DO CONSTITUTIONAL COURTS CARE ABOUT PARLIAMENTS IN THE EURO-CRISIS? ON THE PRECEDENCE OF THE "CONSTITUTIONAL IDENTITY REVIEW"

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Abstract

The article assesses how and to what extent Constitutional Courts dealing with Euro-crisis measures protect or limit parliamentary powers through their case law. The article argues that constitutional case law regarding the Euro-crisis measures permit national constitutional identities to emerge in a more explicit way than in the past. In this respect, Constitutional Courts' judgments are concerned with parliamentary prerogatives as long as the safeguard and enhancement of the democratic principle is considered part of the national constitutional identity and can prevail, in the specific case in question, over other supreme principles. In particular, two relevant elements may be identified. First, the case law of Constitutional Courts regarding Euro-crisis measures can be viewed on a continuum with past judgments, although the Euro-crisis law appears to have "forced" some Courts to elaborate more in their reasoning on the core and non-negotiable principles on which national Constitutions are based. Second, such an exercise in the constitutional reasoning has been triggered particularly by those Euro-crisis measures which are international and intergovernmental in nature and which have been adopted in the framework of financial assistance programmes. In conclusion, the protection of Parliaments through constitutional adjudication during the crisis is instrumental and is achieved only where it is so requested to preserve the constitutional identity.

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1. Introduction: The context in which constitutional review takes place

According to most commentators, Euro-crisis measures have deeply affected the relative stability of national constitutional orders. In particular, the Eurozone crisis has been accused of impairing the institutional balance, at both European and national levels[1], of strengthening irremediably the role of courts in the Member States[2], of triggering the marginalization of parliaments[3], of letting technocrats prevail over politics[4], and of overturning the principle of the rule of law[5] and the protection of rights[6].

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[1] M. Dawson & F. De Witte, *Constitutional Balance in the EU after the Euro-Crisis*, 76 Moder L.R. 5 (2013), at 817 and E. Chiti & P.G. Teixeira, *The constitutional implications of the European responses to the financial and public debt crisis*, 50 Comm. Mkt. L.R. 3 (2013), at 683.

[2] M. Everson & C. Joerges, *Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?*, 63 LSE 'Europe in Question' Discussion Paper Series 1(2013), 23, http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper63.pdf. and F. Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, 32 (1) Berkley J. Int'L., 64 (2014).

[3] B. Crum, *Saving the Euro at the Cost of Democracy?*, 51 J. Comm. Mkt. Studies 4 (2013), at 614; K. Tuori & K. Tuori, *The Eurozone Crisis. A Constitutional Analysis* (2014), 195.

[4] P.L. Lindseth, *Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration*, 15 Ger. L.J. 4 (2014), 529.

[5] C. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, 35 Oxf. J. Leg. Stud. 2 (2015), at 325.

[6] B. De Witte & C. Kilpatrick (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, EUI Working Papers, LAW 2014/05; A. Poulou, *Austerity and European Social Rights: How Can Courts Protect Europe's*

In particular, two of these trends, namely the increasing role of courts and the threat to the powers of national parliaments, both considered to be consequences of the Euro-crisis measures, represent the focus of this article. Indeed, existing literature has thus far entirely failed to draw a connection between these two trends and to analyse them from a comparative perspective. Rather, the attention has been focused almost exclusively on the case law of the German Constitutional Court dealing with the *Bundestag*. Why has the prominent role played by this German Court been accompanied by growing levels of judicial protection provided to the national parliament, while such a relationship cannot be detected in most Eurozone countries having a Constitutional Court?

There are several reasons why this has happened. These include procedural reasons, such as the easier access to constitutional review in Germany compared with other States and, more precisely, the loose check on the admissibility requirements carried out by the German Constitutional Court on individual constitutional complaints[7], and reasons linked to Germany's relative financial and economic stability during the crisis, which did not lead to a potential clash between the protection of the democratic principle and other competing supreme principles of the Basic Law, such as dignity. The most significant explanation underlying the varying attitudes demonstrated by Constitutional Courts towards Parliaments during the Euro-crisis appears to be based on what can be referred to as the substance of the national constitutional identity, constituted by legal principles and values that shape the very nature of the national Constitutions and whose violation connotes an attempt to overturn the Constitution itself[8]. Such constitutional identity is often based on the content of eternity clauses entrenched in rigid Constitutions. By means of constitutional review of legislation, Courts remain the ultimate interpreters of those clauses and sometimes identify new principles or values as constitutionally 'untouchable' in a given polity.

Lost Generation?, 15 Ger. L.J. 6 (2014), at 1145 and C. Kilpatrick, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, 10 EuConst 3 (2014), at 393.

[7] P. Faraguna, *Il Bundesverfassungsgericht e l'Unione Europea, tra principio di apertura e controlimiti*, DPCE 2 (2016), at 438.

[8] G. J. Jacobsohn, *Constitutional Identity* (2010), 271-322.

In Germany the protection of the democratic principle, through the Parliament, forms part of the national constitutional identity, according to the federal Constitutional Court and based on Art. 79.3 and 20.2 GG; the Euro-crisis constitutional case law in other Member States, by contrast, does not confer the same value as German constitutional law does on the Parliament as guarantor of citizens' rights of participation in political decisions. Rather, in light of the relevant national political and economic context, other principles and values are deemed to be superior to democratic and representative principles. For example, the values given preeminence by Constitutional Courts dealing with Euro-crisis law include the principle of sincerity in France, the principle of equality and the right to defence and to an independent judge in Italy, the principle of proportional equality in Portugal, and the principle of a balanced budget in Spain. Thus, the powers of Parliaments in the current crisis are protected through constitutional review in the case law regarding Euro-crisis measures only if and insofar as their safeguard, as in Germany, is considered to be instrumental to preserving the substance of the constitutional identity vis-à-vis other competing though unequally important legal values. This means that, in different circumstances, beyond the scope of the crisis, the judicial balancing between the democratic principle and other concurrent supreme principles shaping the German constitutional identity could permit a different principle to prevail.

When giving substance to the national constitutional identity, often Constitutional Courts do not explicitly establish a direct link between certain principles and such an identity. In other words, even if they carry out a review of the constitutional identity, Courts do not state this clearly. Hence it is for scholars to detect such trends and the more or less implicit acknowledgment of the substance of the constitutional identity. From this viewpoint, given the challenge they have posed to the stability and effectiveness of national constitutional systems, the Euro-crisis measures – which represent a mix of international, European and national measures adopted in response to the Eurozone crisis – have compelled Constitutional Courts to make a more systematic use of the core principles of the Constitution. The Courts have done this in order to defend these fundamental principles from the 'attack' of the Euro-crisis law, just as they have done during other crises, like the European migration crisis: the higher the rate of constitutional

conflict, the more likely it becomes that the Courts will resort to reference to the supreme principles and to identity such arguments in their constitutional adjudication[9]. Although they were also present in constitutional case law prior to the crisis, the volume and intensity of references to constitutional principles defining the national constitutional identity has increased in constitutional judgments dealing with Euro-crisis measures. This article maintains that the democratic principle and the protection of Parliaments are not primary concerns for most Constitutional Courts when it comes to preserving the constitutional identity of their Member State against Euro-crisis measures.

This article is structured as follows. Section 2 considers to what extent the protection of parliamentary powers had been considered inherent to the constitutional identities of Member States before the Euro-crisis erupted, and the role the EU has usually played in triggering the identification of supreme constitutional principles by Constitutional Courts. Section 3 analyses which place, if any, Parliaments occupy in the constitutional identity review during the Euro-crisis. Section 4 critically assesses the treatment afforded to Parliaments in the constitutional case law dealing with Euro-crisis measures. Finally, Section 5 concludes that while the Eurozone crisis has pushed Constitutional Courts to complete an explicit or implicit identity review, in particular in relation to the most controversial Euro-crisis measures, this has not been accompanied by an increasing judicial protection of parliamentary prerogatives.

2. The construction of constitutional identities through case law: The role of the EU (before the Euro-crisis)

Constitutional Courts are established *ad hoc* to ensure the correct enforcement of a Constitution as their primary task, by contrast, for instance, with Supreme Courts that perform this role only incidentally[10]. It follows that Constitutional Courts are

[9] See, for example, the controversial judgment of the Constitutional Court of Hungary 22/2016 (XII. 5.) AB and the case-note by G. Halmai, *The Hungarian Constitutional Court and Constitutional Identity*, VerfBlog, 10 January 2017, https://verfassungsblog.de/.

[10] See V. Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (2009), at 36-70. J. Komárek, *National constitutional courts in the*

particularly sensitive to cases of potential encroachment on the national constitutional identity. By constitutional identity here we mean the untouchable core of a Constitution grounded in unamendable constitutional clauses, according to explicit limits set by constitutional provisions, in the Preamble and in the introductory title of the fundamental law, and very often further defined and reinterpreted by Constitutional Courts, as implicit limits[11].

The list of exemptions from constitutional revisions may be longer or shorter depending on the particular Constitution. Often the explicit limits to constitutional amendments are vague in their formulation and are present in most – though not all – European Constitutions, such as the reference to the form of the State, e.g. the Republic in France, Italy and Portugal (arts. 89 Fr. Const., 139 It. Const., 288 Pt. Const.), or the unity and the indivisibility of the State (France, Italy, and Portugal, for example). Constitutional Courts, however, reserve for themselves the power to orient and shape the substance of these limits, sometimes in an unexpected way when considering the plain words of constitutional texts. For instance, the Portuguese Constitution includes a long list of limitations imposed on constitutional amendments (art. 288 Pt. Const.), which has undoubtedly influenced the more or less explicit identification of supreme principles of the constitutional system as part of the national constitutional identity. For our purpose, the case of the rights of workers as an express restriction to constitutional revision (lit. e) is particularly significant to the relationship with the (supreme) principle of proportional equality that has been applied in many decisions of the Portuguese Constitutional Court on the Euro-crisis law, without often paying much attention to the effects of this case law on the role of the parliament in the constitutional system.

