

In this paper, we aim to survey representative constitutional amendments in the European Union's (EU) area, whether attempted or accomplished, as well as significant adjudications by constitutional bodies. Then, we proceed to assess these legal phenomena in light of human rights jurisprudence. Pivotal reference in our work is the recently released 7<sup>th</sup> volume of the *Annuaire international des droits de l'homme* (Athens: Sakkoulas, December 2014), edited by G. Katrougalos, M. Figueiredo and P. Pararas under the aegis of the International Association of Constitutional Law. Not only does this volume comprise the work of some of Europe's noted constitutionalists, it also addresses the constitutional matters central to this paper in light of human rights jurisprudence, which is the area of expertise of one of the paper's authors, i.e. Ágúst Þór Árnason, and the area that the other author, Giorgio Baruchello, has construed axiologically as a pivotal instantiation of *civil commons*, i.e. "all social constructs which enable universal access to life goods". Have European constitutions continued to function *qua* civil commons in the crisis years? That, at the deepest level of value scrutiny, is the question that our joint survey and analysis aim to answer.

## Introduction

On 12 October 2005, while **addressing** the members of the National Italian American Foundation meeting in Washington D.C., Mr. Alan Greenspan, the long-time Chairman of the United States' (US) Federal Reserve, stated openly and confidently: "recent regulatory reform [i.e. deregulation], coupled with innovative technologies, has stimulated the development of financial products, such as asset-backed securities, collateral loan obligations, and credit default swaps, that facilitate the dispersion of risk." **Writing** three years before Greenspan's speech, financial mogul Warren Buffett referred to the same products as "financial weapons of mass destruction" (p.15). Who was right? Since then, such legally deregulated and technologically innovative products have caused the transnational banking network to freeze, the world's stock exchanges to crash and most countries to fall into an economic slump, which, depending on the country we look at, has taken the shapes of technical depression, mass unemployment, or reduced access to means of life for vast sectors of the population. It is no surprise that, three years after Greenspan's speech, the world's popular press as well as serious pundits did nickname all such products "toxic assets" (this term being the brainchild of Angelo Mozilo, founder of Countrywide Financial).[1]

Despite its rather specific and institutionally circumscribed origin within the realm of deregulated, private, technologically intensive, global high finance, this realm's crisis, by disrupting the availability of credit for all kinds of businesses and opening vast opportunities for financial speculation, including bearish targeting of State bonds and currencies, has sent shockwaves throughout social bodies and institutions at large.[2] As a result, the innovative creations of white-collar specialists in "Economics, Finance, and Insurance & Risk Management" that, at least until 2008, had been called by some "the best and brightest", [3] have caused *inter alia*: Italian musicians and opera singers to have their annual season curtailed or their contracts annulled; [4] low-income Portuguese pensioners to have their monthly income further reduced; [5] life-saving and serving Greek nurses to lose their jobs; [6] and young Latvian people of working age to emigrate *en masse* at an unprecedented rate. [7]

### **Constitutions in times of crisis: A token of Civil Commons?**

Even the typically aloof and fairly resilient sphere of constitutional law has been far from immune. Between 2008 and 2015, some European countries have either modified or tried to modify their constitutions so as to enshrine within them tight budgetary rules. At the same time, constitutional *fora* have been busy addressing crisis-related laws and policies. In public debates and scholarly studies, many of these laws and policies have been referred to as "austerity" laws and policies, given their conspicuous consumption-reducing impact on citizens, particularly those already vulnerable and/or the less affluent members of society (e.g. youth's unemployment, wage cuts in the public sector, children's and elderly citizens' illness and/or premature death by reduced healthcare provision). [8]

In this paper, we aim to survey representative constitutional amendments in the European Union's (EU) area, whether attempted or accomplished, as well as significant adjudications by constitutional bodies. Then, we proceed to assess these legal phenomena in light of human rights jurisprudence. Pivotal reference in our work is the recently released 7<sup>th</sup> volume of the

*Annuaire international des droits de l'homme* (Athens: Sakkoulas, December 2014), edited by G. Katrougalos, M. Figueiredo and P. Pararas under the aegis of the International Association of Constitutional Law.[9] Not only does this volume comprise the work of some of Europe's noted constitutionalists, it also addresses the constitutional matters central to this paper in light of human rights jurisprudence, which is the area of expertise of one of the paper's authors, i.e. Ágúst Þór Árnason, and the area that the other author, Giorgio Baruchello, has construed axiologically as a pivotal instantiation of *civil commons*,[10] i.e. "all social constructs which enable universal access to life goods".[11] Have European constitutions continued to function *qua* civil commons in the crisis years? That, at the deepest level of value scrutiny, is the question that our joint survey and analysis aim to answer.

We focus intentionally upon non-Nordic countries. Firstly, only some of the Nordic nations are part of the EU and even fewer are members of the Eurozone.[12] Secondly, we assume that the predicaments of the nations discussed hereby are less known in Northern Europe and therefore make a fresh contribution to the Nordic Summer University's (NSU) research group for whom this paper has been written. Thirdly, we believe that discussing the constitutional events that have taken place in these nations may cast light on the deepest reasons for the on-going European crisis. Not only do these events pertain to EU and Eurozone countries; also, they exemplify most starkly the conflict between the European populations' life-needs and the money-preferences of the institutional creditors of Europe's States. Theirs is the conflict on which constitutional courts are mandated to adjudicate given the existing international treaties and national constitutions, the civil-commons function of which can therefore be observed and gauged.

## Select events on Europe's constitutional scene, 2008-2015

### i. Greece

Let us begin with Greece, possibly the most dramatically crisis-hit country in Europe, at least as regards demographic indicators such as HIV-infection, mental illness, suicide and overall

mortality rates, all of which worsened considerably after the fatal “intoxication” of the international financial markets, the resulting collapse of Lehman Brothers, the subsequent disruption of the global economic regime, the opportunities for rampant financial speculation emerging therefrom,[13] and the austerity measures taken by the Greek State in order to be granted new, dearer loans.[14]

## i1. Preliminary remarks

Without these new, dearer loans transferring by definition an even bigger share of public wealth into private hands, the Greek State would have succumbed to speculation and possibly stepped into massive debt restructuring or even sovereign default. Both outcomes were resisted by State creditors,[15] for they would have meant: (i) huge immediate losses for Greek as well as foreign private bond-holders and investors; (ii) sizeable gains for some foreign hedge funds speculating or betting directly upon such events;[16] and (iii) a meltdown of the nation's financial and banking businesses akin to the one that occurred in Iceland, i.e. the former “Viking tiger” about which we have spoken on previous meetings of our NSU research group, but this time within the Eurozone, hence foreboding major “contagion”[17] risks on an international scale.[18] Given its dramatic connotations, its systemic implications, and the publicity surrounding it, we are going to focus here more upon the Greek experience than on the others following it. Besides, these additional experiences adhere to the same inherent socio-economic logic and debtor-creditor power aetiology that we describe *vis-à-vis* Greece and its “absentee owners” who, as US economist Thorstein Veblen discussed almost one hundred years ago, can hold the nations' private businesses and public governments to ransom by means of actual and/or threatened financial “sabotage” of the real economy (e.g. reduction or suspension of credit provision, speculation upon State bonds and national currencies, mass capital outflow).[19]

The legal system of the Hellenic Republic does not include a constitutional court as such, but rather the Greek Council of State deals *qua* highest administrative court of the country with many, though not all, matters of a substantial constitutional character. As of 2008, this court

has passed two decisions in relation to the 2010 and 2012 Economic Adjustment Programmes and the related “memoranda”[20] between the Greek State and the representatives of the International Monetary Fund (IMF), the European Central Bank (ECB) and the European Commission, i.e. the three international institutions representing creditor interests that the media dubbed the “Troika”. [21] Via the 2010 and 2012 bailout operations, the members of the Troika required the Greek government to adopt extensive sets of austerity laws and policies in order to obtain loans aimed at securing the solvency of the State, henceforth its ability to pay its creditors, as well as the effective continuation of the country's private financial and banking sectors. Such was at that point in history the will of the transnational institutional creditors, who had poured money far more easily, if not actually quite eagerly, into the Greek economy *before* 2008, irrespective of whatever notorious private corruption or public profligacy may have characterised that country.[22] As US investment giant Goldman Sachs is concerned, it even sold the Greek State highly profitable—for the former—and secretive financial derivatives in 2000-2002, thus allowing the latter to report misleading information on Greece's public finances.[23]

