been accused in its pay cuts 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, the coherence and guidance of its reasoning, its inter-institutional relations and its EU relations.[31] This makes it especially useful to place this Constitutional Court in a comparative constitutional framework as this allows better assessment of whether it is guilty as charged of playing its constitutional court role wrongly and thereby allows a broader assessment of constitutional courts dealing with social challenges in times of euro-crisis. We shall do this as we develop our analysis.

Our analysis also provides some material for assessing what difference it makes to have a specialised constitutional court or leave constitutional review to the ordinary courts. While Portugal, Latvia and Romania have specialised constitutional courts, Greek constitutional challenges have been decided by a range of different courts. The key constitutional challenges to date consist of a decision by the Greek Council of State (the highest administrative court) in 2012[32] and a decision with a different outcome and reasoning by the Greek Court of

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salaries, judges' salaries); Decision 873/2010 (constitutionality of cuts to judicial pensions): see V. Viţă, http://eurocrisislaw.eui.eu/romania/

[27] Judgment 396/2011, 21 September 2011 (Budget Law 2011: public sector pay-cuts).

[28] Portuguese Constitutional Court: Judgment 353/2012, 5 July 2012 (Budget Law 2012: suspension of 13th and 14th month of salary for public sector workers).

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

[30] 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).

[31] 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 in C. Kilpatrick/B. de Witte (eds)…

[32] 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.

Auditors.[33] 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.[34]

A constitutional text providing a basis for a challenge to social bailout measures is evidently a necessary but not a sufficient condition for such challenges to occur. But nor does the existence of constitutional judgments on social aspects of the bailouts necessarily point to civil society mobilisation. In fact, in all these states other than Greece,[35] 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.

C. Constitutional social rights scholarship

Much constitutional social scholarship focuses on making or countering objections concerning enforcement by constitutional courts of constitutionally protected social and economic rights. 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 legislature[36] 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.[37] A key purchase of the comparative constitutional social literature for our inquiry is its focus on whether and how courts invite constitutional and political controversy when they accept constitutional challenges to social rights and when and how they can take steps to diminish such controversy. This is an issue we return to below when we look at the inter-institutional dimension of controversial constitutional court decisions. For now, I point to three ways in which focusing on constitutional courts in times of social crisis differs from constitutional social rights scholarship.

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[33] 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' in Kilpatrick/De Witte (eds) forthcoming *European Journal of Social Law*.

[34] A. Marketou/M. Dekastros http://eurocrisislaw.eui.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.

[35] However, 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 Naţional al Poliţiştilor*, Order of 14 December 2011; C-134/12 *Corpul Naţional al Poliţiştilor*, Order of 10 May 2012; C-462/11 *Cozman*, Order of 14 December 2012. Portugal and Court of Justice: C-127/12 *Sindicato dos Bancários do Norte*, Order of 7 March 2013; C-264/12, *Sindacato 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 Nos 62235/12 and 57725/12 *Da Conceicão Mateus and Santos Januário v Portugal*, Judgment (2nd section), 8 October 2013.

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

[37] 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.

There is little focus in this literature on European countries other than (occasionally) Germany and most focus is placed on the Commonwealth, America and Africa, especially the interesting case of the South African Constitution. Secondly, most constitutional social scholarship focuses on rights to housing, health, food, education and social assistance.[38] Yet, as noted earlier, a fuller and broader definition of the social to encompass work-related rights and entitlements as well as rights to health, housing, education and income support is necessary to fully cover the range of potential constitutional challenges in response to sovereign debt loan conditionality. There is a final adjustment our area of inquiry makes to constitutional social scholarship. The focus there is on social rights in constitutions rather than the broader canvas opened by asking how changes to social rights are constitutionally challenged and which constitutional arguments are successful before constitutional courts. That is to say, challenges to changes to social rights may be made using constitutionally protected social rights but also using other not specifically social constitutional provisions. Yet both these issues, and indeed their interaction, require close attention if we are to make sense of constitutions and social rights in times of European crisis.