European Constitutional Democracy, 12(3) ICON 1474 (2014) insists that the special position that national Constitutional Court have in the EU and in the Member States should be preserved.

[11] See C. Grewe, *Methods of Identification of National Constitutional Identity*, in A. Saiz Arnaiz, C. Alcoberro Llivina, *National Constitutional identity and European Integration* (2013), at 37–48. On the specific point of the substantive limits to constitutional amendments and the role of Courts, see G. Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 Constellations 2 (2012), 182 and Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (2017), Parts I and III.

In the legal systems of the EU Member States, the identification of national constitutional identities is also triggered by EU law[12]. Particularly where a national Constitution, like in Spain, is devoid of an eternity clause and hence of unamendable constitutional provisions, the participation of the State in the European integration process prompts the Constitutional Court of that country to set limits on what can be achieved through integration in order to comply with the Constitution. The identification of constitutional limits to European integration as a way of shaping the national constitutional identity has also occurred in Member States with textual limits to constitutional amendments, but is particularly significant where such literal boundaries are lacking. Being a potential threat to the endurance of a Constitution that only recognises procedural limits to its modification – like arts. 167 and 168 of the Spanish Constitution – [13], the EU prompts the guarantor of the correct application of the fundamental law, that is, the Constitutional Court, to identify additional substantial constitutional constraints to the deepening of the European integration[14]. Indeed, on the occasion of the *ex ante* review of constitutionality of the Treaty establishing a Constitution for Europe in 2004, the Spanish Constitutional Court admitted that:

> 'These material limits, which are not expressly included in the constitutional provision (Article 93), but which implicitly derive from the Constitution and from the essential meaning of the precept itself, are understood as *respect for the sovereignty of the State, our basic constitutional structures and the system of fundamental principles and values established in our Constitution, in which fundamental*

[12] See B. Guastaferro, *Beyond the Exceptionalism of Constitutional Conflicts: The ordinary Functions of the Identity Clause*, 31 Yearbook of Eur. L. (2012), at 236; F.-X. Millet, *L'union européenne et l'identité constitutionnelle des états membres* (2013); P. Faraguna, *Ai confini della Costituzione. Principi supremi e identità costituzionale* (2015), at 171-178 and J. Sterck, *Sameness and selfhood: The efficiency of constitutional identities in EU law*, early view Eur. L.J. 1 (2018).

[13] See L. Álvarez Álvarez, *La lealtad constitucional en la Constitución española de 1978* (2008).

[14] M. Dani, *National Constitutional Courts in supranational litigation: a contextual analysis,* 23 Eur. L.J. 3-4 (2017), at 189.

rights acquire their own substantive nature (Article 10.1 CE)[emphasis added] [15].'

The gaps identified in the vague formulation of Article 4.2 TEU, which describes national identities as inherent in Member States' 'fundamental structures, political and constitutional, inclusive of regional and local self-government,' are then filled in by national constitutional provisions and case law[16]. Even before this clause was inserted into the European Treaties, Constitutional Courts in some Member States had taken the opportunity to point to the 'essential elements' of their Constitutions that could not be encroached upon by their participation in the European integration process. To some extent, the European Community/Union has had a maieutic effect on these Courts. It has forced them to elicit "counter-limits" against the expansion of the European range of action by elaborating on national constitutional texts to identify the non-amendable core of a Constitution[17]. For instance, despite the fact that the only explicit limit to constitutional amendments under the Italian Constitution is the republican form of the State (Art. 139 It. Const.), when dealing with the then European Community law, the Italian Constitutional Court spelled out the existence of supreme principles of the constitutional legal system, that is, fundamental principles of the Constitution and inviolable rights of the person that were to prevail over the founding Treaty of the European Economic Community (TEC) and on the measures advanced by its institutions[18]. In a judgment dealing with the

[15] Declaración 1/2004, § 2. On this point see A. Saiz Arnaiz, *Identité nationale et droit de l'Union Européenne dans la jurisprudence constitutionnelle espagnole*, in L. Burgorgue-Larsen (ed), *L'identité constitutionnelle saisie par le juges en Europe* (2011), 101–131, and P. Pérez Tremps, *National Identity in Spanish Constitutional Case Law*, in A Saiz Arnaiz & C Alcoberro LLivina (eds.), cit. at 11, at 270.

[16] As pointed out by B. Guastaferro, *Beyond the Exceptionalism of Constitutional Conflicts*, cit. at 12, 263-318 and E. Cloots, *National Identity in EU Law* (2015), 127-190, it can be questioned whether the area of protection covered by Art. 4.2 TEU and that is safeguarded by the Constitutional Courts' identity review really overlap.

[17] See P. Faraguna, *Taking Constitutional Identities Away from the Courts*, 41 Brook. J. Int'L. 2 (2016), at 501-508 and G. Van der Schyff, *Exploring Member State and European Union Constitutional Identity*, 22 Eur. Pub. L. 1 (2016), at 231-234.

[18] See Italian Constitutional Court, decisions no. 183/1973, § 9, of 18 December 1973; and 170/1984, § 7, of 5 June 1984. On these judgments, see in detail M. Cartabia, *The Italian Constitutional Court and the relationship between the Italian legal system and the European Union*, in A.-M. Slaughter, A. Stone Sweet, J. H. H. Weiler

constitutionality of the national law (n. 1023/1957) ratifying and executing the Rome Treaty of 1957, the Court had the opportunity to identify one of these supreme principles and to consider it in relation to Community law, although in the end it declared the case inadmissible. The referring court – the case having been brought before the Constitutional Court through the *incidentaliter* proceeding – asked whether Art. 177 TEC (by excluding the effects of a Court of Justice's preliminary ruling declaring an EC Regulation invalid on the main proceeding at the national level) violated Art. 24 It. Const., where the right to defence and judicial protection is entrenched[19]. That this right amounts to a supreme principle of the Italian Constitution has been further confirmed in the following case law of the Italian Constitutional Court, also in the field of international law[20]. Likewise the right to defence and to an independent judge, as supreme constitutional principle, has been adopted as a standard of review in the case law on the Euro-crisis measures.

In a more recent case that is still pending at the time of writing, dealing with VAT frauds affecting EU financial interests and the Italian statute of limitations, and featured as the last step in the "Taricco saga", the Italian Constitutional Court's issue of an order for a preliminary reference to the Court of Justice has cast doubt as to whether the principle of legality in criminal matters, amounting to a supreme principle of the Italian Constitution (Art. 25 It. Const.) and according to the interpretation given to this principle under Italian law, is in fact compatible with Article 325 TFEU[21]. In view of the conciliatory answer provided by the Court of Justice on 5 December 2017 (case C-42/17), it is unlikely that the

(eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal change in its social context* (1998), 133.

[19] See Italian Constitutional Court, decision n. 232/1989, § 3.2, of 13 April 1989 and the comments by M. Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, 12 Mich. J. Int'l L. 173 (1990-1991), at 173-174. See also judgment n. 18/1982.

[20] See judgment n. 238/2014 and the first effective use of the "counter-limits doctrine".

[21] Italian Constitutional Court, Order n. 24/2017 and the comments by D. Tega, *Narrowing the Dialogue: The Italian Constitutional Court and the Court of Justice on the Prosecution of VAT Frauds*, Int'l J. Const. L. Blog, 14 February 2017 and the contributions collected in A. Bernardi, C. Cupelli (eds.), *Il caso Taricco e il dialogo tra le Corti. L'ordinanza 24/2017 della Corte costituzionale* (2017).

Italian Constitutional Court will use the constitutional identity review - "counter-limit doctrine" against EU law in its final decision.

In Germany, the EU has also triggered the definition by the *Bundesverfassungsgericht* of the national constitutional identity. This process started with the *Solange* saga and it ended with the protection of the democratic principle and democratic representation in EU affairs through the *Bundestag*[22]. In the Court's ruling on the Treaty of Maastricht, the *Bundesverfassungsgericht* had already outlined the features of the *ultra vires* review of EU acts that transgressed the boundaries of the Treaty-based competences with the effect of declaring those acts inapplicable in Germany[23]. The *ultra vires* review stood as a bulwark for the protection of the constitutional and, in particular, legislative powers of the national parliament against the EU, when the latter overstepped its jurisdiction. However, the avenues for the application of this kind of review have been restrained by the subsequent case law[24]. Moreover, in the *Maastricht decision* the German Constitutional Court emphasized the importance of the democratic principle for the overall construction of the European integration process and as a condition for Germany's participation in the EU. The *Bundesverfassungsgericht* spelled out the idea of the 'complementary' legitimacy[25] of the European Parliament vis-à-vis national parliaments with respect to the protection of democracy at national level. In other words, any withdrawal of legislative competence from the national parliament in favour of the EU must entail a transfer of power to the democratically elected institution, that is, the European Parliament, provided that it had sufficient democratic credentials in terms of representation and powers.

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[22] See German Constitutional Court, Second Senate, BVerfGE 37, 271 2 BvL 52/71 *Solange I-Beschluß*, 29 May 1974 and BVerfGE 73, 339 2 BvR 197/83 *Solange II-decision*, 22 October 1986, both cases concerning the standard of protection of fundamental rights.

[23] German Constitutional Court, Decision of 12 October1993, BVerfGE 89, § 155.

[24] German Constitutional Court, BvR 2661/06, Decision of 6 July 2010, *Honeywell case*. See C. Möllers, *German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, Honeywell*, 7 EuConst 1, (2011), at 161.