## i2. The big picture

Analogously to the conditionalities that the IMF and the World Bank set in place for debtor countries in the so-called “Third World” over the 1980s and 1990s,[24] these austerity policies have had a remarkably depressing effect on the Greek economy. For one, they have generated a prolonged slump rather than the “higher growth and employment” indicated in the 2010 “*Memorandum of Understanding of Economic and Financial Policies*” (p.2). Three years later, the IMF's “*Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement*” admitted that there had been “notable failures” with these policies, including the uneven way in which “the burden of adjustment” had been spread “across different strata of society” (pp.1-2). Still, about 90% of the bailout money was used to repay or pay interest on loans from private lenders, Greek as well as non-Greek—*ergo* Goldman Sachs too—, also *via* eventual, partial debt restructuring in 2012.[25] So-called “haircuts” were made then, but the IMF and the institutional creditors that the IMF represents on international *fora* seem pleased with the overall result, which has so far prevented a sovereign default and preserved the bulk of creditors' claims.[26] After all, these payments and repayments took

place during and despite a worsening economic situation and, with it, vast socio-demographic losses, some of which beyond any possible compensation (e.g. death and children's loss of opportunities). Apparently, there was too little money to avoid them, the bailout funds serving the end of preventing major pecuniary losses to the State's bondholders as well as to private shareholders and investors of Greek private banks, such people being both Greek and non-Greek. Their claims did not vanish by way of sovereign default; their value was not annihilated thanks to the Troika's acting as intermediary and the State's wealth as guarantee; the interest payments to which they were entitled kept streaming unchanged, at least until 2012, and are still unfrozen; old, undesired claims were refunded; new ones were established at a higher premium for the willing. Meanwhile, the debt burden was shifted from private hands into public ones, which then reduced the provision of public goods and services at central and local levels, with dramatic effects for the population.[27] As the 2010 Loan Agreements state, a "safety net" was promptly put and sternly kept in place, but "for the financial system", [28] not the population at large, who received instead "cuts in public sector salaries, bonuses... allowances, and steps to reduce health care spending". [29] Shifting the burden of the crisis onto States and their citizens, i.e. away from the private agents with whom it originated, is what the Bank of England's executive director Andrew Haldane and economic analyst Piergiorgio Alessandri call "**Banking on the state**". [30] It is not a phenomenon limited to Greece alone: quite the opposite. As they wrote in 2009:

*[Take] a snap-shot of the scale of intervention to support the banks in the UK, US and the euro-area during the current crisis. This totals over \$14 trillion or almost a quarter of global GDP. It dwarfs any previous state support of the banking system. These interventions have been as imaginative as they have large, including liquidity and capital injections, debt guarantees, deposit insurance and asset purchase. The costs of this intervention are already being felt. As in the Middle Ages, perceived risks from lending to the state are larger than to some corporations. The price of default insurance is higher for some G7 governments than for McDonalds or the Campbell Soup Company. Yet there is one key difference between the situation today and that in the Middle Ages. Then, the biggest risk to the banks was from the sovereign. Today, perhaps the biggest risk to the sovereign comes from the banks. Causality has reversed. (p.1)*

Apart from recalling the experiences of developing yet never truly developed countries in recent decades, the chain of events observed in Greece has also proved consistent with the statement pronounced on the 9<sup>th</sup> May 2010 by Nogueira Batista, Brazil's executive director on the IMF board at the time of the first Greek bailout agreements. On that fateful occasion, Batista stated that the planned bailout process should "be seen *not* as a rescue of Greece, which will have to undergo a wrenching adjustment, but as a bailout of Greece's private debt holders, mainly European financial institutions." (emphasis added)[31] As legal scholar Ellen Brown succinctly explains: "ballooning Greek debt was incurred to save the very international banks to which it is now largely owed." [32]

The inner economic logic revealed by Haldane, Alessandri, Batista and Brown is as clear as it is twisted. The nations' public wealth (e.g. State-owned utilities, tax revenues, citizen's pension money) and institutions (e.g. income taxation, debt-issuing treasuries, executive power) are used to keep afloat the transnational private financial sector, especially the over-indebted banks and funds that, in recent decades, created, traded and/or ballooned upon virtual assets that proved to be toxic in reality. These banks' and funds' debts and, in turn, these debts' toxicity caused an eventual systemic collapse. Then, and then only, did large-scale public intervention in the economy and novel regulation come to be advocated forcefully and operated factually, their prime aim being the rescue of the over-indebted private banks and funds (e.g. the US' TARP, the ECB's LTROs).[33] As we write, the ECB has just has been handing out €1.1 trillion to the private financial industry in its latest round of quantitative easing, while impoverished Greek pensioners have to go through the garbage in order to find something edible.[34] Yet this is only part of the twisted, indeed paradoxical logic at work. Such large-scale public intervention and novel regulation have occurred in spite of the free-market principles championed until 2008 by most Western governments since at least Margret Thatcher's first cabinet in the UK, as well as by the most eminent representatives of the private financial industry, which has been deregulated worldwide since the 1980s in line with the same principles.[35] Economic bankruptcy was averted by intellectual bankruptcy. As to the justification for suddenly abandoning these principles, it was argued that the transnational private financial sector, albeit culpable for the collapse, is



uniquely necessary to provide credit to the real economy of the world.[36]

The real economy, however, has been largely deprived of credit since 2008, at least in the EU. The money that has been made available most promptly to the private financial industry by Europe's as well as other major central banks has not gone primarily to families and businesses. Rather, it has been used largely for worldwide speculation on financial assets.[37] This lack of outflowing productive credit has been lamented by the current ECB's president himself, Mario Draghi, who has gone so far as to charge private banks for holding reserves at the ECB.[38] Claims of the private financial sector's unique necessity, moreover, fly in the face of historical instances of constructive public credit provision, ranging from Bismarck's Germany to today's North Dakota.[39] Desirable the private financial and banking sectors might be, certainly for private shareholders and top managers; but necessary they are not, at least factually. Neither are they necessary logically. If anything, the frequently heard official justification fails the principle of Ockham's razor because of unneeded multiplication of agents. If public wealth is gathered *via* privatisation, taxation, budget cuts, etc. in order to be given to private agents, who then return it—for a fee—to the public, then it is simpler to skip the fee-charging intermediate agent and let the public manage the wealth it already possesses, e.g. by local or national public banks. Rather than "necessity", Veblen's term "pecuniary opportunity" better describes the inner economic logic at work, albeit one that may be neither productive nor constructive.[40] Echoing Haldane and Alessandri, US economist and economic historian Michael Hudson writes: "The [financial] rentier or monopolist masquerades as contributing to the production process so that its revenue appears to be earned rather than siphoned off in a zero-sum activity... In the case of financial parasitism, *bankers and money managers have become more destructive over the centuries.*"[41] (emphasis added)

### i3. The small picture

It is within this broader systemic context that the Greek Council of State adjudicated case 668/2012 on whether the agreements with the Troika violated the constitutional principles of



“proportionality, equality, the fair distribution of public burden and the right to property” (AID: 10). It determined that, given the “exceptional and urgent goals of general public interest as well as the need to guarantee the country’s obligations towards the European Union and the International Monetary Fund”, the agreements were acceptable, for “the need to serve the country’s external funding and the enhancement of its financial credibility were crucial” at this stage (AID: 10; cf. also pp.578-79). It was a case of acknowledged *force majeure*, or an “*état d’exception*” [state of exception], under which “the need to effectively protect the public interest prevails temporarily over the full realization of rights and the executive is empowered towards the legislative and the judicial.” (AID: 10; cf. also pp.315-24)[42]

Speaking of effective protection of people’s interests by impeding the fulfilment of their rights may sound Orwellian, especially when this is coupled with the idea of skewing the balance among the three fundamental powers within the liberal paradigm. However, under international law, only slavery and torture are prohibited absolutely as *ius cogens* [compelling law], whilst in Europe, both inside and outside the EU, no State may take a citizen’s life in peacetime either. All other rights, whether private property or freedom of assembly, can be weighed and must be balanced mutually in the interest of the public good.[43] In an attempt to find the right equilibrium, in case 1685/2013 concerning whether the new taxes introduced because of the memoranda conflicted with Art. 78 par. 2 of the Greek Constitution, which limits to one fiscal year any retroactive legislation imposing taxes upon Greek citizens, the court concluded that they were acceptable, “due to the need of protecting the public interest” (AID: 10-12; cf. also pp.578-79). In what amounts to a patent acknowledgment of power relations under current economic conditions, the Greek Council of State concluded that, in order for “public interest” to be protected, resources should be withdrawn from the Greek citizenry so as to make sure that the creditors’ interest payments kept flowing.

Some constitutional matters were dealt with by other courts, however, and they did not meet the same fate. The Greek Court of Auditors, “after reviewing the fourth... programmed cuts on the public sector pensions”, issued an opinion on 20 February 2012 that condemned

“these horizontal [i.e. across the board] and with no specific time limit reductions”, for they [what follows is a direct translation of the opinion]: “violate the principle of the social state, but also lead to its destruction since they deteriorate the pensioners’ situation in such a level, that the principle of *human dignity* according to the Constitution is jeopardized” (AID: 11-12; emphasis added).[44] Time had elapsed, elderly Greek citizens had been impoverished and their rights, especially social and economic ones, curtailed by repeated rounds of budget and pension cuts. The exceptional measures were becoming a new norm; henceforth, the balancing of rights in view of the public good required a move in the opposite direction, in order not to be disproportionate—indeed, in order not to violate the paramount principle of human dignity itself. As we are going to see, that is what the constitutional courts of other EU countries concluded as well during these years of crisis.

