The limited effectiveness of individual direct complaints for adjudicating Euro-crisis law.[1]

1. The constitutional context

The Eurozone crisis has triggered the adoption of severe austerity policies at both European (and international) and domestic level in all the member of the Euro area starting from 2008 till today. Those measures, which will be defined in the present article as forming part of the Euro-crisis law, comprise EU law, international agreements amongst the EU Member States, like the Fiscal Compact (FC) and the Treaty on the European Stability Mechanism (TESM), Memoranda of Understanding between the Member State concerned, the EU and its Member States and, most often the International Monetary Fund, as well as national norms implementing international and European obligations. Despite the problems that the Euro-crisis law created in terms of potential violations of national Constitutions, regarding the limitation of State sovereignty, the challenge to parliamentary powers and, in particular, the limitation of fundamental and social rights, the number of individual constitutional complaints before Constitutional Courts has been definitely low.

To start with, it should be considered that within the European Union individual constitutional complaints are devised in a majority of Member States having a Constitutional Court in place (11 out of 19): Austria, Belgium, Czech Republic, Germany, Hungary, Latvia, Poland, Romania, Slovenia, Slovakia, and Spain.[2] Nonetheless, Czech Republic, Hungary, Latvia, Poland and Romania have a different status, as Czech Republic, Hungary, Poland and Romania are still outside the Eurozone, while Latvia joined recently, in 2014. Thus they cannot be properly included in the analysis of individual constitutional complaints on Euro-crisis law. No relevant cases dealing with the Eurocrisis law can be signaled in Czech Republic and Hungary.

Furthermore constitutional litigation before the Constitutional Courts of Poland and Romania in neither cases was triggered by individual constitutional complaints. The Polish Constitutional Court was asked to judge *ex post* on the constitutionality of the Act of Parliament ratifying art. 136 TFEU amendment (as to allow to rescue bailout Member States) and on the FC (Poland was bound only by its Title V) and its Ratification Bill by minorities of MPs and senators.[3] The same applies to the relevant cases decided by the Constitutional Court of Romania, on the rescue package, as this country asked for financial assistance, and the national Acts of implementation. Judgments 1414 and 1415 of 2009 refer to Law 329/2009 on the reorganization of public authorities and institutions, rationalization of public expenditure, business support and compliance with the framework agreements with the European Commission and International Monetary Fund and the Law 330/2009 on a unitary wage system and were adjudicated based on a complaint brought by parliamentary minorities before the Court. The following judgments, in 2010, have to do, instead, with the 2010 adjustment measures in matters of balanced budget and pension system: two judgments 871/2010 and 874/2014 were delivered according to a request by a parliamentary minority for the *ex ante* constitutional review; judgments 872 and 873 of 2010 were rendered by the Constitutional Court upon a preliminary reference of constitutionality by the High Court of Cassation and Justice, the Supreme Court of Romania.[4]

In Latvia, instead, a significant number of individual constitutional complaints challenging the austerity measures adopted by the Parliament in exchange for the financial assistance received were upheld in part or in full.[5] Possibly the most important among this judgment is

no. 2009-43-01 of 2009 concerning the amendments to the Disbursement Law affecting pensions, in particular. The Constitutional Court of Latvia judged those amendments unconstitutional as they violated the right to social security (Article 109 Latvian Constitution) and they do not pass the proportionality test (Article 1 Latvian Constitution) in that less restrictive measures had not been considered with care. Moreover the Court ordered the Parliament to regulate the reimbursement of the deductions of social benefits and set the principle according to which international loans (to which the contested legislative provisions were deemed to be related) in significant cases, like that of 2008, must be approved by the Parliament.

A possible explanation regarding the major effectiveness of individual constitutional complaints on Euro-crisis law in Latvia compared to other then non-Eurozone countries, besides the financial support received and the severity of the austerity measures lies on the broad avenues to access the Constitutional Court of Latvia under this proceeding: indeed, individual constitutional complaints in this country are admitted also o if not all the legal means have been exhausted in case of general significance or "or if legal protection of the rights with general legal means cannot avert material injury to the applicant"[6].

2. The limited use of individual constitutional complaints in Eurozone countries

Individual complaints to Constitutional Courts within Member States which have formed part of the Eurozone since the inception of the financial crisis have been likewise limited when adjudicating Euro-crisis measures.