[25] J. Baquero Cruz, *The Legacy of the* Maastricht-Urteil *and the Pluralist Movement, EUI Working Paper Series,* EUI WP-RSCAS 2007/13, at 2-3.

The constitutional identity review, however, was expressly acknowledged by the German Constitutional Court only with the judgment on the Treaty of Lisbon.[26] Although it has not yet been applied, the *Bundesverfassungsgericht* has considered this particular kind of review in relation to the protection of the national parliament's powers in EU affairs in the interests of ensuring citizens' rights of participation. In the *Lisbon ruling* the Court based the constitutional identity review on art. 23.1 GG in combination with the eternity clause of the German Basic Law, Art. 79.3 GG[27]. These two provisions are indeed closely intertwined in that the former requires that the establishment of the EU as well as changes in the Treaty foundations capable of "amending or supplementing this Basic Law" are subject either to a prior constitutional amendment (Art. 79.2 GG) or to the eternity clause (Art. 79.3 GG), i.e. they are inadmissible as long as the Basic Law remains in force. The judicial protection of the *Bundestag* then is based upon a peculiar interpretation of Art. 38.1 GG on the right to vote for the *Bundestag* as a 'right to democracy'– a right that would be irremediably impaired if the powers and the autonomy of this chamber, where the people are represented, were severely limited – in conjunction with Art. 20.2 GG, which identifies the source of the state authority in the people and in the elections, and Art. 79.3 GG, which makes the democratic principle unamendable as part of the German constitutional identity. This implies that the constitutional identity review focuses, in this regard, on the ability of the national parliament to perform its representative function towards the citizens when EU decision-making is at stake[28], since, according to the Court, German citizens are not adequately represented in the European Parliament nor are they directly allowed to take decisions at the supranational level. From this viewpoint, the national parliament is worth protecting insofar as it

[26] L. FM. Besselink, *National and constitutional identity before and after Lisbon*, 36 Utrecht L.R. 6 (2010).

[27] German Constitutional Court, Second Senate, 2 BvE 2/08 - 2 BvE 5/08 - 2 BvR 1010/08 - 2 BvR 1022/08 - 2 BvR 1259/08 - 2 BvR 182/09, 30 June 2009, § 240 and 273.

[28] Also because national parliaments have obtained new powers to participate in the EU decision-making process, after the Lisbon Treaty revision: see Art. 12 TEU and protocols no. 1 and 2 to the Treaty of Lisbon.

is the only institution through which citizens, by means of their right to vote and the elections, can retain control over the EU.

Although other Constitutional Courts have also ruled on the constitutionality of the Treaty of Lisbon, before and after its ratification, a comparable argument, connecting the national constitutional identity to the parliament, has not been raised outside Germany[29]. Even where, like in France, the *Conseil Constitutionnel* ruling on the constitutionality of the Lisbon Treaty decided that a change to the Constitution was required to address the role of the national parliament in the new European procedures, there was no mention of a potential threat to the constitutional identity with regard to parliamentary powers[30]. Nor, following the Treaty revision, was the change in the powers of the national parliament, regarding its representation of French citizens in EU affairs, deemed to overcome the limits of constitutional amendability, despite the democratic principle appearing to be part of the French constitutional identity[31].

Likewise, when the Polish Constitutional Court decided on the Law of ratification of the Treaty of Lisbon, despite touching upon the role of the national parliament regarding the transfer of competences to the EU, it did not invoke the 'spectrum' of the constitutional identity review and did not identify any violation of the Constitution deriving from the new Treaty provisions. The Polish Constitutional Court held that the strengthening of parliamentary powers in EU affairs at the domestic level was a matter for the national legislature, to be achieved through the Act of Cooperation of the Council of Ministers with the *Sejm* and the Senate[32]. The constitutional identity was not invoked and the

[29] See M. Wendel, Lisbon Before the Courts: Comparative Perspectives, 7 EUConst. 1 (2011), at 93.

[30] French *Conseil constitutionnel,* Décision 2007-560 DC, however, has further developed the case law of the *Conseil constitutionnel*, e.g. Décision 70-39 DC, implicitly dealing with the French constitutional identity in relation to EU law and the potential "threat to the essential conditions for the exercise of the national sovereignty (Considérant 9)". See extensively M. Quesnel, *La protection de l'identité constitutionnelle de la France* (2015), 15 ff.

[31] See French *Conseil Constitutionnel*, Décision n. 2007-560 DC, 20 December 2007, § 28-32. See M. Quesnel, *La protection de l'identité constitutionnelle de la France*, cit. at 30, 187-188.

[32] Polish Constitutional Court, K32/09, 24 November 2010, § 4.2.14.

judgment did not link the powers of the national parliament to the untouchable core of the Polish Constitution[33].

Finally, the process of European integration and in particular the creation of the Economic and Monetary Union (EMU) has led Eurozone countries to add new fundamental principles to be balanced against more "traditional" supreme principles of national Constitutions. The Euro-crisis has further reinforced such a potential – and sometimes actual – conflict between supreme principles. The principle of sincerity of the budget, which appeared for the first time in France in the case law of the *Conseil Constitutionnel* in 2000 and was codified one year later in the *loi organique relative aux lois de finances* (LOLF), derives from the European Stability and Growth Pact of 1997 and from the obligation to maintain a reliable budget[34]. The *Conseil constitutionnel* has reviewed the principle of sincerity in relation to the parliamentary scrutiny foreseen by the law and has concluded that if the Parliament, including through its committees, is promptly informed by the government about the budgetary measures to be adopted and is able to examine them, this is a further element in favour of the sincerity of the budgetary measure at stake, which has survived the scrutiny of the elected assembly[35]. This further condition makes it particularly difficult for the *Conseil* to declare unconstitutional an act on the basis of the principle of sincerity.

More recently, for example in Italy and in Spain, the constitutionalization of the principle of a balanced budget during the Euro-crisis has prompted a sort of "competition" between the "golden rule" and other principles, like the principle of equality, when welfare cuts are imposed upon selected categories of people. Constitutional Courts have been asked to resolve this "competition" on a case by case basis, sometimes with no consistent line of reasoning produced over time. Indeed, in addition to the right to defence and judicial protection, in Italy the principle of equality has been considered by the constitutional case law and

[33] See C. Fasone & N. Lupo, *Constitutional Review and the Powers of National Parliaments in EU Affairs. Erosion or Protection?*, in D. Jancic (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (2017), 69-70.

[34] French *Conseil Constitutionnel*, décision n. 2000-441 DC and décision n. 2005-519 DC.

[35] French *Conseil Constitutionnel*, décisions n 2001-453 DC and n 2001-456 DC,

scholarship to be a supreme principle of the Italian Constitution, which thus shapes the Italian constitutional identity[36]. In Belgium, where the Constitutional Court had never carried out a constitutional identity review, a first cautious development regarding the use of the Belgian constitutional identity as a barrier to further integration has occurred, for the first time, in 2016 by means of the adjudication of the Fiscal Compact. However, as explained in the next section, this remains in very vague and generic terms.

3. The marginal place of Parliaments in the "constitutional identity review" during the Euro-crisis

The definition of the constitutional identity through case law is prompted especially in moments when the enforcement of the Constitution is under stress, due to domestic political and economic crises and even more so by virtue of external events and the legal reaction to them. Hence, in the last few years, Euro-crisis measures and particularly those having the most controversial nature – because of their form and substance – like the intergovernmental agreements negotiated outside EU law and the rescue packages, have strengthened the "maieutic" effect EU law had already prompted in triggering the identification of the supreme principles of Member States' Constitutions through the case law of Constitutional Courts, even when they do not expressly acknowledge them as constituting the national constitutional identity.

Although the protection of parliamentary powers in the Euro-crisis has been invoked via the constitutional complaints and challenges before Constitutional Courts, the argument of the safeguards to the prerogatives of parliaments has been somewhat disregarded. Even when, like in Poland and Belgium, the role of the Parliament was at the very centre of the Euro-crisis case law, this did not necessarily result in a higher level of protection for this institution.

[36] See, for example, Italian Constitutional Court, decision n. 1146/1988, § 1, and n. 15/1996, § 2. See A. Celotto, *Art. 3*, in R. Bifulco, A. Celotto & M. Olivetti (eds), *Commentario alla Costituzione* (2006), 68.

The Constitutional Court of Poland had the opportunity to intervene in support of the Parliament twice, but it chose either to dismiss the case or to resolve it on other grounds. In a first case, a parliamentary minority challenged *ex post* the compliance of the Act ratifying art. 136 TFEU amendment – based on Decision 2011/199/EU – with art. 48.6 TEU, establishing a simplified Treaty revision procedure, and art. 90 of the Polish Constitution, in view of the national procedure followed in spite of the content of the Treaty amendment. In particular, the parliamentary opposition contended that the Treaty amendment had extended the EU's competences and especially the jurisdiction of the Court of Justice and the Court of Auditors in breach of art. 48.6 TEU. Moreover, according to the parliamentary minority, the role of the Parliament in the ratification procedure had been undermined. Given the alleged extension of the EU's competences, the ratification of this conferral of competence beyond the State authorities required authorisation pursuant to art. 90 of the Polish Constitution, i.e. the Ratification Act must be approved in each Chamber by two thirds majority or by a national referendum, and not by simple majority in both Chambers in compliance with art. 89 Const., as in fact occurred[37]. The Constitutional Court, however, did not address the question at all, since it held that "the addition of Paragraph 3 to Article 136 of the TFEU did not confer any new competences on the Union" and also relied on the *Pringle* case law of the Court of Justice to support this statement[38].