## ii. Portugal

Let us continue with the other crisis-hit countries, commonly referred to with the disparaging acronym “PIIGS”, which is worth noting as a token of victimisation of victims.[45] The first one, “P”, is Portugal, which entered an Economic Adjustment Programme with the same Troika members as Greece in May 2011 and abandoned it voluntarily, without full disbursement of the planned loans, in June 2014.[46] It too comprised a “Memorandum of Economic and Financial Policies”, a “Memorandum of Understanding on Specific Economic Policy Conditionality” and a “Technical Memorandum of Understanding”. Behind the decision to abandon the bailout plan lie three much-publicised rulings by the national Constitutional Court (cf. AID: 7 n12, 575 n8 & 579-81), whose adjudications are binding on all public and private persons and bodies.[47] They concern cases 396/2011 (in Portuguese; cf. also AID: 7, 578 n13), 353/2012 (in Portuguese; cf. also AID: 7-8, 118 n74) and 187/2013 (in Portuguese; cf. also AID: 8, 119 n75), all pertaining to the constitutionality of severe cuts to public-sector wages and pensions.

In 2011, the court acknowledged “a compelling State interest in fiscal adjustment” and deemed constitutional “the contested salary cuts in the public sector”, based upon

considerations of adequacy, necessity and proportionality in view of “tangible results.” (AID: 578 n13). However, in 2012, the State budget had planned yet another round of vast cuts in the salaries and pensions of public employees, so as to gather resources to repay *in primis* its private creditors, but the court intervened: public-sector workers were being targeted in a way that was not applied to private-sector workers: the constitutional principle of *equality* was being denied (AID: 118).[48] Similarly, in 2013, the principle of *equality* was called upon in order to condemn further cuts in the public sector as unconstitutional, adding to this notion a temporal and etiological component: “as time progresses... the reason to target public sector employees grows weaker since the cumulative effect of three years of pay cuts increases the weight of the burden placed specifically on their shoulders while... the Government had plenty of time to find workable alternatives to reduce public expenditure.” (AID: 118-19).[49]

### iii. Italy

Italy has received no bailout funds yet and it has actually been the third biggest net contributor to the European Financial Stability Facility (EFSF), established in 2010 alongside the European Financial Stabilisation Mechanism (EFSM) in order to loan funds to the States of Greece, Portugal and Ireland within the context of coordinated bailout programmes with other international financial institutions (IFIs).[50] Italy has also been the third biggest net contributor to the EFSM's legal successor, i.e. the 2012 European Stability Mechanism (ESM).[51] Nonetheless, the State's historically high public debt and the dubious “health” of some of its largest banks have made Italy a significant target of international financial speculation during the crisis years, so that “[b]y attacking Italy, financial speculation could really cause the euro-zone to break up”.[52] Thus, in order to secure regular interest payments on its public debt and thereby reassure the international financial community, the country has been undergoing a prolonged period of austerity under four successive governments (i.e. Berlusconi IV, Monti, Letta, Renzi; of them, only the first was formed after a round of elections for the national Parliament). Speculation-impairing limitation or suspension of free capital trade, as successfully operated in Malaysia during the 1997-1998 Asian crises,[53] has never been discussed by national leaders in connection with the recent Eurozone troubles, despite its prime causal role[54] and the well-known absence of financial

meltdowns in the Bretton Woods era.[55] Quite the opposite, austerity measures have been the standard solution across the board, thus displaying *ipso facto* the awesome power that international financial interests can have over national ones in current world affairs.[56]

Analogously to what occurred in Greece and Portugal, the Italian Constitutional Court has eventually been involved in assessing some of the laws implementing such austerity policies. The rationale and the chronological evolution of the court's decisions have been analogous too. In 2010, assessing case 316/2010 (in Italian; cf. also AID: 395), the court declared constitutional the State's recouping of resources *via* temporary cessation of the revaluation of the highest pensions of former State employees (i.e. above 90,000.00 EUR a year). This recouping was called a "solidarity contribution", given the objectives of "a balanced budget" and the effectively "limited resources available" for the State at that time (AID: 395). Three years later, however, dealing with case 116/2013 (in Italian; cf. also AID: 9 & 395-96), the continued blockage of those pensions' revaluation was deemed unconstitutional, given also a previous decision of the same court on the salaries of public top managers (case 223/2012), in which it was determined that withholding due payments to public employees, whilst keeping those for equivalent private ones unaffected, violated the constitutional principle of *equality*. [57] As already seen in the opinions of the Portuguese constitutional court, the continued singling out of public-sector workers, past and present, violates their equal standing as right-bearing citizens of the State. [58]

An additional analogy is to be found with regard to those citizens that lie at the opposite end of the income spectrum, i.e. those who are so poor because of the ongoing crisis that a "right to nourishment" (the court's own formulation; case 10/2010) must be acknowledged openly and clearly to their benefit, in connection with the fundamental constitutional principle of the "*dignity of the human person*" (*idem*, in Italian; cf. also AID: 396; emphasis added). By so doing, the court recognises that "the extraordinary circumstances created by the crisis [are] a basis not to curtail rights, but to enhance their protection by upholding provisions that would otherwise be ruled unconstitutional" (AID: 575). Contrary to the 2012 decision of the Greek Council of State, the conditions of *force majeure*, i.e. the state of exception caused by

the severe economic downturn, may actually justify unconventional policies to respect, protect and fulfil the citizens' rights, rather than curtailing them temporarily for the sake of meeting financial obligations with the State's creditors—as was also done, historically, in wartime periods. “First things come first”; or, as even the liberal thinker Isaiah Berlin believed, they ought to.[59] If the State's interest payments are frozen, delayed or cancelled, an investor may lose some of her money, and hardly ever the principal. If the State's medical treatments are frozen, delayed or cancelled, a citizen may lose her one and only life, which can never be recovered. Economic, social and cultural rights may and can be prioritised over creditors' pressing demands, which may and can be postponed without harming or destroying citizens' livelihoods and lives. This was done in response to Iceland's 2008 meltdown, for instance, without it even causing a rift with the IMF.[60] Serious economic crisis is *ipso facto* the moral and legal justification for emergency lines of action.[61] It is precisely in gravely difficult times that legally acknowledged human rights become truly crucial *qua* means of shielding the individual from major life-harm and must therefore be respected, protected and fulfilled.[62]

Finally, under the umbrella-notion of austerity policies, Italy underwent a veritable constitutional change too. It was the introduction of a new constitutional principle, i.e. that of a “balanced budget” [*pareggio di bilancio*], through the constitutional law [nr.1 of 20 April 2012](#), modifying articles 81 (State budget), 97 (Public Administration), 117 and 119 (regions and local authorities) of the Italian Constitution (in Italian; cf. also AID: 397-99). This principle was introduced despite the ratified EU treaties, which allow for a 3% deficit over the national GDP, but in explicitly declared connection with the 2012 European Fiscal Compact among EU countries fixing the State's annual budget deficit to 0.5%, or 1% in case of the public debt being below 60% of the country's GDP.[63] Taken in isolation, this new principle seems austere indeed, for it apparently contradicts the well-established notion and historical praxis whereby States grow and develop by means, *inter alia*, of public deficit. However, in the successive law of implementation (nr. [243/2012](#)), a modicum of flexibility was immediately reintroduced, given previous pronunciations of the same court on matters of public finance (especially the decision 1/1966) and the explicit acknowledgment of the simple but important fact of “contrary and favourable phases of the economic cycle” (art. 81, al.1). Eighty years of macroeconomic science and experience were not suddenly obliterated. Rather, what was

really new in connection with this constitutional change was the specification that the new principle has to be adhered to “in conformity with the normative order of the European Union” (art. 97). To many commentators, this open reference to the EU did strike as a breach of national sovereignty (cf. AID: 398).