In Austria, the Constitutional Court was involved in two main cases, neither of them based on an individual complaint. The first on the TESM, of 16 March 2013 (decision no SV 2/12-18), reached the Court through a complaint filed by the Government of Carinthia; the second, on the FC, of 3 October 2013 (decision no SV 1/2013-15), was brought to the attention of the Court by a parliamentary minority, i.e. 70 MPs of the National Council, from the Green Party, FPÖ and BZÖ. By the same token, the Constitutional Court of Slovenia was asked, by a parliamentary minority, to check the compliance of the Guarantees Act, regulating the participation of the country in the European Financial Stability Facility, with the Constitution, which it deemed not to be violated (Case U-I-178/10) and, by the National Assembly in 2012, to authorize the holding of a referendum – then judged unconstitutional – on the Slovenian Sovereign Holding Act and the Act Determining the Measures of the Republic of Slovenia to Strengthen Bank Stability, both aiming to comply with Directive 2011/85/EU. Likewise, in Slovakia there were not even relevant cases on the Euro-crisis law that the Constitutional Court was requested to adjudicate.

In Spain, Belgium and Germany, however, the respective Constitutional Courts have been given the possibility to decide to individual constitutional complaints, even though with very different outcomes.

In Spain, most constitutional judgments on the Euro-crisis law have been rendered according complaints filed by regional (*Comunidades autonomas*) or State governments or by judges through preliminary references of constitutionality. Indeed, the *recurso de amparo* (Article 53 Sp. Const.) is not really a viable tool for adjudicating Euro-crisis law,[7] first of all because legislative acts – primarily Budget Acts and laws implementing structural reforms – cannot be subject to this procedure, and secondly because a violation of social rights – or rather the *Principios rectores de la política social y económica* (Part I, Chapter 3, Sp. Const.) – is not protected by this kind of individual complaint, with the exception of the right to education.[8] It follows that there is very narrow leeway to exploit

the tool of the *recurso de amparo* in this specific field. This notwithstanding, there is a notable exception to this trend: the individual constitutional complaint against the constitutional amendment entrenching the balanced budget clause – Article 135 – into the Spanish Constitution (Auto no 9/2012, 13 January 2012).[9]

Indeed, the constitutional amendment process leading to the constitutional entrenchment of the new clause raised many concerns as for the respect of the constitutional prerogatives of the Parliament. From the proposal of the constitutional bill to its publication on the Official Journal (BOE) only thirty-two days elapsed, from the end of August to the end of September 2011.[10] 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*. Only some left-wing parties, like *Izquierda Unida*, showed their discontent but they were not able to reach the quorum of one tenth MPs to hold a constitutional referendum (Article 167 Sp. Constitution). Subsequently 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 just passed. In particular, the *amparo*, on the one hand, sought the annulment of the parliamentary resolutions and agreements leading to the adoption of the constitutional reform through the urgency procedure and in *lectura única*; on the other, contested the use of the ordinary procedure to revise the Constitution (Article 167 instead of Article 168 Sp. Const.),[11] although the constitutional bill was able to impair the protection of fundamental rights and to limit the prerogatives of MPs and citizens. The *amparo* was declared inadmissible as the governing bodies of the Parliament, according to the majority of the judges, rightly applied parliamentary standing orders. The *Tribunal constitucional* simply decided not to engage with the substantive issues at stake in the *amparo*; it did not issue a judgment (*Sentencia*), but just an order of inadmissibility (*Auto*).[12] 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 would have deserved a much more careful consideration. Should the Court have declared the case admissible, it could not have avoided taking a stance on the powers of the Parliament during the constitutional reform.

If in Spain the only individual constitutional complaint against an Euro-crisis measure has been declared inadmissible, in Belgium the Constitutional Court has decided on the merits of the only complaints referred but dismissing them (Arrêt 62/2016 of 28 April 2016). The complaints in this case – which adjudicated them all together – dealt with the Law of 18 June 2013 giving execution to the FC, with the cooperation agreement between the Federation, the Communities, the Regions and the Communities' Commissions on the implementation of Article 3 FC and with the Flemish Decree giving assent to that agreement. Despite providing important insights on several constitutional aspects – from the constitutionality of the budgetary discipline imposed by the EU, to the respect of social and economic rights and parliamentary prerogatives,[13] the Belgian Constitutional Court has not considered well founded the objections raised by the complainants and, hence not even in Belgium individual constitutional complaints have been effective for adjudication Euro-crisis law.