In a second case, when it was asked to review the constitutionality of the Fiscal Compact, although Poland was only bound by Title V of the treaty being outside the Eurozone, the Constitutional Court dismissed the case on procedural grounds despite having the opportunity to address the problem of the Parliament's constrained budgetary autonomy[39]. Most claims of

[37] K. Granat, *Approval of Article 136 TFEU Amendment in Poland: The Perspective of the Constitutional Court on Eurozone Crisis Law*, 21 Eur. Pub. L. 1 (2015), at 33.

[38] The case of the Polish Constitutional Court is K 33/12 of 26 June 2013, § 7.4.1. The *Pringle* case, C-370/12, of the Court of Justice, was decided on 27 November 2012 and was based on a preliminary reference of the Supreme Court of Ireland also dealing with art. 136 TFEU amendment.

[39] Polish Constitutional Court, joint cases K 11/13 and K 12/13, judgment of 28 March 2013. See A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (2015), 148, note 107.

alleged violation of the Constitution advanced by a group of MPs and senators against the Fiscal Compact and the Ratification Bill actually dealt with the illegal transfer of powers from the Parliament to the European Commission and the EU in general, with the result being the limitation of the scope of parliamentary decisions, for instance regarding the "golden rule" in light of the prospective accession to the Eurozone.

In Belgium, given the delayed implementation of the Fiscal Compact in domestic law, the Constitutional Court was asked to decide quite late, compared with other countries, on the constitutionality of the Law of 18 June 2013 giving execution to the agreement, with the cooperation agreement between the Federation, the Communities, the Regions and the Communities' Commissions on the implementation of Article 3 of the Fiscal Compact and with the Flemish Decree giving assent to that agreement[40]. Interestingly, several actions for annulment that were brought before the Court related to the limitation of parliamentary powers on budgetary decision-making. For example, a number of individual applicants invoked the impairment, by the Fiscal Compact and by the national sources implementing it, of their ability to participate in decisions dealing with budgetary issues precisely because of the marginalization of national parliaments' prerogatives. Moreover, a member of the Parliament of the German-speaking community in Belgium contested the severe restriction of his duties and rights as an MP regarding budgetary decisions[41]. However, all these actions for annulment were declared inadmissible because of the lack of standing of the applicants, who had failed to prove their direct interest in the outcome of the case[42]. Nevertheless, the case is interesting, for two main reasons, despite constitutional identity review and the role of national parliaments not directly being considered by the Court. First, the constitutional

[40] See Belgian Constitutional Court, Arrêt 62/2016 of 28 April 2016 and the case note by P. Dermine, *La Discipline Budgétaire Européanisée À L'Aune De La Constitution Belge - Obs. Sous C. Const., N° 62/2016, 2016/27*, 6655 Journal des Tribunaux 470 (2016).

[41] See, in detail, P. Gérard & W. Verrijdt, *Belgian Constitutional Court Adopts National Identity Discourse. Belgian Constitutional Court No. 62/2016, 28 April 2016*, 13 EuConst 1 (2017), 184.

[42] Although, in contrast to the case mentioned, typically the scrutiny of this standard by the Constitutional Court has not been very strict: see M. Verdussen, *Justice constitutionnelle* (2012), 169-173.

judges briefly elaborated on the authority of the Parliament in light of the Fiscal Compact. The power of the federal Parliament to decide on the budget (Article 174 Belg. Const.), and its discretion to set the medium-term objective together with other institutions and to vote on relevant international agreements are expressly acknowledged by Constitutional Court in the case. The Court assessed the Fiscal Compact as being in accordance with Article 174 Const.; that is, the treaty does not jeopardise the discretion of the Parliament in the implementation of the budgetary constraints. Second, for the first time in the Court's case law, the constitutional judges referred expressly to the Belgian constitutional identity. Therefore, a Constitutional Court that had never previously elaborated on, or even referred to, the constitutional identity argument and to the limits to constitutional amendments did so in the context of the Euro-crisis, alongside other Courts that had already cited or used these tools. In doing so, the Court confirmed that the discourse on constitutional identity review may be framed within the phenomenon of the "migration of legal ideas"[43] and that this crisis has further fostered such a "migration" from one country to another.

When dealing with the attribution by the Fiscal Compact of new competences to the European Commission and to the Court of Justice, the Belgian Constitutional Court outlined new limits as to what the legislature can do in terms of further conferral of powers to institutions under public international law, based on Article 34 Const. The national legislature and the international institutions in question are not given "an unlimited licence" in this regard[44]. The boundary here, according to the vague formula used by the Court in an *obiter dictum*, and mirroring in part Article 4.2 TEU, is represented by "a discriminatory derogation to national identity inherent in the fundamental structures, political and constitutional, or to the basic values of the protection offered by the Constitution to all legal subjects"[45]. The Court failed to clarify the content of the national identity in this case, in part because it decided ultimately that neither the Commission nor the Court of Justice are granted an extended jurisdiction to control and constrain national budgets by

[43] See Y. Roznai, *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, 61Am. J. Comp. L. 3 (2013), at 657.
[44] See Belgian Constitutional Court, Arrêt 62/2016, B.8.7.
[45] *Ibidem.*

the Fiscal Compact. Some attempts have been made to identify that which the Court did not express, namely the precise meaning of the Belgian national identity. Although the democratic principle and the principle of representative democracy do not stand out clearly on the list, the principle of legality does, and it may in fact play a role in preserving parliamentary powers such that some domains, like tax, are reserved for parliamentary legislation[46]. Hence, according to the case law, the safeguard of Parliament's prerogatives does not appear to be a part of the Belgian national identity at present, but in the future, it may be explicitly included in order to enhance the protection of the principle of legality.

By contrast, in Germany, alleged violations of the democratic principle and the powers of the *Bundestag* not only have formed the basis for the many constitutional challenges and individual complaints on which the Constitutional Court has been requested to judge. The Court itself, in line with its Lisbon ruling of 2009, has deemed the protection of the budgetary powers of the *Bundestag* to be part of the unamendable core of the German Basic Law and to serve as a standard for the constitutional identity review. In its first judgment on the matter, of 7 September 2011, regarding the loan agreement between Greece and the European Financial Stability Facility (EFSF), the German Constitutional Court clarified which standard must be followed to grant the *Bundestag* the power to control and orient the government during the Eurozone crisis[47]. The reasoning of the Court from this judgment onward has been based on the argument of the overall budgetary responsibility of the *Bundestag*, and therefore on the constitutional requirement to keep budgetary powers in the hands of the national parliament. The standard for review was constituted, as usual since the *Maastricht* decision[48], by Art. 38.1 GG in conjunction with Art. 20.1. and 2 GG, and Art. 79.3 GG.

In the 2011 judgment, the Court held that the fact that the *StabMechG* of 22 May 2010[49] simply requested the Government to 'try to involve' the *Bundestag*, through its Committee on budget,

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[46] See P. Gérard & W. Verrijdt, *Belgian Constitutional Court Adopts National Identity Discourse*, cit. at 41, 201-204.

[47] German Constitutional Court, BVerfG, 2 BvR 987/10, 7 September 2011.

[48] German Constitutional Court, 2 BvR 2134/92, 12 October 1993.

[49] Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, Euro Stabilisation Mechanism Act.

before issuing the guarantees for the EFSF, led to a violation of the *Bundestag*'s power to make decisions on revenues and expenditures with responsibility to the people. People are democratically represented by this institution, which in turn would be deprived by the *StabMechG* of the right to decide, should the Government make the agreement of the *Bundestag* unnecessary in order to issue guarantees. The Government must obtain the consent of this Chamber before it acts. As a consequence of this judgment, the *StabMechG* has been amended, thereby commencing a process of incremental strengthening of the decision-making powers of the *Bundestag* regarding financial procedure.

In its ruling of 28 February 2012[50], regarding the *Bundestag*'s right of participation in the EFSF and particularly in the authorization of extension of the guarantees for the Fund, the Constitutional Court clarified whether, and if so to what extent, a temporary limitation of the rights of MPs to be informed could be permitted. According to the *StabMechG* (Art. 3.3), in situations of particular urgency and confidentiality, the consent to the extension of the EFSF guarantees was to be provided on behalf of the *Bundestag* by a new parliamentary body, the *Sondergremium*, elected from among the members of the Budget Committee. In cases of particular confidentiality, the *Sondergremium* was also informed about the government's operation on the EFSF in the place of the *Bundestag* (Art. 5.7 *StabMechG*). Although the transfer of the right to be informed from the plenary to a minor parliamentary body was not found to be in violation of Art. 38.1 GG, the rights of every MP to be informed can be restricted 'only to the extent that is absolutely necessary in the interest of the Parliament's ability to function.' Consequently, an interpretation of the provision in conformity with the Constitution was required: the right to be informed may only be temporarily suspended for as long as the reasons for keeping the information confidential remain in place. Once they have been overcome, the Government must inform the entire *Bundestag*.

The reasoning used in this decision regarding the right to information was further developed in a subsequent judgment of the German Constitutional Court of 19 June 2012[51]. The Court acknowledged that Article 23.2 sentence 2 GG, which obliges the

[50] German Constitutional Court, 2 BvE 8/11, 28 February 2012.
[51] German Constitutional Court, 2 BvE 4/11, 19 June 2012.

Federal Government to keep the *Bundestag* informed, comprehensively and at the earliest possible time, 'in matters concerning the European Union', also applies to international treaties and political agreements negotiated outside the EU legal framework though linked to the European integration. The *Bundesverfassungericht* also outlined specific standards of quality and quantity for the information to be transmitted to the *Bundestag* in order to enable the Parliament to contribute effectively to shaping the government's position (as the Parliament must have a direct influence on it). These standards have been entrenched in the Act on Financial Participation in the European Stability Mechanism (*ESMFinG*) and Law on the Pact of 2 March 2012 on Stability, Coordination and Governance in the EMU, regarding the Fiscal Compact, both adopted on 29 June 2012.