#### iv. Ireland

Another country where constitutional changes have been discussed and/or passed is Ireland, the former “Celtic tiger”, which entered an Economic Adjustment Programme with the Troika in 2010, just like Greece and Portugal, given the implosion of its private banking sector in 2008.<sup>[64]</sup> As already seen in Greece and Portugal, bailout programmes have regularly required austerity measures *qua* conditionality for the loans. Unlike Greece and Portugal, though, the Irish constitution requires popular votes to be held in connection with constitutional amendments. As a result, three referenda were held in Ireland on constitutional amendments that related palpably to the aftermath of the 2008 crisis. The first one was held on 27 October 2011 and allowed for the successive reduction of the wages for Irish judges, who therefore suffered a worse pecuniary fate than their Italian colleagues. The second was held on 31 May 2012 and allowed the Irish government to ratify the European Fiscal Compact. The third one was held on 4 October 2013 and rejected the abolition of the Seanad, i.e. the Irish upper house or Senate, which had been targeted for extinction by several politicians as a cost-saving move.<sup>[65]</sup>

Additionally, just before and then immediately after the 2008 Worldwide collapse, Ireland's popular votes on constitutional amendments had already been in the news extensively, for the voting population had first rejected (12 June 2008) and then approved (2 October 2009) the ratification of the Lisbon Treaty, which increased the level of institutional integration of the EU countries. Finally, three more popular votes have been held since 2008 that do not seem to be directly relatable to: (a) the crisis as such; (b) the role played by the Irish banking sector or the deregulating governments of the former Celtic tiger in the early 2000s; and (c) the austerity measures following the 2010 Economic Adjustment Programme agreed upon

with the Troika. They consisted of: an October 2011 vote on the scope of investigative powers of Parliamentary commissions; a November 2012 vote on children's rights in the country; and an October 2013 vote on the introduction of a new Court of Appeal between the High Court and the Supreme Court.

Possibly, the most conspicuous constitutional change that Ireland may undergo will result from the 2015 referenda and governmental replies to the conclusions of the national [Convention on the Constitution](#), held between 1 December 2012 and 31 March 2014, largely as a response to the crisis, as shown most clearly by the Convention's focus on economic, social and cultural rights.<sup>[66]</sup> For those who are not aware of the nature, composition and aims of this institution:

*The Convention on the Constitution is a forum of 100 people, representative of Irish society and parliamentarians from the island of Ireland, with an independent Chairman. The Convention was established by Resolution of both Houses of the Oireachtas to consider and make recommendations on certain topics as possible future amendments to the Constitution. The Convention is to complete its work within 12 months. For its part, the Government has undertaken to respond to the Convention's recommendations within four months by way of debates in the Oireachtas and where it agrees with a particular recommendation to amend the Constitution, to include a timeframe for a referendum.*<sup>[67]</sup>

The current year may thus yield interesting constitutional changes for Ireland.

As regards the Irish constitutional court, however, not a lot has happened in the Irish courts directly related to the economic crisis. Education-related cases of the early 2000s set down such a conservative line on judicial enforcement of socio-economic rights, even those that



are justiciable in the text, that it had a chilling effect on any possible litigation in this area. We write “conservative” because in other countries, most notably in South Africa, constitutional jurisprudence moved in the opposite direction, i.e. by facilitating the protection, respect and fulfilment of such human rights *via* judicial enforcement.[68] When the crisis erupted, it was pretty clear that the Irish courts were going to be highly unlikely to do anything with positive implications for resource policy or allocation. Certainly, there were some more procedural cases that sought to challenge some of the international agreements that Ireland signed up to during the crisis, but these were unsuccessful.[69]

## **v. Spain**

Another country witnessing significant crisis-related constitutional changes has been Spain, which underwent a Financial Sector Adjustment Programme between 2012 and 2014, because of the precarious “health” of some of its biggest banks.[70] In this kingdom, the national constitution was changed on 27 September 2011 without any popular vote, precisely under the political justification of coping with the urgent economic crisis (cf. AID: 451-56). As in Italy, here too the so-called “*golden rule* of budgetary stability” was introduced into the constitution, this time by modifying Art.135 and granting the central government new powers to “impose budgetary stability” over the largely autonomous communities of the kingdom (cf. AID: 455; emphasis in the original).[71] Only three Parliamentary votes on the national constitution have been held in Spain since 1978. One of them was already inspired by the European institutions and partners, i.e. the 1992 vote to ratify the Maastricht Treaty. The other vote was, in 1978, on the ratification of the constitution itself. Constitutional change, in Spain, is rare. Additionally, budgetary stability was already part of the Spanish constitutional order, given the Constitutional Court’s judgment nr. 134/2011 concerning laws 5/2001 and 18/2001 (in Spanish; cf. also AID: 451-53). These laws addressed and accepted a number of EU recommendations on budgetary stability within their member states. Why introduce the “golden rule” in such an atypical manner, then?

One likely answer that can be extrapolated from the 2011 Spanish constitutional text and

context is the fear of the State's institutional creditors, especially large foreign financial holdings, of losing their money. [A] As the constitutional text is concerned, it could be argued that the 2011 constitutional amendment leaves the Spanish State, like its Italian counterpart, a modicum of room for technical manoeuvres aimed at implementing "budget stability" rather than a "balanced budget" *via* Keynesian responses to fluctuations of the economic cycle and/or at maintaining the "social sustainability" of the State itself (AID: 455). Again, eighty years of macroeconomic science and experience could not be suddenly obliterated. Nonetheless, the constitutional amendment at issue states most blatantly that "*absolute priority*" must be given to the payment of sovereign debt and that "[t]hese appropriations may not be subject to amendment or modification" (art.135, c.3). *Ipsa dicto*, the State's creditors, including foreign ones, are prioritised over its citizens (*idem*; emphasis added).[72]

[B] As the constitutional context is concerned, Spanish experts were left baffled, to say the least, by the fact that: (1) no popular vote was called on the 2011 amendment; (2) no substantial Parliamentary debate was allowed (an *ad hoc* fast-track system conceded only *one* debate on the matter and this was deemed constitutional by the Constitutional Court); and (3), for the first time in Spanish history, no large consensus was sought in the national Parliament, since the two main Madrid- and Castile-based parties (i.e. the socialists and the Christian-democrats) had just enough votes to pass the amendment in accordance with formal requirements for constitutionality.[73] Considering the few previous, certainly consensus-based constitutional reforms, as well as the constitutionally acknowledged strong local autonomies, this third point remains a most striking aspect of the matter and may help explain the fervid resurgence of separatist parties in Catalonia, the Basque country and Valencia over the past four years (AID: 456-63).[74]

## vi. Other significant cases

An overview of the *ipso dicto* victimised "PIIGS" gives us already a lot of food for thought. Before moving to our concluding section, however, let us recall very few significant cases from other EU countries.

## **vi1. Latvia**

The former “Baltic tiger” of Latvia, for example, underwent between 2008 and 2012 an Economic Adjustment Programme, which led in turn to major austerity measures, and joined eventually the Eurozone in 2014.[75] Austerity measures produced in turn severe impoverishment for large sectors of the population—especially the elderly—and mass emigration—especially the youth. In this context, the nation’s constitutional court issued a number of decision dealing with such austerity measures, some of which were deemed acceptable because of reduced State revenues (cases 2009-08-01 on pensions’ indexing, 2009-44-01 on reduced child benefits, 2010-17-01 on reduced unemployment benefits, 2010-21-01 on reduced future State pensions). Others, on the contrary, were deemed unacceptable (cases 2009-76-01 on 70% reduction of retirement pensions of employees of the Ministry of Interiors, 2009-88-01 on 10% reduction of retirement pensions for the Army, 2010-60-01 on wage freeze for judges). In the latter event, articles 1 (legitimate expectations and proportionality) and 109 (social rights) of the national constitution were regularly referred to in order to justify the negative judgment.[76] Indeed, even when deeming constitutional an early round of reduced old-age pension disbursements (case 2009-43-01), the court deemed it important to clarify: “even if the State reduces the pension disbursement amount for a period of time in the situation of rapid economic recession, there is still a definite body of *fundamental rights* that the State is not entitled to derogate from” (AID: 118; emphasis added).[77]

## **vi2. Romania**

Romania underwent a series of Financial Assistance Programmes over the years 2009-11, 2011-13 and 2013-15.[78] They too translated into a number of austerity measures impoverishing what was under many accounts the already-poorest member of the EU.[79] On the one hand, cost-saving reforms of the national constitutions were attempted. First, the reduction of the houses of parliament to one and the introduction of the principle of the “balanced budget” in the constitutional text were proposed in 2011. Then, the former attempt having failed to gain enough political support, a new proposal comprising no fewer than 128 amendments of the constitution was presented in parliament in 2014, but no final

decision has been taken yet. On the other hand, the Constitutional Court of Romania, *per* its decisions nr. 872 & 873 published in the Official Gazette nr. 433 (25 June 2010), pointed out that: “the state has a positive obligation to take all measures necessary to achieve that objective and to refrain from any conduct likely to encroach *the right to social security*” (AID: 118; emphasis added). Like their colleagues in the former “Baltic tiger”, social and economic rights have been acknowledged by the constitutional court and the negative impact of austerity measures upon them condemned.

### **vi3. Germany**

In Germany, finally, the constitutional “Court declared unconstitutional a law reducing benefits for social assistance, on the basis that the legislator had failed to respect the fundamental right to guarantee a subsistence minimum, which is derived by the principles of *human dignity and the social state*” (AID: 119; emphasis added).[80] Emblematically, in the country that is regarded by most pundits as the politically most powerful member of the EU, both human dignity and the social state are highlighted by the constitutional court as essential benchmarks for the budgetary considerations of the State. It is not investors’ confidence that legitimises State action, but its function *qua* constitutionally mandated civil commons.