D. Constitutional reasoning on challenges to social rights in times of economic crisis

The Focus of Constitutional Challenges

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 almost always for 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, reductions of subsidies, caps, freezes, in new calculation formulae or as the imposition of contributions or taxation on income, they all share the common feature of reductions (real or nominal) in the monetary amount previously received. This is a crisis constitutional jurisprudence of cuts.

This is noteworthy given that, as outlined in the introduction, the social loan conditions covered a much broader range of constitutionally relevant issues. These include interferences with housing, 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 that we find a broader set of *national constitutional* challenges concerning changes to employment protection.[39]

The Basis of Constitutional Challenges

The constitutional basis for challenges to cuts differed on a broad East-West axis. Eastern challenges were brought on distinctive constitutional social provisions; Western challenges were not. Hence, in Latvia and Romania challenges to pension and benefit cuts were brought

[38] Young above; H. Alviar García, K. Klare and L. Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2014); check Cecile Fabre chapter in de B/de W and her book. Tushnet instead investigates primarily the implications of doctrines on the application of constitutional rights between private parties for social and economic rights.

[39] Judgment 474/2013; 602/2013 and 794/2013 all above at n.XX.

under the constitutional guarantee to social security.[40] Challenges to pay cuts, brought in Romania and 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 the same constitutional basis 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 burdens[41] (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 principle of equality in Article 13(1): 'All citizens possess the same social dignity and are equal before the law'.

The Structure of Constitutional Reasoning

A first point to emphasise is that there are real differences in approach between different courts in relating the economic crisis with fundamental rights. Relatedly, a second is that the specific structure of the constitutional inquiries, although all are broadly based on a proportionality analysis, makes a difference. A third area of inquiry is whether the broad 'social' thrust of each constitutional text, discussed above, affected the intensity and scope of constitutional review of changes to social rights even when the constitutional reasoning was not expressly based on social rights but on broader constitutional principles.

The Portuguese Constitutional Court's reasoning takes a specific position on how fundamental rights apply in times of economic 'emergency'. In summary, the Court finds 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. Applying Article 13(1) of the Portuguese Constitution, the Constitutional Court developed a cuts jurisprudence which required that the burden of austerity adjustment should not be disproportionately placed on particular groups such as public sector workers, or benefit recipients. The duration and scale of measures were important factors in assessing proportionality.

This can be compared with how other courts and supervisory bodies reasoned on the co-existence of fundamental rights in the bailouts.[42] This is an important and productive line of research and analysis raised by social rights in times of crisis. Compare this reasoning for instance to that 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. It concerned pay and

[40] 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.'

[41] 'Greek citizens contribute without distinction to public charges in proportion to their means'.

[42] We can see different constructions again of how to accommodate crisis and social rights in the many decisions of the European Committee of Social Rights and other fundamental rights' institutions. So the ECSR has stressed that the 'economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter' and that 'governments should take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when citizens need it most'.

pension cuts and the right to protection of property. These courts reasoned that the 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.

We can see very different starting points in these Portuguese and Greek examples: the latter placing much more emphasis on exceptional fundamental rights protection in extreme situations, with the assumption that responding to the economic emergency defines the public interest; the former placing constitutional commitments in a more central position and using them to develop more extensive guarantees of review of the distribution of the burdens of adjustments.

The Latvian and Romanian Constitutional Courts required bailout measures to be evaluated within existing parameters of constitutional reasoning. Hence, for the Latvian Constitutional Court, there was no question of accepting the Government's argument that international loan obligations *per se* justified exemption from constitutional review or restrictions of fundamental rights or automatically meant that such measures fulfilled any particular stage in the proportionality analysis. The legislature was obliged to respect constitutionally protected fundamental rights independently of the economic situation of the country.

The Romanian Constitutional Court evaluated challenged measures according to its constitutional text whereby certain constitutional guarantees can be subject to public interest restrictions and others cannot. In fact, this is the pivot on which constitutionality of the Romanian measures turned. Pay cuts, including judicial pay cuts, were constitutional because they were subject to the public interest provision in the Romanian Constitution.[43] 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. Where the public interest provision applied, however, it provided an easy path towards constitutionality. The Court found that the reference to national security 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:

..the Court finds that there is a 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

[43] 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.

discrimination, in the sense that the 25% cut applies to all categories of public sector staff in the same amount and method.[44]

The Latvian Constitutional Court scrupulously followed the same reasoning path in each of its judgments. As each of these measures interfered with social constitutional rights they therefore had to be subjected 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 was temporary, the benefit gained by society from the contested norm outweighed the infringement of rights of those affected.