In the latest decisions concerning this 'saga', the German Constitutional Court went a step further by aspiring to protect the *Bundestag* against its inaction. For example, in the OMT reference by this Constitutional Court to the Court of Justice of 14 January 2014, the issue of parliamentary passivity was invoked by the (majority) opinion of the Court. According to the Court, it was the inactivity of the parliament (as well as of the government) towards the OMT decision of the ECB that could threaten a violation of the complainants' constitutional rights as well as the position of the German *Bundestag* invoked by the applicant in the *Organstreit* proceedings[52].

After the OMT saga had come to an end, following the judgment of the Court of Justice and the final judgment of the *Bundesverfassungericht*[53], a new chapter began with the second reference for a preliminary ruling issued by the German Court, this time on the matter of quantitative easing[54]. Indeed, in its order of

[52] See BVerfG, 2 BvR 2728/13, the first question referred for a Preliminary Ruling, § 33.

[53] See, respectively, Court of Justice of the European Union, Grand Chamber, Case C-62/14, *Peter Gauweiler and others v. Deutscher Bundestag*, 16 June 2015, ECLI:EU:C:2015:400 and German Constitutional Court, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13, Judgment of 21 June 2016.

[54] See German Constitutional Court, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, Order of 18 July 2017 and the commentary by M. Goldmann, *Summer of Love: Karlsruhe Refers the QE Case to Luxembourg*, Verfassungsblog, 16 August 2017, https://verfassungsblog.de/summer-of-love-karlsruhe-refers-the-qe-case-to-luxembourg/ and by G. Zaccaroni, *The good, the bad, and the ugly:*

referral, the Court in Karlsruhe once again repeated its usual mantra about the protection of parliamentary powers in the name of the German citizens' right to democratic self-determination and the authority of the Court to ascertain whether EU institutions, in particular the ECB, through their acts have encroached upon the national constitutional identity.

Although in Portugal none of the constitutional challenges brought before the Constitutional Court have concerned parliamentary powers, but rather related to social rights, the Euro-crisis constitutional case law has profoundly contributed to undermining the role of the legislature in the implementation of the rescue package. Being a bailout country from 2011 to 2014, the Portuguese Government and, in turn, the Parliament were forced by the Troika to adopt a series of structural reforms involving serious welfare cuts in exchange for financial assistance. Starting from 2012, when this Court began to declare provisions of the Budget Acts determining pensions and salary cuts for public workers unconstitutional, the Portuguese Constitutional Court resorted to reliance upon supreme constitutional principles against the legislation passed by the Parliament under the auspices of the emergency of the rescue operations and despite the fact that most constitutional challenges had been promoted by parliamentary minorities (sometimes alongside challenges from the President of the Republic and the Ombudsman)[55]. Depending on the case and within a highly divided Court, the principles on which the Court relied to strike down provisions of the Budget Acts were those of proportional equality, of equality *tout court*, and of legitimate expectations, often in conjunction with one another. The economic emergency – according to the Court – does not justify *per se* the overthrow of fundamental principles of a democratic State based

national Constitutional Courts and the EU constitutional identity, in this special issue. Meanwhile, in 2015, and although dealing with the constitutionality of an order for a European Arrest Warrant issued against a US citizen convicted in Italy *in absentia*, thus outside the framework of Euro-crisis law, the German Constitutional Court used the tool of the constitutional identity review once again (BVerfG, 2 BvR 2735/14). This time the Court annulled the order by advancing an interpretation of EU law which complies with the German Constitutional identity and, in particular, with the principle of human dignity.

[55] For example, judgment 187/2013 decided jointly four constitutional challenges brought before the Court by a variety of actors, the President of the Republic, parliamentary minorities, and the ombudsman, based on individual complaints.

on the rule of law (art. 2 Pt. Const.), particularly when the same cohort, i.e. civil servants and pensioners, is systematically affected year after year by austerity measures by comparison with the less adverse conditions faced by other groups of citizens. Moreover, the public status and working or retirement conditions of an individual do not amount to persistent, or permanent, discriminatory treatment. In particular, according to the Constitutional Court, there was no evidence that the conditions imposed by the MoU and the loan agreement, which the Court recognized as international agreements[56], did not leave discretion to the Parliament as to their implementation. At the opposite end of the spectrum, the Parliament could have explored alternative avenues to implement the rescue package. This has been the Court's warning since judgment n. 353/2012, which has provided the basis for most declarations of unconstitutionality of the Budget Acts from judgment n. 187/2013 onwards[57].

The long catalogue of social rights protected by the Portuguese Constitution, and the limits to constitutional amendments of workers' rights, might also have contributed to pushing the Court in this direction, although social rights have not been used as a standard for review (except in judgments 794/2013 and 572/2014). Rather, as noted above, the Court resorted to the supreme principles of the Constitution, which were eventually explicitly linked to Portugal's national (constitutional) identity. In judgment n. 575/2014, the Court finally disclosed its position vis-à-vis Euro-crisis law, in particular EU law in the context of the excessive deficit procedure. In this field – according to the Court – EU law is binding upon Member States only with regard to the objectives set, and not on the national means chosen to reach those objectives. The Court went on to say, though in an *obiter dictum*, that the national Constitution enjoys priority over EU law by relying on

[56] On the disputed nature of those agreements, see F. Pereira Coutinho, *A natureza jurídica dos Memorandos da "Troika"*, XIII 24/25 Themis 147 (2013).

[57] See, Portuguese Constitutional Court, judgments 353/2012, 187/2013, 474/2013, 602/2013, 862/2013, 413/2014, 574 and 575/2014 and the case-notes by M. Nogueira De Brito, *Comentário ao Acórdão nº 353/2012 do Tribunal Constitucional*, 1 Direito & política 108 (2012) and by R. Cisotta & D. Gallo, *Il Tribunale costituzionale portoghese, i risvolti sociali delle misure di austerità ed il rispetto dei vincoli internazionali ed europei*, 7 Diritti umani e diritto internazionale 2 (2013), at 465.

the national identity clause included in the Treaty of Lisbon (art. 4.2 TEU) and that, in the particular field of Euro-crisis law under review, no divergence could be detected. There is, instead, a convergence between constitutional law and EU law, based on the fact that the guiding principles used by constitutional judges to resolve the case law regarding Euro-crisis measures, that is, the principles of equality, proportionality, and protection of legitimate expectations, are at the core of the rule of law and an inherent part of the common European legal heritage, which the EU is also bound to respect. Hence, this case made clear the impact of the Euro-crisis law – especially the budgetary measures implementing the conditions posed in the rescue packages – in making the core of the Portuguese constitutional identity explicit; that is, a constitutional identity which gives precedence to constitutional values and principles other than that of representative and parliamentary democracy. The effect of this series of rulings was ultimately the marginalization of the Parliament, constrained between these constitutional judgments, on the one hand, and the pressure of the executive, on the other hand, to fulfill European and international obligations and reassure the financial markets.

The tensions to which the French constitutional system has been subject during the Euro-crisis have been far less than those observed in the Portuguese context. Perhaps for this reason, the adjudication of the Euro-crisis law has not prompted the *Conseil constitutionnel* to refer to the protection of French constitutional identity in its case law on the Euro-crisis measures. The only, partial, exception has been the judgment of the *Conseil* of 2012 regarding the Fiscal Compact, which nevertheless included no special consideration for the power of the Parliament[58]. The *Conseil* found the agreement to be in compliance with the Constitution but specified that, with respect to the jurisdiction of the Court of Justice of the European Union, such a conclusion had been reached because that Court had not been conferred the authority to adjudicate on the respect of the Fiscal Compact requirements by the French Constitution. Had this not been the case, the extended jurisdiction of the Court of Justice would have amounted to a threat to the essential conditions for the exercise of national sovereignty. Beyond this exceptional case, the constant reference by the *Conseil*

[58] *Conseil Constitutionnel*, Décision 2012-653 du 9 août 2012, Considérant 30.

to the principle of budgetary sincerity, almost always used as the standard of review when adjudicating the fiscal measures, has been very much consistent with the pre-crisis case law[59]. A series of cases was brought before the *Conseil Constitutionnel* by parliamentary minorities (also) on this ground, although they have never succeeded[60]. For instance, in a *saisine parlementaire* against the Social Security Financing Act of 2014, law n° 2013-1203, a minority of senators and MPs challenged the constitutionality of the law taking into account that, according to the opinion of the *Haut Conseil*, the macroeconomic forecasts on which the Social Security Financing Act was based were insufficiently reliable and, hence, the principle of sincerity had been violated[61]. This case could have been an opportunity for the Parliament, through its parliamentary minorities, to use independent information to closely scrutinize the government's fiscal policy, and, if necessary, to challenge its effectiveness. The Constitutional Council, however, dismissed the constitutional challenge. It held that no evidence supported the hypothesis that the Social Security Financing Act would have impaired the achievement of the national objective as to expenditure for health care insurance. Moreover, according to the Constitutional Council, the government during the legislative process tabled an amendment – which was adopted – aimed at reducing the negative impact on public expenditures.