### **Critical considerations**

Recessions happen. Crises happen. Depressions happen. Unlike tsunamis and earthquakes, however, it is not nature’s tampered yet untamed power that causes them. Rather, they result from the combined responsibility of economic agents and the legal-political ones legislating upon, fostering, monitoring and sanctioning the former—or failing to do so. Sometimes, the agents responsible for economic downturns are easier to spot than other times. As far as the 2008 crisis is concerned, the key-role played by gargantuan financial institutions under a deregulated normative framework has been clearly identified and denounced by *ad hoc* Parliamentary commissions[81] and top-level government officials.[82]

Yet, as the crisis deepened and expanded well beyond the borders of high finance, the brunt of the collapse has been borne by individuals that had hardly anything or nothing to do with high finance: poorer pensioners, poorer public employees, poorer disabled individuals, fired workers of private enterprises, and innocent children deprived of medical care and educational or cultural opportunities that will never come back, for, whatever improvement there may be in the future, their childhood will be over by then.[83] Though rarely discussed in connection with the for-profit toxic assets that caused the ongoing crisis in the first place, innocent children are neither a rhetorical flourish nor merely some of the blameless victims of financial wizardry. They are the ontological precondition of the next generations in the world's communities. Civilised humanity is at stake here. This is no hyperbole. As shown in this account, more than one constitutional court has claimed that the ongoing crisis has caused such socio-economic disruptions that not only well-established constitutional principles of equality and proportionality are endangered—and so are socio-economic rights too—but the very dignity of the human person has been encroached upon. Albeit somewhat vague, it is hard to imagine any stronger pronouncement coming from constitutional judges, who have come to confront, among other things, the malnutrition, destitution and death engendered by austerity laws and policies over much of Europe.[84]

As to applicable ethical criteria, it can be argued that the whole logic inherent to the adjustment processes witnessed in Europe is nothing but *cruel*. [85] On the one hand, affluent private investors and shareholders are rescued from the losses caused by their own or their money-managers' bad market choices through the indebting of public bodies and the ensuing reduction of social goods provision, whilst private banks enjoy ECB's special credit lines (e.g. 2008, 2011 and 2012 LTROs), which have been used *inter alia* to speculate on EU-based public debt instead of lending money to the shrinking real economy. On the other hand, no such ample and prompt credit is provided to the populations, for such a provision might be inflationary; thus Europe's peoples are left to suffer both psychologically and physically, not just economically, for their health is negatively affected, the growth of their offspring reduced in quality and opportunity, and the lives of some ended under avoidable circumstances. First things are not coming first. Quite the opposite, the relentless crushing of livelihoods and lives goes on for the sake of continued money-accruing. As the current Pope of the Church of Rome has recently written on this point: "[t]he worldwide crisis affecting finance and the

economy lays bare their imbalances and, above all, their lack of real concern for human beings", thus adding to the "persistent injustice, evil, indifference and *cruelty*" that we witness "all around us" (emphasis added).[86] No less forcefully does Greek constitutional lawyer Giorgios Kasimatis state (emphasis added):

*The Loan Agreements (the Loan Facility Agreement; the Memorandum of Understanding between Greece and the Euro-area Member States and the agreement with the IMF for the Participation of Greece in the European Financial Stabilization Mechanism to the purpose of obtaining the approval of a Stand-by arrangement by the International Monetary Fund) form a system of international treaties the likes of which... the **cruelty** of the terms and the extent of breach of fundamental legal rights and principles... have never been enacted in the heart of Europe and the European completion; not since the World War II.*[87]

But who is the cruel invader here? There are no tanks, no armed divisions in view. We invite the reader to reflect on a statement that the former President of the German Central Bank, Hans Tietmeyer, made during the 1990s, as the Europe-wide process of liberalisation of financial markets was being implemented and the Euro was in the process of being launched: "*the financial markets will become the gendarmes of the nations*"[88] (emphasis added); or, in a slightly longer version quoted by Uruguay's famous novelist Eduardo Galeano: "Financial markets more and more play the role of gendarmes. *Politicians should understand that from now on they are under the control of financial markets.*" (pp.151-52; emphasis added)[89] Meant as a metaphor, Tietmeyer's paradigm evokes a military occupation, which is what Kasimatis refers to: World War II, to be precise. The cruel invader is transnational private finance, as embodied by the "European financial institutions" that the Troika set itself to rescue through the nation-wrenching bailout programme foreshadowed by the aforementioned Brazilian IMF board director Batista in 2010.

In this connection, signs of an evolving "supranational economic constitution" serving the

wishes of large transnational creditor institutions are detected by some of Europe's noted constitutionalists (e.g. AID: 115). These legal scholars have no hesitation in regarding such a development as a silent *coup d'état* directed against "national democracy", e.g. by means of "ultra vires" decisions on matters well "outside EU competencies" in the memoranda between the Greek State and its institutional creditors (e.g. Decision 2010/320/EU; AID: 117 & 243-55). Italy's former finance minister and current conservative Senator of the Republic Giulio Tremonti dubs it adamantly "*financial fascism*", whereby the money-preferences of transnational financial institutions trump the constitutional rights of Europe's citizens (emphasis in the original).[90] Politicians use even stronger language than constitutional judges.

Yet, it is not only European financial institutions that are engendering a "supranational economic constitution" that caters to their wants. In a public May 2013 report entitled "[The Euro area adjustment: about halfway there](#)", the Europe Economic Research Team of US financial giant J.P. Morgan openly laments that Europe's national "Constitutions tend to show a strong socialist influence, reflecting the political strength that left wing parties gained after the defeat of fascism", thus allowing *inter alia* for "constitutional protection of labor rights" and "the right to protest if unwelcome changes are made to the political status quo", both of which prevent these nations from undergoing "fiscal and economic reform agendas" meeting their creditors' desiderata (p.12). "Portugal", "Spain", "Italy and Greece" are singled out as having constitutions that constrain governmental action in this sense, as though the democratic constitutions emerged after World War II were not an affirmation of those freed peoples' national self-determination, but the source of "deep seated political problems" that impede the European Monetary Union (EMU) "to function properly" (pp. 12-13). To put it bluntly, the world's gendarmes do not like democracy, inasmuch as it does not produce the results desired by J.P. Morgan's shareholders and investors. Moreover, as these gendarmes criticise constitutions that were born after, and as a result of, Europe's bitter struggle against fascism, they exemplify and substantiate Tremonti's observation regarding an emergent financial fascism, which prioritises creditor interests over citizens' rights.[91] It might not be merely a matter of strong words, then.



Nonetheless, whatever J.P. Morgan's expert team may be upset with, European human rights jurisprudence is pretty straightforward on who comes first. In a pivotal adjudication of the European Court of Human Rights (ECHR), i.e. *Capital Bank AD v. Bulgaria* nr. 49429/99, 24 November 2005 para. 110-11, it is made clear that States' obligations under human rights conventions and their protocols persist, no matter what subsequent obligations States may agree upon with international institutions such as, in this case, the IMF (cf. AID: 755-56). This is the case despite the right to private property being enshrined in the first protocol of the European Council's Convention of Human Rights and the ECHR being primarily *not* about social and economic rights, but rather civil and political ones. Precedents making the same point exist, though perhaps in not so explicit a manner, in abundant number, e.g. *Prince Adam II of Lichtenstein v. Germany* [GC], nr. 42527/98, para. 47-8, ECHR 2001-VIII; and *Bosphorus Hava Yollari Turzim ve Ticaret Anonim Sirketi v. Ireland* [GC], nr. 45036/98, para. 153-4, ECHR 2005; *Matthews v. the United Kingdom* [GC], nr. 24833/94, ECHR 1999-I; *Waite and Kennedy v. Germany* [GC], nr. 26083/94, ECHR 1999-I; *Beer and Regan v. Germany* [GC], nr. 28934/95, 18 February 1999; *Al-Adani v. the United Kingdom* [GC], nr. 35763/97, ECHR 2001-XI.[92] Our case could become even stronger if we were to add additional sources of human rights legislation that bind all European countries, both within and outside the EU, but we do not need to do it: the ECHR's jurisprudence is more than adequate here.