If we return to the harsh criticism of the Portuguese Constitutional Court's reasoning, we are now in a position to consider the first two charges. The unfairness charge is directed at the Court using the equality principle in the constitution to evaluate the burden placed on those affected by the contested measures. The charge of unpredictability concerns instead the incoherence of its reasoning which has the particular vice of leaving the government unable to plan constitutionally compliant measures. This comparative analysis suggests such critiques need to be substantially modulated. The Portuguese Constitutional Court, in using equality, equal burdens, non-discrimination, legitimate expectations and proportionality to evaluate cuts shares much with the reasoning of the other constitutional courts faced with challenges to similar measures. At the very least, the other constitutional courts could be subject to similar criticism. The blunt distinction made by the Romanian Constitutional Court between pay and pensions can certainly be questioned. 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. This is not to say that the Portuguese Constitutional Court's reasoning is beyond reproach or critique. It is to argue that it is certainly not the judicial monster with outrageous reasoning that much of the commentary suggests.

Constitutional judicial dialogue and borrowings in the crisis

[44] Judgment 872/2010, MONITORUL OFICIAL AL ROMÂNIEI, PARTEA I, Nr. 433/28.VI.2010 at p. 12.

On the one hand, constitutional analysis of social rights in times of European crisis shows 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. [45] In order to underline this idea, the Court looked at '*some considerations made by other Constitutional Courts with regard to the right to pension.'* In particular it drew on the Latvian Constitutional Court judgments on constitutional guarantees of pension rights in the context of the Latvian bailout which it had access to via the Venice Commission of the Council of Europe (ie its advisory body on constitutional matters). What is interesting is how exceptional this recourse by the Romanian Constitutional Court to comparative constitutional law was: out of around 11,000 decisions issued by the Romanian Constitutional Court from 1992 only 10 have referred to foreign jurisprudence. Two of these ten judgments concern euro-crisis law. This makes it an interesting example of new kinds of transnational judicial communications provoked by the bailouts. It is also noteworthy that in both these cases the Romanian Constitutional Court's comparative constitutional interpretation came *only* from Central and eastern European EU Member States: a 1995 Hungarian decision, a number of social rights in bailout decisions of the Latvian Constitutional Court and decisions of the Czech and Lithuanian Constitutional Courts. 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 mark 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 the constitutional review courts (bar Portugal?) draw extensively on the ECHR and Strasbourg Court jurisprudence. None draws on ILO or European Social Charter text or supervisory bodies findings.

E. <u>The inter-institutional dimension: courts, legislatures and executives</u>

A key purchase of the comparative constitutional social literature for our inquiry is its focus on 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. Yet even here there is an interesting and additional EU dimension as the political 'backlash' or response came not just from national legislatures or executives but from the EU legislature and its institutions. I focus primarily on the example of Portugal which provides the most extensive and articulated example of a range of responses. I indicate primary sources illustrating responses from the media, the EU legislature, the EU institutions and the IMF, the national government as well as from the Constitutional Court itself.

The Portuguese Constitutional Court's judgments have attracted exceptional media coverage and analysis. It has regularly featured in the *Financial Times* and other international news

[45] Insert other example. See above for further discussion. CHECK 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).

outlets over the last 2 years. One FT 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.

A second 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'.[46] Hence, national constitutional court decisions on fundamental constitutional principles have explicitly become for the EU legislature 'legal risks' to be managed.

The Portuguese Constitutional Court decision of 30 May 2014 provoked a series of institutional and political communications and consequences. The most important consequence was the Portuguese's 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.[47]

A 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.[48] Yet the Constitutional Court in a subsequent strongly worded statement rejected the Government's

[46] Council Implementing Decision 2013/323/EU of 21June 2013 amending Implementing Decision 2011/344/EU on granting Union financial assistance to Portugal [2013] OJ 175/47.
[47] 12 June 2014 - Statement by the European Commission, ECB, and IMF on Portugal.
[48] Portuguese News Agency, 19 June 2014.