When, on 13 July 2012, the new President of the French Republic, François Hollande, requested the *Conseil constitutionnel* to decide on whether the authorization to the ratification of the Fiscal Compact had to be preceded by a constitutional reform, thus departing from the approach pursued by his predecessor, Sarkozy, to constitutionalize the balanced budget clause, the reasoning of the Court regarding the consequences for parliamentary powers remained very superficial. The *Conseil* considered the constitutionalization of the balanced budget clause unnecessary

[59] *Conseil Constitutionnel*, Décision no. 2012-658 DC du 13 décembre 2012, para 19.
[60] See *Conseil Constitutionnel*, Décision no. 2013-682 DC, due 19 décembre 2013; Décisions no. 2014-698 DC and 2014-699 DC du 06 août 2014; and Décision no. 2014-707 DC du 29 décembre 2014.
[61] *Conseil Constitutionnel*, Décision no. 2013-682 DC, 19 December 2013, in particular paras 2-7.

and consequently its inclusion in an organic law sufficient[62]. As a result, the Court only touched upon the protection of the Parliament's budgetary autonomy to say that the implementation of the Fiscal Compact could not be fulfilled in a way that encroached upon the prerogatives of this institution without further specifications. In support of the idea that the Fiscal Compact did not violate parliamentary powers, the Court cited art. 3.2 of this Treaty, providing that the correction mechanism cannot breach the prerogatives of the national parliaments, which, however, appears to be a programmatic provision to be further elaborated upon and implemented at the domestic level by each contracting party[63].

In contrast to France, Spain has been one of the very few countries to have constitutionalized the balanced budget clause during the Eurozone crisis (Article 135 Sp. Const.). This choice – also triggered by the unstable financial situation, especially of the Spanish banking sector – has certainly constrained the budgetary autonomy of the Parliament. In fact, a balanced budget requirement had been in force in this country for all public administrations (state, regional and local) well before the Eurozone crisis exploded, although it was not embedded in the Constitution. Law no. 18/2001 (*Ley General de Estabilidad Presupuestaria*) and Organic law no. 5/2001 (*Ley Orgánica complementaria a la Ley General de Estabilidad Presupuestaria*), as subsequently modified, imposed an obligation of a balanced budget for the public sector[64]. After the constitutional reform of 2011, the Constitutional Court explicitly stated that, following the acknowledgment of the principle of a balanced budget in the Constitution, this principle has become a standard of review based on the doctrine of the *ius superveniens*[65].

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[62] French *Conseil Constitutionnel,* décision n° 2012-653. Art. 34 Fr. Const., provides: 'Social Security Financing Acts shall lay down the general conditions for the financial equilibrium thereof, and taking into account forecasted revenue, shall determine expenditure targets in the conditions and with the reservations provided for by an Institutional Act.' However, as pointed out by G. Carcassonne, *La Constitution*, 11 ed. (2013), §232-233, this provision has always been interpreted simply as fixing a mere objective rather than an immediately enforceable rule.

[63] *Conseil Constitutionnel,* décision n° 2012-653, § 25.

[64] J. García Roca & M. Á. Martínez Lago, *Estabilidad presupuestaria y consagración del freno constitucional al endeudamiento* (2013), at 63-65. See also decision n. 134/2011.

[65] Spanish Constitutional Court, decision n. 157/2011, 18 October 2011, § 3.

The constitutional amendment process leading to the constitutional entrenchment of the new clause has raised many concerns regarding the respect for Parliament's constitutional prerogatives. From the proposal of the constitutional bill to its publication in the Official Journal (BOE) only thirty-two days elapsed, from the end of August to the end of September 2011[66]. The constitutional bill was examined by means of the urgency procedure and in *lectura única*, i.e. directly debated and adopted by the *plenum* without prior scrutiny by standing committees. The overall majority of the two Chambers agreed on the reform, with the support of the socialist government and of the main opposition party, *Partido Popular*. However, a *recurso de amparo* was brought before the Spanish *Tribunal constitucional* by some MPs from the political group of *Esquerra Republicana-Izquierda Unida-Iniciativa Per Catalunya Verds* against the constitutional amendments which had just passed. In particular, the *amparo*, on the one hand, sought the annulment of the parliamentary resolutions and agreements leading to the constitutional reform's adoption through the urgency procedure and in *lectura única*. On the other hand, the *amparo* contested the use of the ordinary procedure to revise the Constitution (Article 167) instead of the process requested for the total revision of the Constitution or the amendments affecting fundamental rights (Article 168 Sp. Const.), although the constitutional bill was able to impair the rights' protection and to limit the prerogatives of MPs and citizens. The *amparo* was declared inadmissible as, according to the majority of the judges, the governing bodies of the Parliament had rightly applied parliamentary standing orders. The *Tribunal constitucional* simply decided not to engage with the substantive issues at stake in the *amparo*[67]. However, the dissenting opinions of Justice Pablo Pérez Tremps and Justice Luis Ignacio Ortega Álvarez pointed to the missed opportunity for the Court to address for the first time ever the issue of constitutionality of constitutional amendments in the Spanish democratic system, an issue of special complexity and institutional significance that should have deserved much more careful consideration. Should the Court have declared the case

[66] See F. Balaguer Callejón, *Presentación*, 16 Revista de derecho constitucional europeo 17 (2011).
[67] See *Auto* 9/2012, BOE no. 36/2012, 11 February 2012, p. 152.

admissible, it could not have avoided taking a stance on the powers of the Parliament during the constitutional reform.

Italy also constitutionalized the balanced budget clause in 2012 (Const. Law n. 1/2012)[68]. This decision was triggered by the turbulence in the financial markets, the rise of the spread and the conditions imposed for the financial support by the European Central Bank. In light of the dramatic economic circumstances and despite being, in theory, the key player in the Italian constitutional amendment procedure, according to Art. 138 Const.[69], the Italian Parliament in fact marginalised itself in the approval of Const. Law 1/2012. The constitutional amendment bill was passed in less than six months, which is a very short timeframe when one considers that two successive parliamentary deliberations by the Houses of Parliament on the same text must take place at intervals of no less than three months after one another, and in three out of four readings the text was approved without 'nays'. Since the entry into force of the constitutional reform of 2012, the Constitutional Court has started to refer more and more often to the compelling interest in having a balanced budget and sound public accounts. Although the new clause could not be officially used as a standard for constitutional review until 2014, constitutional case law has nonetheless been inspired by it being in the background of the Court's reasoning[70].

[68] There were, however, academic opinions that considered a balanced budget rule to already be entrenched in the Italian Constitution (see, for example, C. Colapietro, *La giurisprudenza costituzionale nella crisi dello Stato sociale* (1996).

[69] According to Art. 138 It. Const., constitutional amendment bills are to be approved by each House after two successive votes, at least three months apart from one another, by absolute majority. In this case a confirmative and optional referendum can be requested by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils within three months from the publication of the reform. If the term elapses without a referendum being requested, the constitutional amendment bill enters into force. The same applies if the reform is approved at the second voting by a two-thirds majority of each House.

[70] For instance, in decision n. 310/2013 the Italian Constitutional Court rejected a challenge of unconstitutionality by using *ad adiuvandum* – although not as the main ground for the decision – new Article 81 Const., not yet in operation in 2013, and Council Directive 2011/85/EU on requirements for the budgetary frameworks of the Member States.

However, at least since the 1990s, and by contrast with its case law of the 1960s and 1970s[71], the Italian Constitutional Court has usually paid close attention to the financial sustainability of its decisions (also in light of the then art. 81.4 Const.). In the landmark judgment no. 455/1990, the Court developed a 'balancing test' to accommodate social rights' protection with the shortage and distribution of fiscal resources[72]. In the background of this reasoning was the idea to enforce the supreme principle of equality among generations in a context where the welfare system was put under stress. Likewise, in the wake of the Euro-crisis, the 'balancing test' was used by the Italian Constitutional Court to limit social rights, for example in a case involving the calculation of the pensions of cross-border workers between Italy and Switzerland, it led to the validity of a retroactive legislative act of 'authentic interpretation' being upheld, thereby confirming the legitimacy of the Parliament's choice[73].

The actual need for the Court to combine the application of the equality principle (art. 3 It. Const.) with the principle of the balanced budget – new art. 81.1 It. Const. – that could not be immediately used as a standard for review, but was nonetheless entrenched in the Constitution, led the Court to make decisions that have not always appeared very consistent or predictable over time[74]. For instance, provisions of decree-laws adopted during the Eurozone crisis with the aim of redistributing resources among workers and pensioners have been declared unconstitutional on some occasions and have been upheld as being compliant with the Constitution on others. Decree-law no. 78/2010 blocked the salary adjustment mechanism for magistrates and reduced their special allowance as a form of 'solidarity contribution', based on the fact that these workers already benefited from high levels of income. The Court considered the reduction of the allowance to be a form

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[71] See S. Scagliarini, *La quantificazione degli oneri finanziari delle leggi tra governo, parlamento e Corte costituzionale* (2006); G. Rivosecchi, *L'indirizzo politico finanziario tra Costituzione italiana e vincoli europei* (2007) and M. de Visser, *Constitutional Review in Europe. A Comparative Analysis* (2014), at 315.

[72] See D. Tega, *Welfare Rights and Economic Crisis Before the Italian Constitutional Court*, 63 Eur. J. of Social L. 1-2 (2014).

[73] See Italian Constitutional Court, decision n. 264/2012, § 5.3.

[74] P. Faraguna, *The Economic Crisis as a Threat to the Stability of Law*, 8 Hague J Rule Law 2 (2016), at 268.

of taxation and declared it inconsistent with the Constitution because it violated the principle of equality, the principle of the progressive nature of the tax system (art. 53 It. Const.), and the principles of independence and autonomy of the judiciary (arts. 100, 101, 104 and 108 It. Const.)[75]. The invocation of these latter principles is of special importance as the protection of the constitutional guarantees of the judiciary can be seen as a pre-condition for the enforcement of one of the supreme principles of the Italian Constitution mentioned above, namely the right to defence and to judicial protection. In particular, the breach of the principle of equality relied upon the introduction of a measure that was targeted at a specific group of people – magistrates – whose independence and neutrality also derives from their income, and imposed upon them a curtailment of their living conditions[76].