We focus upon human rights because that is what the cited constitutional judges and experts claim to be at stake, as the official constitutional rejection occurred of some of the laws passed in the context of austerity policies cutting public expenditures to scoop up resources for institutional creditors and *a fortiori* private banks' shareholders and investors. If unemployment, poverty and reduced social provisions by the State increase dramatically, then the fundamental human right of personal dignity is denied, not to mention human rights to adequate nutritional standards, as exemplified in case 10/2010 of Italy's constitutional court (AID: 505-13). If public-sector workers, whether current or former, are singled out for prolonged or repeated cuts, freezes and "solidarity contributions", proportionality and equality are also being denied. By holding against the power of institutional creditors and *eventually* reminding the legislator and the executive of their paramount human rights obligations,[93] the constitutional bodies of Europe are being true to their life-serving function as civil commons.[94] As Cicero had already realised long ago, that function is the

ultimate ground for the legitimacy of public policy and legislation: "*Ollis salus populi suprema lex esto*".<sup>[95]</sup>

**Works cited from the 7<sup>th</sup> volume of the *Annuaire international des droits de l'homme* (AID):**

CHRISTINA M. AKRIVOPOULOU, "Eurozone crisis and social rights protection in the south European jurisprudence", pp. 3-13.

GEORGE KATROUGALOS, "The crisis of the European social state", pp. 105-23.

DAVID SCHNEIDERMAN, "A New Global Economic Constitutional Order in the Making? The Case of International Investment Law", pp. 243-55.

ANTONIS BREDIMAS, "État de nécessité, force majeure et dette souveraine en droit international économique avec mention spécifique du cas de la Grèce", pp. 297-329.

MARINA CALAMO SPECCHIA, "La crise économique et l'équilibre budgétaire en Italie. Quel avenir pour les droits sociaux?", pp. 387-404.

ÁNGEL RODRÍGUEZ, "Sovereign Debt, Decentralization and Fundamental Social Rights After the Constitutional Reform of 2011 in Spain", pp. 445-64.

XENOPHON CONTIADES/ALKMENE FOTIADOU, "The debt crisis proving ground. Social rights theory revisited", pp. 573-82.

STAVROULA N. KTISTAKI, "Les droits sociaux en période de crise économique. Le cas de la Grèce", pp. 615-34.

**APPENDIX**

Since the 2015 Winter Symposium at which this paper was presented, the following major

constitutional events have taken place in some of the countries discussed above:

## GREECE

On 27 June 2014, the Greek Council of State in Plenum issued Decision 2307/2014 declaring all labour law measures implementing the second Memorandum of Understanding (MoU) in compliance with the Greek Constitution, the TFEU (arts 125 and 136), the ECHR (art 11 and art 1 of its 1<sup>st</sup> Additional Protocol) and ILO Conventions 87, 98 and 154, except those measures amending recourse to labour arbitration, which were found contrary to the principle of collective autonomy as guaranteed in the Greek Constitution (art 22 para 2). The Decision was the result of appeals lodged in March and April 2012 by nine trade unions, including the General Confederation of Workers of Greece (GSEE), contesting the validity of Ministerial Act 6/2012 which implemented the austerity labour measures contained in the second MoU. (Cf. European University of Cyprus' Matina Yannakourou, "Labour measures of Memorandum II before the Greek Council of State: Decision 2307/2014 (Plenum)", available at: [http://eurocrisislaw.eu.europa.eu/wp-content/uploads/2015/04/Greek-Council-of-State-2307\\_2014.pdf](http://eurocrisislaw.eu.europa.eu/wp-content/uploads/2015/04/Greek-Council-of-State-2307_2014.pdf))

12 July 2015, 3rd bailout agreement via European Stability Mechanism, 2015–2018, 86 billion EUR loan, of which 25 to recapitalise and resolve Greek banks (the first 10 billion EUR disbursement was made available immediately for this purpose); further cuts introduced, a new VAT system, previous laws to undo some of the previous austerity revoked, and a plan drafted to privatise about 50 billion of public assets; EU aid to reduce unemployment and poverty promised via Jean-Claude Juncker's European Commission's Investment Plan for Europe (EC IPE) over the period 2015–2017. (Cf. Euro Summit Statement, Brussels, 12 July 2015, [SN 4070/15](#)).

## PORTUGAL

Adjudication [413/2014](#) on Arts. 33, 75, 115 & 117 of Law nr. 83-C/2013 cutting public-sector pay, pensions and welfare provisions: unconstitutional because of lack of *equality*, *proportionality* and *trust*.

## ITALY

[Judgment 70/2015](#) of the Constitutional Court confirms unconstitutionality of the Monti government's (emergency) law decrees nr. 201, 6 Dec. 2011, and 214, 22 Dec. 2011. Pensioners' rights were unduly denied because of "unspecified financial needs" [*esigenze finanziarie non illustrate in dettaglio*]. Pension rights are said *not* to be untouchable, but more caution and clarity are required whenever touching them.

## SPAIN

For the first time in Spanish history, municipalities were able to lodge an action of unconstitutionality for breach of local competences (the law requires that 1,160 municipalities representing at least one-sixth of the Spanish population act together, i.e. about 7,8 million inhabitants; more than 3,000 municipalities cooperated in this case, about 850 of which from Catalonia). The municipalities oppose the reconfiguration of local social services carried out by the austerity laws 27/2013, whereby the management of social services can be transferred to the council of the province in municipalities of less than 20,000 inhabitants. Like the other actions against the Law 27/2013 of Rationalisation and Sustainability of the Local Administration, this action of unconstitutionality is pending of resolution by the Spanish Constitutional Court. (Cf. "[El TC admite a trámite el conflicto en defensa de la autonomía local planteado por 3.000 ayuntamientos contra la Ley 27/2013](#)", *Juridicas*, 11 September 2014).

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[1] Cf. Petruno, T. (2009, 4 June), "[Mozilo knew hazardous waste when he saw it](#)", *Los Angeles Times*.

[2] Cf. Chang, S-S., Stuckler, D., Yip, P. & Gunnell, D. (2013), "[Impact of 2008 global economic crisis on suicide: time trend study in 54 countries](#)", *BMJ* 2013;347:f5239; Christian, P. (2010), "Impact of the Economic Crisis and Increase in Food Prices on Child Mortality: Exploring Nutritional Pathways", *The Journal of Nutrition* 140(1): 177-181; Economou, M., Madianos, M., Peppou, L.E., Theleritis, C. & Stefanis, C.N. (2012) "Suicidality and the Economic Crisis in Greece", *The Lancet* 380: 337; Faresjö, Å., Theodorsson, E., Chatziarzenis, M., Sapouna, V., Claesson, H.-P., Koppner, J. & Faresjö, T. (2013) "Higher Perceived Stress but Lower Cortisol Levels Found among Young Greek Adults Living in a Stressful Social Environment in Comparison with Swedish Young Adults" *PLoS ONE* 8(9): e73828. doi:10.1371/journal.pone.0073828; Kentikelenis, A., Karanikolos, M., Papanicolas, I., Basu, S., McKee, M. & Stuckler, D. (2011), "Health Effects of Financial Crisis: Omens of a Greek

Tragedy" *The Lancet* 378: 1457-58. As to the economic aetiology at work, cf. US economist Michael Hudson on his [website](#).

[3] E.g. University of Central Arkansas (n.d.a.), "[Why Study Economics at UCA?](#)".

[4] Cf. Mesco, M. (2014, 19 June), "[Italy's Opera Crisis. Government austerity measures are leaving storied theatres in a lurch](#)", *Wall Street Journal*.

[5] Cf. Organisation for Economic Co-operation and Development (OECD; 2013), [Pensions at a Glance 2013. OECD and G20 Indicators](#).

[6] Cf. European Federation of Nurses Associations (EFN; 2012), [Caring in Crisis. The Impact of the Financial Crisis on Nurses and Nursing](#).

[7] Cf. Lulle, A. (2014), "Baltic Triplets? Out-migration Migration and Responses to Crisis", *Regional Formation and Development Studies* 3(11): 135-45.

[8] Cf. Stuckler, D. & Basu, S. (2013), *The Body Economic: Why Austerity Kills*, London: Allen Lane.

[9] The volume is abbreviated hereafter as AID, with page numbers indicated in the main body of the present text; the actual articles referred to hereby are listed separately at the end. All other references are listed either as hyperlinks in this text's main body or in its endnotes.

[10] Cf. Baruchello, G. & Johnstone, R.L. (2011), "Rights and Value. Construing the International Covenant on Economic, Social and Cultural Rights as Civil Commons", *Studies in Social Justice*, 5(1): 91-125.

[11] McMurtry, J. (2010), "What is Good? What is Bad? The Value of All Values Across Time, Place and Theories", [Encyclopedia of Life Support Systems](#), Paris & Oxford: Eolss-Unesco, para. 5.34.10.

[12] Sweden, Denmark and Finland are part of the EU. Finland alone uses the Euro.

[13] Depending on the countries' specific weak spots, financial speculation chose different targets, e.g. currency (Iceland), sovereign debt (Italy), bank's shares and obligations (Spain).

[14] Cf. Stuckler & Basu, *op. cit.*; Kentikelenis, A., Karanikolos, Reeves, A. McKee, M. & Stuckler, D. (2014), "Greece's Health Crisis: From Austerity to Denialism", *The Lancet* 383: 748-53.

[15] Cf. IMF (2013), "[Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement](#)": "With

debt restructuring off the table, Greece faced two alternatives: default immediately, or move ahead as if debt restructuring could be avoided. The latter strategy was adopted, but in the event, this only served to delay debt restructuring and allowed many private creditors to escape." (p.27)

[16] Cf. Clerin, M-F. (2010), "[What About Greece and Goldman Sachs?](#)", *Diplomatic World* 26.

[17] It is interesting to note how life-based metaphors abound in the pundits' descriptions of economic affairs (e.g. "health", "contagion", "metastasis"), which are however conducted in such a way as to cause literal harm to living beings (cf. Stuckler & Basu, *op. cit.*) and without taking any noticeable account of them (e.g. IMF, *op. cit.*).

[18] Cf. Árnason, Á.P. (2013) "[Colonial Past and Constitutional Momentum: The Case of Iceland](#)", *Nordicum-Mediterraneum* 8(2); Baruchello, G. (2014) "[The Picture—Small and Big: Iceland and the Crises](#)", *Nordicum-Mediterraneum* 9(3).

[19] Veblen, T. (1923) *Absentee Ownership: Business Enterprise in Recent Times*, New York: Huebsch. Continuing the classical tradition of Ricardo and Mill, Veblen regarded high finance as a rent-seeking wealth-transferring endeavour, i.e. parasitic upon the real economy, and capable of twisting the constitutionally elected governments' hand in supplying it with public wealth by application or sheer threat of withdrawal of credit from the national economy (cf. Hudson, M. (2012, 27 July), "[Veblen's Institutional Elaboration of Rent Theory](#)"). Unlike classical and neoclassical economics, which are built upon the paradigm of Newtonian physics, Veblen's institutional economics is built upon the paradigm of Darwinian biology. We believe that the latter's notions of predation and parasitism, for instance, describe insightfully the actual behaviour of living economic agents in real-world economic settings.

[20] I.e. the "Memorandum of Economic and Financial Policies", the "Memorandum of Understanding on Specific Economic Policy Conditionalities" and the "Technical Memorandum of Understanding".

[21] All relevant official documents are available, in English, on the [website](#) of the Hellenic Foundation for European and Foreign Policy.

[22] Cf. "[Foreign direct investment – net inflows \(% of GDP\) in Greece](#)", *Trading Economics*.

[23] Dunbar, N. & Martinuzzi, E. (2012, 6 March), "[Goldman Secret Greece Loan Shows Two Sinners as Client Unravels](#)".

[24] E.g. Nobel-prize economist and former World Bank's Chief Economist Stiglitz, J. (2002), *Globalization and its Discontents*, London: Penguin.

[25] Cf. Jubilee Debt Campaign (2015), "[Six key points about Greek debt and the forthcoming election](#)"; Zettelmeyer, J., Trebesch, C. & Gulati, M. (2013), "[The Greek Debt Restructuring: An Autopsy](#)" EBRD.

[26] "Private creditors were able to significantly reduce their exposure" and "escape", whilst "[the] program... failed to achieve critical objectives, especially with regard to restoring growth, ensuring debt sustainability, and regaining market access", i.e. put Greek public finances into safety (IMF, *op. cit.*, pp.11, 17 & 27). Key socio-demographic indicators as those recorded in Stuckler & Basu, *op. cit.* are quite simply absent from the IMF's account.

[27] Cf. Stuckler & Basu, *op. cit.*

[28] "The Loan Agreements between the Hellenic Republic, the European Union and the International Monetary Fund" [Formerly confidential governmental and inter-governmental documentation, distributed to the participants in the conference "Sovereign debt and fundamental social rights", organised by the International Association of Constitutional Law and held in Athens, Greece, June 28-29, 2013] (p.58)

[29] IMF, *op. cit.*, p.14.

[30] BIS Review 139/2009.

[31] *The Wall Street Journal* (2013, 8 October), [Streaming Coverage](#).

[32] Brown, E. (2015, 10 March), "[The ECB's Noose Around Greece: How Central Banks Harness Governments](#)". Paying interest on pre-existing debt by taking on more debt is what development economist Gérard de Bernis (1999) calls "perpetual debt" or the "usury model" of Third World countries (cf. "[Globalization: History and Problems](#)", ISMEA).

[33] Cf. also Ferguson, N., Schaab, A. & Schularick, M. (2014, 26 May), "[Central Bank Balance Sheets: Expansion and Reduction since 1900](#)" [paper presented at the May 2014 ECB conference in Sintra], showing how the "debt crisis" of the Eurozone is the direct result of expanding central-bank balance sheets aimed at rescuing the private banking sector from its bad bets, as well as the size of this rescue: "Measured both by scale and incidence, the post-2007 expansion episode has eclipsed all other historical precedents." (p.34)

[34] Black, J. & Kennedy, S. (2015, 22 January), "[Draghi Commits to Trillion-Euro QE in Deflation Fight](#)", *Bloomberg Business*.

[35] E.g. Greenspan, *op. cit.* Cf. also Sherman, M. (2009), "[A Short History of Financial Deregulation in the United States](#)", Center for Economic and Policy Research.



[36] E.g. US President Barack Obama, who stated on 14 April 2009: "There are a lot of Americans who understandably think that government money would be better spent going directly to families and businesses instead of to banks... but the truth is that a dollar of capital in a bank can actually result in eight or ten dollar of loans to families and businesses." ("[Remarks by the President on the Economy](#)")

[37] Cf. Chen, Q., Filardo, A.J., He, D. & Zhu, F. (2014, 18 September), "Financial Crisis, Unconventional Monetary Policy and International Spillovers", HKIMR Working Paper No. 23/2014, *SSRN*; Rogers, J.H., Scotti, C. & Wright, J.H. (2014), "Evaluating asset-market effects of unconventional monetary policy: A multi-country review", *Economic Policy* 29(80): 749-99.

[38] ECB (2014, 12 June), "[Why has the ECB introduced negative interest rates?](#)".

[39] Cf. Brown, E. (2013), *The Public Bank Solution*, Baton Rouge: Third Millennium.

[40] As cited in Brown, B.E. (1969), "The French Experience of Modernization", *World Politics*, 21(3): 366-91.

[41] Hudson, M. (2014, 3 April), "[P is for Ponzi](#)".

[42] All translations from French and Italian into English are by Giorgio Baruchello.

[43] This is the constitutional ground for lawful withdrawal or redistribution of private property.

[44] All European countries in this study have pension systems consisting of a primary public pension pillar, plus voluntary occupational, personal or profession-based pension saving plans (cf. [Pension Funds Online](#), 2015).

[45] The term "PIIGS" was coined in 2009 by the *Financial Times* (Cf. Petry, J., (2013, 8 December) "[Constructing the Eurozone Crisis: A Tale of PIIGS, Debt, and Austerity](#)", *Pinpoint Politics*). With it, the public authorities and the peoples of few EU countries are mocked for being in trouble, despite their trouble's fountainhead being over-indebted US private investment banks. The result is that the public opinion forgets about the private sector's leveraged, i.e. debt-based, bonanza leading to the 2008 collapse, including the notorious "toxic assets", and all that is talked about is instead those countries' "sovereign-debt crisis", as though the States' financial difficulties were the cause rather than the effect of the crisis (cf. McMurtry, J. (2013), *The Cancer Stage of Capitalism*, London: Pluto).

[46] All relevant documents are available, in English, on the European Commission's [website](#).

[47] Cf. [Constitution of the Portuguese Republic](#): art.18, c.1.

[48] Perplexingly, such a principle has not been employed in previous rulings in order to secure private-sector workers' equality with public-sector ones in wages and pensions. The same applies to the other EU countries where constitutional courts appealed to this principle.

[49] Art.9 d) of the Portuguese constitution ([official En. transl.](#)) requires the State "[t]o promote the people's well-being and quality of life and real equality between the Portuguese, as well as the effective implementation of economic, social, cultural and environmental rights".

[50] Cf. European Commission (2014), "[European Financial Stabilisation Mechanism \(EFSM\)](#)".

[51] Cf. European Commission (2012), "[Treaty establishing the European Stability Mechanism \(ESM\) signed](#)".

[52] Squinzi, G. (2012, 15 June) [president of the Italian industrialists' syndicate *Confindustria*] as cited in "[Speculation against Italy could destroy euro – business lobby head](#)", *Reuters*.

[53] Free capital trade has also been suspended in Iceland since the emergency act [125/2008](#).