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.

Recounting this notable inter-institutional episode may seem to give considerable force to the third charge – of illegitimacy or judicial activism or juristocracy – levelled against the Portuguese Constitutional Court. Yet other elements must be considered and evaluated before any assessment can be made.

One is that 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 which made 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.[49] We see such actions having also been taken by the Latvian Constitutional Court.[50]

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.

A final element is that inter-institutional relations can also usefully be traced inside the constitutional courts themselves, via qualitative and quantitative analysis of the evolution of dissent within the court across the arc of euro-crisis challenges or across different issues.[51]

F. EU primacy claims, the loan conditions and national constitutional review courts

Given that the loan conditions emanated from the EU,[52] an important question is raised as to how these national constitutional decisions mesh with EU law. Assume for now that the loan conditions are straightforwardly EU law, bracketing doubts which exist on this issue.[53]

[49] Judgment 353/2012, para 6.

[50] 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.

[51] See for eg what is described as the 'historical dissent' of Judge Maria Lúcia Amaral in Judgment 413/2014; discussion and further references in Jorge Silva Sampaio/Filipe Brito Bastos/Afonso Chuva Brás, 'New Challenges to Democracy: The Portuguese Case' forthcoming *European Public Law*.

[52] The cases of Greece and Cyprus is 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 I do not explore further here. For more extensive discussion see C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because they are not EU Law?' forthcoming *EUConst*.

[53] See again C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because they are not EU Law?' forthcoming *EUConst*.

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, 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'.[54] Central for fundamental rights or constitutional principles is *Internationale Handelsgesellschaft*[55] 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 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.[56]

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.[57] It is well-known that many, indeed most, national constitutional systems do not accept the Court of Justice's asserted monopoly on 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.* While this

[54] *Law and Integration in the European Union* (OUP, 1995) 136.
[55] Case 11/70, [1970] ECR 1125.
[56] Case 314/85 *Fotofrost* [1987] ECR 4199.
[57] 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.

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 then they are unlikely to recognize that EU law might simply prevail over the very foundation from which its legal force derives'.[58] Constitutional courts have often though not always 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 constitutional dialogue, co-operation or conflict.

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.[59] 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. 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.[60]

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

[58] Ibid at 352.
[59] 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.
[60] This second is a very recent development and its scope and ramifications are not as yet entirely clear.

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. 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,[61] or as part of the constitutional duty to participate in EU integration,[62] 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.

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 rarely and barely articulated in legal challenges as either an implementation of EU law or as acts of EU institutions. Either explicitly, as in the case of Latvia[63], or implicitly and partially, as in the cases of Portugal and Romania,[64] 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.[65] Yet there are

[61] This was a feature of some of the dissenting judgments in the Portuguese Constitutional Court. See eg Judge Lúcia Amaral's dissent in Decision 353/2012 stating that the challenged measures have also to be seen through the lens of European and international co-operation 'towards the financial and economic stability…of the eurozone'.

[62] 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'. My thanks to Filipe Brito Bastos for information about Portugal on this issue.

[63] See Latvian judgment 2009-43 (finding 10% and 70% pension cuts unconstitutional) which notes the MoU of 13 July 2009 contains 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'.

[64] Insert quote for Portugal; Check Romania.

[65] For other reasons, see C. Kilpatrick, 'On the Rule of Law and Economic Emergency: the Degradation of Basic Legal Values in Europe's Bailouts' forthcoming *Oxford Journal Legal Studies*.

overwhelming arguments in the case of the bailout sources applied to Latvia, Romania and Portugal that the loan conditions were contained in EU sources.[66] 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.[67]

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 rights and principles in the Portuguese Constitution.[68] 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 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 four 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.

[66] See C. Kilpatrick , *EUConst*, for further analysis. The situation in relation to Greece is more complex.

[67] There are reasons to doubt such an explanation, at least in relation to the Portuguese Constitutional Court where two of the Constitutional Court's Judges are also EU legal academics and the President of the Constitutional Court until late 2012, Rui Moura Ramos, was a judge of the CFI from 1995 to 2003. Thanks to Filipe Brito Bastos for this information.

[68] 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).