One could have expected that this decision would set a precedent for subsequent case law, such as decisions no 241/2012 and no. 116/2013. Instead, the difficulty of striking a balance between financial sustainability and the balanced budget rule with long-standing supreme principles of the Italian Constitution has led to disputable and incoherent developments of the constitutional case law. For example, when the Constitutional Court ruled again on the constitutionality of Decree-law no. 78/2010, the freezing of the salary adjustment mechanism for non-contracted people working in the public sector was not considered a form of taxation and it appeared to be a reasonable sacrifice for the purpose of restoring sound public accounts in the present economic crisis (decision no. 310/2013). In addition, by contrast with decision n. 223/2012, in the case in question, there were no exemptions to be invoked, like the special position of independence of magistrates to be protected in the constitutional system.

Although the Italian Constitutional Court has never developed a line of reasoning that has embedded the protection of parliamentary prerogatives into the supreme principles of the Constitution, the decisions just examined showed a rather deferential approach by the Court towards the Parliament. The

[75] Italian Constitutional Court, decision n. 223/2012, § 11.5.

[76] Judgment no. 223/2012, in relation to which see D. Piccione, *Una manovra governativa di contenimento della spesa «tra il pozzo e il pendolo»: la violazione delle guarentigie economiche dei magistrati e l'illegittimità di prestazioni patrimoniali imposte ai soli dipendenti pubblici*, 55 Giur. Cost. 5 (2012), at 3353.

Court affirmed that it is for the Parliament, in the exercise of its legislative discretion, to decide to give precedence to the fundamental needs of the economic policy rather than to competing constitutional values[77].

However, a *revirement* suddenly appeared in the Court's case law, which this time resulted in a shock for both the Parliament and the Government[78]. The Court declared unconstitutional the article of decree-law 201/2011 providing for the temporary block to the inflation rate, only in 2012 and 2013, of the adjustment of public pensions that were at least three times beyond the minimum level of pension established by law. The decision was based on the principle of equality in combination with the right of pensioners to a remuneration commensurate with the quantity and quality of their work and capable of ensuring a dignified existence (art. 36.1 It. Const.) and of assuring adequate means for their needs and necessities (art. 38.2. it. Const.). In particular it was the threshold chosen by the decree-law – three times beyond the minimum level of pension – that was considered to be irrational and inadequately justified. What is more striking, however, is the fact that the Court's reasoning does not even mention the new principle of the balanced budget clause, which had been a constant reference featured in previous cases, despite not forming a standard of review.

This judgment has disregarded the budgetary autonomy of the Parliament (and the Government) and has forced the budgetary institutions to find enough resources (billions of euro were mobilized through decree law 65/2015[79]) to compensate pensioners for the illegitimate block of the pension adjustment, which measure was adopted during the most acute phase of the speculative attack against Italy. In an outcome that very much resembles some of the decisions of the Portuguese Constitutional Court, this judgment again raises several doubts about the ambivalent attitude shown by the Italian Constitutional Court in its adjudication of the Euro-crisis

[77] See Italian Constitutional Court, decisions n. 304 and 310/2013, and 154/2014, § 5.3, 10/2015.

[78] See Italian Constitutional Court, decision n. 70/2015, § 5. Among the many critical case notes, see A. Barbera, *La sentenza relativa al blocco pensionistico: una brutta pagina per la Corte*, 2 Riv. AIC 1 (2015), 1-5 and C. Bergonzini, *The Italian Constitutional Court and Balancing the Budget: Judgment of 9 February 2015, no. 10 and Judgment of 10 March 2015, no. 70*, 12 EuConst. 1 (2016), at 177.

[79] Upheld in its constitutional validity by decision no. 250/2017.

law, where the balance struck between constitutional principles in the different cases appears somewhat unpredictable. As a consequence, the treatment that the Constitutional Court affords to the Parliament as a budgetary authority is equally unpredictable, although it appears that when social rights are limited through a general legislative intervention, without a particular target of workers and pensioners, and is temporary, the Court is more keen to uphold the validity of the legislation[80].

4. Parliaments as a second-order concern for Constitutional Courts in the Euro-crisis

The case law of many Constitutional Courts on Euro-crisis measures has been determined in the light of supreme principles of the Constitutions, most often in line with pre-crisis decisions that had explicitly or implicitly defined the national constitutional identity. Concerns for the powers of national parliaments in the crisis have rarely surfaced in the decisions of these Courts, even if a reference to them was made in the constitutional challenge or complaint that reached the Court.

The judgments of the Portuguese Constitutional Court, in particular in 2013 and 2014, possibly represent the most evident example in the adjudication of the Euro-crisis law of a clear lack of consideration by a Court for the effects of its rulings on the Parliament. Some justifications for this aspect of the Portuguese Court's case law may nonetheless be provided. In the Portuguese constitutional system, it appears that many institutional actors were equally concerned by the challenged measures; first and foremost parliamentary minorities, the ombudsman and the President of the Republic, who repeatedly brought cases before the Constitutional Court. Further, before striking down parts of the Budget Acts, in 2012 the Constitutional Court had warned the Parliament not to adopt budgetary provisions which introduced unreasonable discriminations against public workers and pensioners, yearly permanent reductions in public wages and pensions, or retroactive measures. Those provisions were unconstitutional and the Court, in the exercise of its powers, under art. 278.4 Pt. Const., decided to suspend the effects of the declaration of unconstitutionality in order

[80] See Italian Constitutional Court, decision n. 124/2017.

to not affect the ongoing execution of the budget in the fiscal year. Furthermore and, perhaps, most importantly, the constitutional challenges and complaints that the Court has been asked to address were focused on the violation of social rights. By contrast, the infringement of the constitutional prerogatives of parliaments has been never invoked as a standard for review, although there were pre-crisis precedents in which the Court had elaborated on arguments comparable to those used by the German Constitutional Court on the Parliament.

The Portuguese Constitutional Court claimed that the Parliament, in light of the avenues provided by the MoU, could have used less restrictive and more proportionate and equitable measures to reduce public spending. The Court failed to take into account the context in which the Parliament was operating, in the extraordinary circumstances of a bailout and the periodical review missions of the Troika representatives. The protection of parliamentary powers was not discussed, and the Court has not always shown a very cooperative approach towards the legislature either. For example, in judgment n. 413/2014 the Portuguese Constitutional Court held that a further reduction of public salaries, provided for by the Budget Act 2014, was inconsistent with the principle of equality, but declined to give its judgment retroactive effect, and the wage cuts were annulled *ex nunc* starting from the date of the ruling. Following this ruling, the Portuguese Parliament referred several questions to the Court seeking clarification on the temporal effects of this judgment. Some practical aspects of the implementation of the Court's decision regarding the quantification of the holiday allowance and the timing for paying it remained unclear in the view of the Parliament, which was responsible for implementing the ruling. However, the Court stated that no ambiguities in the implementation of the ruling derived from the text of the judgment itself. The Constitutional Court is not a legislature and it is beyond its mandate to define the aspects of the decision requested, which concern the administrative competence of the Government and its exercise of rule-making powers. Nor, according to the Court, could the principle of inter-institutional cooperation be invoked by the Parliament to this end. Thus, the doubts remained unresolved and the judgment proves how difficult the relationship between the Parliament and the Constitutional Court can be during the Euro-crisis.

By contrast with the case law of the Portuguese Court, the French *Conseil constitutionnel* has not directly undermined the budgetary authority of the Parliament, but it certainly has not exerted itself to protect parliamentary powers either. Rather, the *Conseil* has determined matters in the government's favour so long as the principle of sincerity, which has shaped the constitutional case law since 2000s, is preserved. This outcome is consistent with the French form of government and with the system of constitutional review of legislation[81]. Thus, the options for the non-constitutionalization of the balanced budget clause (décision n° 2012-653), for the inclusion of the medium-term objective in ordinary legislation, specifically in the Programming Act (décisions n° 2012-658), and for the non-binding effects of the opinions of the *Haut Conseil des finances publiques* (décisions n° 2013-682 and n° 2014-699), are all signs of the Court's will to permit the government a wide margin of manoeuvre in the economic governance. The *Conseil constitutionnel* had the opportunity to take a stance in favour of the protection of parliamentary powers, for instance when parliamentary minorities claimed that the fiscal measures advanced by the government were based on unreliable economic sources and consequently that the Parliament had been asked to make decisions on the basis of misrepresented information. However, without elaborating much, the Court concluded that the principle of sincerity had been respected, while occasionally considering some provisions to be unconstitutional on different grounds.

It is more difficult to assess whether and if so to what extent the Spanish and the Italian Constitutional Courts took the Parliament's position into account when adjudicating on Euro-crisis law, despite usually being quite deferential towards the legislature. Certainly in both cases these Courts were not directly requested to decide on the matter of the Parliament's budgetary autonomy, with the partial exception of the Spanish case on the constitutionalisation of the balanced budget clause, which the Court declared inadmissible.

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[81] As A. Stone Sweet, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective (*1992), 140-191, points out, only on a few – though significant – occasions, the Constitutional Council has ruled against legislation implementing governmental programmes, for instance when a new party assumed power, like the socialist party under the leadership of President François Mitterand in 1981.