Although being very much discussed nationally and internationally because of the important principles set, also the judgments of the Federal Constitutional Tribunal of Germany on individual constitutional complaints against Euro-crisis measures have been dismissed at large. Compared to the cases adjudicated by other European Constitutional Courts, those delivered by the German Court were based on constitutional complaints undersigned by thousands individuals and associations and often combined with *Organstreit* proceedings put forward by minority groups in Parliament, like *Die Linke.* Amongst the many cases on Euro-crisis measures that reached the Court via individual constitutional complaints,[14] only in the judgment of 28 February of 2012, on the constitutionality of the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (*StabMechG*), has the Court detected a violation of the Basic Law and, hence, has upheld the complaints, in part. In particular, 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 in violation of Article 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.' Therefore Article 3.3. of the Act had to be revised as to ensure that the right of MPs to be informed can be only temporarily suspended 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*. Yet, by means of an interpretation in conformity with the Constitution, also in the other cases (of dismissal of individual complaints), the German Constitutional Court has been able to guarantee the protection of citizens' rights to be represented through the *Bundestag* in budgetary decisions.[15] In order to protect those rights, since the judgment of 7 September 2011 onward the reasoning of the Court has been based on the argument of the overall budgetary responsibility of the *Bundestag*, thus on the constitutional requirement to keep budgetary powers in the hand of the national parliament as the only democratically legitimate institution (Art. 38.1 GG in conjunction with Art. 20.1. and 2 GG, and Art. 79.3 GG) and to oppose the relinquishment of such responsibility in favour of supranational bodies.

3. Conclusion

Constitutional adjudication of Euro-crisis measures has benefited very little, with the exception of Germany (and Latvia amongst the non-Eurozone countries at the time of the judgments), of individual constitutional complaints as a way to access Constitutional Courts for the sake of protecting rights, especially if taking into account that a majority of Member States with a centralised model of constitutional review do provide for such an avenue.

This outcome might appear paradoxical given the degree of pressure under which fundamental and social rights have been exercised during the crisis. However, it is argued here that this is the natural result of the conditions under which constitutional adjudication was performed in the aftermath of the adoption of Euro-crisis measures. Indeed, individual constitutional complaints are subject to a series of constraints in many EU Member States

as for the objects of review, the standard for review to be invoked and the timing, for example the requirement to exhaust all judicial remedies before appealing to the Constitutional Court. In other words, the timing of the individual constitutional complaints might not be favorable to redress rights' violations depending on measures adopted under urgency and extraordinary procedures, like those during the crisis, and on which the entire financial stability of a country relies. So that constitutional judges might not be willing to put at risk the fragile national economic situation by upholding an individual complaints.

With this regard, the German and the Latvian exceptions should not come as a surprise. Indeed, in Germany and Latvia the constraints on individual constitutional complaints referred to above do not apply and there are also fast track procedures that the Constitutional Courts can use.

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[1] Cristina Fasone, LUISS Guido Carli.

[2] See Venice Commission, Study on individual access to constitutional justice, adopted at the 85th Plenary session, 17-18 December 2010: http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e, and Venice Commission,

[3] See Polish Constitutional Court, K 33/12 of 26 June 2013, and joint cases K 11/13 and K 12/13, judgment of 28 March 2013. In both cases the challenged measures were declared in compliance with the Constitution. Cf. A. Hinarejos, The Euro Area Crisis in Constitutional Perspective, OUP, 2015, p. 148, note 107 and K Granat, Report on Poland – art. 136(3) TFEU, Constitutional Change through Euro-Crisis Law, Law Department, European University Institute, Florence, 2014, retrieved at http://eurocrisislaw.eui.eu/country/poland/topic/tfeu/

[4] See V. Vita, Report on Romania – Financial support, Constitutional Change through Euro-Crisis Law, Law Department, European University Institute, 2014, Florence, retrieved at http://eurocrisislaw.eui.eu/country/romania/topic/financial-support/

[5] See Constitutional Court of Latvia, judgments no. 2009-44-01, 2009-76-01, 2009-88-01, 2009-111-01, 2010-21-01. Cf. Z. Rasnača, http://eurocrisislaw.eui.eu/latvia/

[6] See D. Žalimas, The individual constitutional complaint as an effective instrument for the development of humn rights protection and constitutionalism, IV Judicial Forum, 1-2.10.2015, Kiev (Ukraine), at http://www.lrkt.lt/data/public/uploads/2015/10/d1_2015-10-02-individualcomplaint-kiev.pdf, p. 7.

[7] On the recurso de amparo, see, for example, F. Fernández Sagado, 'El regimen jurídico-procesal del recurso de amparo en España', in Id., La justicia constitucional. