NOTA

EU LAW AND THE JURISPRUDENCE OF CONSTITUTIONAL CRISIS[1]

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In a conference devoted in general to the role and future of national constitutions in Europe, I focus my attention on the particular aspect of the role of national constitutions and their principles in the context of the euro-crisis, of the European Union in times of crisis.

What is the role and the future of national constitutions in such a context, in the current multifaceted European crisis which is at the same time an economic, a financial, a fiscal, a political crisis?

To answer, one must first of all acknowledge that the constitutional nature and the constitutional balance of the EU has surely changed in the last years. A new reinforced model of economic policy coordination was built with instruments such as the European Stability Mechanism, the Fiscal Compact treaty, the Six Pack regulations, the Two Pack regulations. This envisages a far greater supranational institutional involvement than before (compared to the old model of the Stability and Growth Pact). Strengthened rules and duties are set to make EU Member States achieve three main objectives: secure a balanced budget; avoid an excessive deficit government deficit; correct macro-economic imbalances. The renewed complex system involves stable impacts on the constitutional fabric of Member States – e.g. the compulsory inclusion of balanced budget rules in national constitutional texts – and also leads to possible ongoing impacts on budgetary national decisions (in a preventive or a corrective phase) and therefore on core political choices of constitutional significance.

The renewed system is criticized by many. For someone, the degree of solidarity and mutualization is unsatisfactory, because it is too low. But someone criticizes the renewed system also for the opposite reason, or in any case because of the profound social impact is having for the correction of economic balances.

For many of the critics, national constitutional charts can and should perform as limits of such a new system of political economic coordination.

And in this respect, we have a first, general meaning of what I meant in the title as "jurisprudence of constitutional crisis": we have a series of strong anti-crisis measures, which represent also a system of wealth redistribution, but no veritable arena of political contestation of those; therefore, a new dynamic of judicialization arises, with a growing involvement of national constitutional courts dealing with claims of unconstitutionality of those measures.

But there is also a more specific sense in which we can speak today of a "jurisprudence of constitutional crisis".

1. Resumen de la ponencia "EU law and the jurisprudence of constitutional crisis" en la jornada "El rol y el futuro de las constituciones nacionales en Europa" celebrado el en Zaragoza el día 8 de junio de 2016 coorganizada por la Fundación Manuel Giménez Abad y la Fundación Konrad Adenauer.

A first trend in post-crisis comparative legal studies has focused on highlighting the growing trend of judicial adjudication based on social rights by national constitutional courts, regarding austerity measures.

But it is possible to go more in depth in such a comparative study, and it is interesting to focus on the legal reasoning of the debtors countries' constitutional courts, in their recent case law, in search of similarities.

And in this respect, we see a trend in shaping judicial adjudication on austerity measures in a common way. Almost all debtors countries' constitutional courts tend to acknowledge that austerity measures in principle restrict constitutionally protected rights, especially social rights; that these rights are not, however, absolute; and that restrictions may be acceptable, in times of crisis, subject to two main conditions: they must be transitory, and they must be proportional. Proportionality is, in turn, assessed by national constitutional courts as part of the principles of legal certainty (including legitimate expectations of the plaintiffs) and equality.

This is a rather traditional way of reasoning. What is new is the role, in such classic proportionality tests, of supranational obligations stemming from European anti-crisis measures (European Stability Mechanism, the Fiscal Compact treaty, the Six Pack regulations, the Two Pack regulations, Memoranda of Understanding). National constitutional courts often argue that, for the austerity measure to be found proportional, it must first of all pursue a legitimate public interest: and in this respect, they often refer explicitly to international and EU legal obligations of the States to acknowledge that, in principle, the economic and financial situation of their own countries requires exceptional austerity measures. But the recognition in such a way of a public interest do not amount to grant the legislator broad discretion with respect to the measures to be adopted. Much to the contrary. In several contexts, as the case law progressed, the local constitutional courts became more and more ready to get deeply involved in defining the type of austerity measures acceptable to the extent of, arguably, directing the legislature towards revenue measures.

There are some problems, I argue, with such a common approach.

First of all, there is a classic problem of legitimacy in adjudicating social rights against the political discretion of the legislator, also in terms of institutional expertise and legal certainty.

Secondly, specifically, there is a problem when courts argue in terms of presence or absence of a transitory nature of austerity measure at stake to find it proportional. In the new European political economic coordination system, also in the ordinary context of the European Semester mechanism, do we really think that we are facing transitory measures, or are we in a "normal" situation with potentially stable impacts (even though in a different normality than in the past)?

Thirdly, there is a problem of removal, in legal interpretative terms, of the important interplay between national and supranational sources. Supranational legal obligations become a building block of national constitutional courts' proportionality tests; still, in this way, every EU law–related obligation of the state is interpreted as a broad objective, with no enforceable legal value even when it is specific and actually leaves no real discretion to the implementing authorities. Moreover, once such a legal value is denied, constitutional courts implement a sort of autarchist interpretation of their own constitutional principles, without any cooperation or dialogue with the European Court of Justice (which would be competent at least in some instances, when national obligations directly stem from EU law measures) and with other national judiciaries

that face similar controversies. In this sense, the European constitutional space and the uniform application of EU law principles and rules are put in crisis.

Finally, there is a critical paradox. With such a kind of adjudication, debtors countries' constitutional courts are dictating a strong conditionality for the functioning of European financial assistance programmes. They acknowledge Member States' obligations on budget targets, but do not acknowledge obligations on how to reach those targets: actually, they are saying that national political measures will be subject to a case-by-case analysis based on pure national/autarchist constitutional principles, with no possibility of harmonization of those. The problem is that if one looks at the creditors countries' constitutional jurisprudence – for instance by the German Constitutional Tribunal or the Estonian Supreme Court on the legitimacy of the subscription of ESM capital stock – a specular kind of conditionality is applied. Financial assistance by creditors countries is not assured, but subject, again, to a case-by-case judicial inspection based purely on national constitutional principles. Therefore, there is a clear, existential incoherence between debtors and creditors countries' constitutional jurisprudences. In this sense, we have a jurisprudence of constitutional crisis by both debtors and creditors countries: this can put in crisis the whole construction of financial assistance mechanisms, and the actual form of our imperfect but important system of anti-crisis financial stabilization and wealth redistribution. ■