The self-restraint of the Spanish Constitutional Court in the adjudication of Euro-crisis law is clearly shown in *Auto* 113/2011. This case, decided upon a preliminary reference of constitutionality, dealt with a very complicated issue in Spain, namely rights protection in the event of mortgage eviction (Articles 9.3, 24.1 and 47 Sp. Const.), which is a problem affecting thousands of families as a consequence of the financial crisis. According to Spanish law, if a contractual term in a mortgage is unfair and illegal, compensation may be granted, but in a separate proceeding from the mortgage enforcement proceeding, which forces the owners to move out of their house in any event. In other words, the court in charge of the enforcement proceedings cannot grant interim relief. The Constitutional Court declared the preliminary reference inadmissible as the order of referral, on the one hand, was too generic and abstract for the Court to evaluate whether the challenged provisions were really relevant to the main proceedings, and on the other hand, it proposed an alternative regime. In this regard, the majority of the Constitutional Court found the order of referral to go beyond its remit, as an ordinary judge cannot invade the competence of the Parliament by putting forward a new legislative scheme and nor can constitutional judges be asked to assess the validity of this new (judicial) solution. Decisions on the Code of Civil Procedure are matters for the legislative power alone, and therefore, the issue was treated as a 'political question'. Although to a significant extent it reached a disputable conclusion on the ground of the protection of the contested rights and of the compliance with EU law[82], in this case the Constitutional Court adopted a very deferential stance – perhaps too deferential – towards the Parliament, which, however, had failed to update the legislation on mortgages according to the new financial situation.

Therefore, the Spanish constitutional case law on the Euro-crisis measures has not aimed to protect or strengthen parliamentary powers directly or specifically, but has had the effect of preserving legislative discretion in general, in particular the choices made by both the Government and the Parliament before or in the aftermath of the crisis, by means of declarations of

[82] Two years later the Spanish legislation was found to be in breach of Directive 93/13/CEE, regarding unfair terms in consumer contracts, by the Court of Justice of the European Union (case C-415/11, *Mohamed Aziz*).

inadmissibility and of interpretations in conformity with the Constitution.

In many respects, when considering the outcomes of constitutional case law in relation to the Parliament, the position of the Italian Constitutional Court on the Euro-crisis law has been similar to that of the Spanish Court. However, since 2012 the position of the Italian Constitutional Court has been much more ambivalent. Indeed, three different types of reaction of the Court towards Euro-crisis law have been detected: deference, resistance and correction[83]. In a few cases, the Italian Constitutional Court declared legislative provisions dealing with pension and allowance cuts unconstitutional (e.g. judgment n. 223/2012), for example in the name of the principle of equality and of the need to protect the independence of the judiciary through the level of its salary. Similarly contested has been the judgment of the Italian Constitutional Court n. 70/2015 that annulled – to the benefit of the greatest majority of pensioners – the block of the pension adjustment to the inflation rate in 2012 and 2013 and hence forced the political authorities to give billions of euro back to pensioners in an effort to redistribute resources, which would usually result from a political choice rather than from the decision of a Court.

The Italian Constitutional Court has to cope with the retroactive effects of the declaration of unconstitutionality provided by the combined reading of Art. 136 It. Const. with Art. 30.3 of Law 87/1953 and until very recently it had seldom applied those techniques which allow it to split the content of a declaration of unconstitutionality from its effects. This is why the Italian Constitutional Court, with a few remarkable exceptions, has usually preferred to uphold the validity of the norms under review during the Eurozone crisis, being conscious of the drawbacks of its judgments for fiscal policy and people's legitimate expectations. However, in order not to overstep the powers of the budgetary authorities, in judgment n. 10/2015 – although the Court considered the levy of the extra corporate income taxation from oil enterprises, established five years prior by Decree-law n. 112/2008, unconstitutional – it constrained the validity of the judgment's effects, from its publication onward, i.e. only *pro futuro*. The Court

[83] M. Dani, *Il ruolo della Corte costituzionale italiana nel contesto della governance economica europea*, 32 Lavoro e diritto 1 (2018), at 147.

justified this decision at length and it is clear that reasons based on the new constitutional balanced budget principle and the obligation of financial sustainability played a role. Otherwise the State would have been obliged to compensate oil companies for the illegitimate taxation which had occurred over the previous seven years. This is why judgment n. 70/2015, also on this ground, came as a surprise. The Court adopted a completely different approach compared to decision n. 10/2015. It did not use the tool applied in the previous judgment, namely postponing the effect of judgments *ex nunc*, so as to limit the institutional and financial impact of the case law, which eventually it did a few months later in judgment 178/2015[84]. It is clear, however, that, behind these shifts in the Italian constitutional case law, considerations of social justice and fairness in a period of crisis prevail. This helps explain why, despite the declaration of unconstitutionality, oil companies were not refunded while pensioners with a relatively low income were.

It appears that in the difficult accommodation of traditional and new constitutional principles, where the balanced budget clause is now in operation but was not a standard for review in these cases (as it was not in force at the time the contested legislation was adopted), the role of the Parliament in the Euro-crisis is not certainly the Court's first concern. The power and the discretion of the legislature in fiscal decisions features in the case law incidentally, and the protection of the democratic principle through the Parliament has never been used as a standard of review to resolve a case.

However, as the two cases decided by the Polish Constitutional Court on Euro-crisis law demonstrate, even where the protection of the Parliament's budgetary powers was invoked in the challenge, the Court either dismissed the case on procedural grounds or determined it on a different ground. In the end, no judicial protection of parliamentary prerogatives was ensured despite the fact that the Court could have ruled on the issue. The same holds true in the Belgian case, where the actions for annulment were declared inadmissible and, yet, the Constitutional Court referred to the national constitutional identity without further elaborating on it and certainly did not emphasise the issue

[84] The latter judgment, however, had to do with a case of *illegittimità costituzionale sopravvenuta* (supervening unconstitutionality).

of the marginalization of parliamentary prerogatives, which instead had been invoked by the applicants.

The only patent exception in this landscape of constitutional case law is represented by the judgments of the German Constitutional Court. However, even in this case, is the *Bundestag* the primary concern of the Court in the adjudication of the Euro-crisis law? Through its many judgments the *Bundesverfassungsgericht* has developed a paternalistic stance toward the Parliament that, in the view of the Court, has not proven to be able to defend its own budgetary powers in the wake of the crisis, and this is of concern because the political rights of citizens to be represented by the Parliament are undermined. The protection of the Parliament counts because it amounts to an indirect protection of the voters. From the OMT reference onwards it has become even clearer that the German Constitutional Court does not safeguard the budgetary powers of the *Bundestag* for the sake of protecting the Parliament as an institution, but just because it is the instrument for the exercise of democratic powers by citizens. The *Bundesverfassungsgericht* has always considered the democratic principle and the effective representation of citizens through the *Bundestag* as a non-negotiable value entrenched in the Basic Law alongside other supreme principles. Therefore, as soon as Parliament's inactivity – against the ECB decisions on the OMT and on the quantitative easing – is challenged as a violation of the democratic principle, the *Bundestag* can easily become the 'victim' of the German constitutional case law that once glorified it. The view of the German Court blaming the Parliament for the (unspecified) unconstitutionality by omission goes in this direction. Furthermore, by linking the attempt to overturn the Parliament's budgetary prerogatives to the possibility of carrying out the constitutional identity review, the German Constitutional Court appears, in the end, to actually have strengthened its own powers, by enlarging its scope of intervention. Indeed, the adjudication of legislative omissions in constitutional case law is commonly perceived in itself as problematic because it affects the role of Constitutional Courts as a "positive" or "negative" legislator[85]. By

[85] See J.L. Requejo Pagés, *The problems of legislative omission in constitutional jurisprudence*, XIV Conference of Constitutional Courts of Europe, Vilnius - May 2008, http://www.confeuconstco.org/reports/rep-xiv/report_Spain_en.pdf

reviewing those omissions and possibly compelling the Parliament to act on the ground of the German constitutional identity that is, in this case, a purely judicial creation, the Constitutional Court may have gone one step too far in empowering itself[86].

5. Conclusion

This article concludes that while the Eurozone crisis has pushed Constitutional Courts to carry out an explicit or implicit constitutional identity review, in particular in response to the most controversial Euro-crisis measures[87], this has not been accompanied by an increasing judicial protection of parliamentary prerogatives, with the patent exception of Germany. In this country, in part because of its stable financial situation and strong economy, a potential clash between the principle of representative democracy and other supreme principles has not surfaced.

The number of complaints that, by invoking a violation of parliamentary prerogatives by Euro-crisis measures, could have led Constitutional Courts in other Member States to also establish a judicial safeguard to the budgetary authority of the legislature has been remarkable. Preferably in compliance with the pre-crisis constitutional case law, however, Constitutional Courts have given precedence and priority to other constitutional principles – equality, independence of the judiciary and judicial protection, sincerity, and balanced budget – that shape national constitutional identities rather than the democratic principle. As a consequence, Parliaments have been a second-order concern for most Constitutional Courts in the aftermath of the Eurozone crisis and, when they have been protected, this has occurred because such protection was instrumental to safeguard other primary goods and principles.

At the same time, the Court that, aiming to preserve the national constitutional identity, has made the protection of parliamentary powers a *mantra* in its Euro-crisis constitutional case law, namely the German Constitutional Court, has been criticized for its position. And the critiques even came from within the Court.

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[86] See the dissenting opinions of Justice Lübbe-Wolff and Justice Gerhardt on the Order of the Second Senate of 14 January 2014, - 2 BvR 2728/13 and others.

[87] On this point, see M. Dani, *National Constitutional Courts in supranational litigation*, cit. at 14, 208-211.

The OMT order of referral to the Court of Justice was not unanimously adopted and was seen as an attempt by the Court to overstep its role. By contrast with the majority view, the dissenting opinion of Justice Lübbe-Wolff claimed that ascertaining whether the federal inaction on the OMT violated the *Bundestag*'s prerogatives amounted to a violation 'of judicial competence under the principles of democracy and separation of powers'.[88]

[88] See in detail M. Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, 10 EuConst 2 (2014), at 281.