[54] Post-Bretton-Woods meltdowns have engulfed Latin America, Sub-Saharan Africa, Pakistan, South Korea, South-East Asia and post-communist Europe, providing testimony of the chaos that, back in the 1990s, Greek economist and philosopher Cornelius Castoriadis deemed the inevitable outcome of the re-introduction of free capital trade worldwide: only a "planetary casino" could emerge from "the absolute freedom of capital movements". ([Figures of the Thinkable](#), p.82) His assessment is echoed in 2012 by Italy's former finance minister Giulio Tremonti, who condemns today's "financial casino" (*Uscita di sicurezza*, Milan: Rizzoli, p.16) and renown Spanish jurist Jesús Ballesteros, who speaks instead of "casino capitalism" (*Globalization and Human Rights: Challenges and Answers from a European Perspective*, Leiden: Springer, pp.6 & 9).

[55] E.g. IMF economist Boughton, J.M. (2000), "Historical perspectives on financial distress: A comment", *Carnegie-Rochester Conference Series on Public Policy*, 53/2000: 169-75. It is therefore not surprising that leading statesmen may advocate for a return to the 1946-1972 Bretton Woods system of pegged but adjustable exchange rates and mobile yet not volatile steered capital trade (e.g. former UK PM Gordon Brown (2011), "[Bretton Woods Keynote](#)", *Institute for New Economic Thinking*).

[56] Cf. McMurtry (2013), *op. cit.*: pp.176-79, 190-91 and 226-67 explain how the banking sector can yield power within the EU legislative framework, which sets "technical" parameters and requirements for its members (cf. also Schäfer, H-B. (2012, 1 May), "[The Sovereign Debt Crisis in Europe: Save Banks Not States](#)", *SSRN*). The book's 1999 first edition, which proved famously prescient on the 2008 financial collapse, is available [online](#).

[57] Like its Portuguese and Spanish counterparts, the Italian constitution reads (Art.3): "It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of

citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country." Equality is much more than a sheer formal principle.

[58] It is also interesting to mention case [223/2012](#) on Law 78/2010 (in Italian; cf. AID: 9 & 579 n19), whereby the constitutional court condemned the pay cuts of the nation's judges as a threat to the constitutionally sanctioned independence of the judiciary power, a violation of the constitutional principle of *equality* (since the judges were being singled out for pay reductions), noting also how judicial pay, given the sensitive role played by judges within the country's institutional set-up, does not stem from standard labour relationships subjected to periodic negotiations.

[59] Berlin, I. (1969), *Four Essays on Liberty* (Oxford: Oxford University Press): "to offer political rights, or safeguards against intervention by the State, to men who are half-naked, illiterate, underfed and diseased is to mock their condition... What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom? First things come first: there are situations in which – to use a saying satirically attributed to the nihilists by Dostoevsky – boots are superior to Pushkin; individual freedom is not everyone's primary need... To avoid glaring inequality or widespread misery I am ready to sacrifice some, or all, of my freedom... I should be guilt-stricken, and rightly so, if I were not." (p.125).

[60] Cf. Ágústsson, H.Ó. & Johnstone, R.L. (2013), "[Practising what they Preach: Did the IMF and Iceland Exercise Good Governance in their Relations 2008-2011?](#)", *Nordicum-Mediterraneum*, 8(1).

[61] Cf. [Case E-16/11 \[2013\] EFTA](#).

[62] Cf. Johnstone, R.L. & Ámundadóttir, A. (2011), "Defending Economic, Social and Cultural Rights in Iceland's Financial Crisis", *The Yearbook of Polar Law* 3(1): 455-77.

[63] Formally, the "[Treaty on Stability, Coordination and Governance in the Economic and Monetary Union](#)".

[64] All relevant official documents can be found, in English, on the [website](#) of the European Commission.

[65] E.g. *The journal.ie* (2013, 20 January) "[In numbers: How much would we save by abolishing the Seanad?](#)".

[66] E.g. The Convention on the Constitution (2014, 23 February), "[The Constitutional Convention Votes in Favour of Reforming Economic, Social & Cultural Rights in the Constitution](#)".

[67] The Convention on the Constitution (n.d.a.), "[Convention](#)".

[68] Cf. *Government of the Republic of South Africa vs Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v*

*Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC); and *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

[69] E.g. *Hall v Minister for Finance*, where standing was denied; and *Pringle v Government of Ireland*, which was rejected on the merits.

[70] All relevant official documents can be found on the [website](#) of the European Commission.

[71] An unofficial 2011 English translation by P. Porta Gracia is available on the [website](#) of the Spanish House of Deputies. For the longer and more detailed new article 135 of the Spanish constitution, cf. Abad, J.M & Galante, J.H. (2011), "[Spanish Constitutional Reform. What is seen and not seen](#)", *CEPS Policy Brief. Thinking ahead for Europe*, 253/Sept. 2011.

[72] Like the Portuguese one, the Spanish Constitution (Art.9 c.2; [official En. transl.](#)) reads too: "It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life."

[73] In comparison, Guðmundur Heiðar Frímansson argues that it is precisely because of the lack of large-scale consensus that Iceland's post-crisis constitutional reforms did not bear fruit; cf. his 2015 book [review](#) of Jón Ólafsson (ed.; 2014), *Lýðræðistilraunir. Ísland í hruni og endurreisn* [Democratic experiments. Iceland in collapse and renaissance], Reykjavík: Háskólaútgáfan/University of Iceland Press.

[74] Cf. Threlfall, M. (ed.; 2000), *Consensus Politics in Spain: Insider Perspectives* (Bristol: Intellect).

[75] All relevant official document are available, in English, on the [website](#) of the European Commission.

[76] Cf. Rasnaca, Z. (2014) "[Constitutional Change through Euro Crisis Law: 'Latvia'](#)".

[77] Cf. also an unofficial English translation available on the [website](#) of the International Network for Economic, Social and Cultural Rights.

[78] All relevant official documents are available, in English, on the [website](#) of the European Commission.

[79] Cf. Precupetu I. & M. (2013), "[Growing Inequalities and their Impacts in Romania](#)", Gini Growing Inequalities' Impacts Country Report.

[80] Cf. also the original ruling, in German, [Hartz IV BVerfGE 125](#), 175 of 9 February 2010.

[81] E.g. Iceland's [Special Investigation Commission](#), 2008-10.

[82] E.g. Tremonti, *op. cit.*

[83] Cf. Ámundadóttir, A. & Johnstone, R.L. (2011), [Mannréttindi í þrengingum. Efnahagsleg og félagsleg réttindi í kreppunni](#) [Human Rights in Stringency. Economic and Social Rights in the Crisis], Akureyri: Háskólinn á Akureyri.

[84] All cited constitutionalists writing in AID concur on the notion that Europe's constitutional judges have stressed well-established civil and political rights such as equality over socio-economic ones to buttress most firmly their rulings.

[85] Cf. Baruchello, G. (2012) "[Cruelty and Austerity. Philip Hallie's Categories of Ethical Thought and Today's Greek Tragedy](#)", *Nordicum-Mediterraneum*, 8(3).

[86] Francis (2013), [Evangelii Gaudium](#), pars. 55 & 276; par. 56 concludes: "The thirst for power and possessions knows no limits. In this system, which tends to devour everything which stands in the way of increased profits, whatever is fragile, like the environment, is defenseless before the interests of a deified market, which become the only rule."

[87] Kasimatis, G. (2010), "[The Loan Agreement between the Hellenic Republic, the European Union and the International Monetary Fund](#)", research paper prepared for Athens Bar Association, English translation by S.G. Vryna.

[88] As cited in "[Hans Tietmeyer, president de la Bundesbank](#)", *L'humanité*, 30 January 1997.

[89] Galeano, E. (1998), *Upside Down: A Primer for the Looking-glass World*, New York: Picador, pp.151-52.

[90] Tremonti, *op. cit.*, pp.14 & 120.

[91] Unlike the crisis-born fascist governments of 20<sup>th</sup>-century Europe, transnational finance can be *crueller* inasmuch as it does not care for obedient nationals and select race, whose livelihoods are thus imperilled rather than protected.

[92] All adjudications are available on the [website](#) of the ECHR.

[93] "Eventually" is emphasised: it took time before constitutional courts intervened to condemn austerity laws and policies. In Italy, it happened when these could reduce the judges' income and the income of better-off retired citizens.

[94] In an abstract philosophical debate, we could conceive of anarchists, libertarians, objectivists, Stalinists or National-socialists arguing that no such human rights and constitutional principles ought to exist. Yet, in concrete and civilised legal or political debates, at least as Europe is concerned, these rights do exist and must be respected, protected and fulfilled. The day we should find ourselves outside the human rights treaties signed and ratified by our States, and the previous "socialist" constitutions criticised by J.P. Morgan's specialists superseded by new ones negating them, then such intellectual stances may be considered and the relevant human rights thoroughly denied. More often than not, if we look at human history, such rights have been denied; but that happened in previous stages of human civilization, including the fascist one. As for whether the mounting financial fascism denounced by Tremonti will emerge victorious, that is likely to be today's challenge for anyone who cares about human rights.

[95] [The welfare of the people must be the supreme law] Cicero, M.T. (ca. 40 BCE), *De Legibus*, I. III, par.8.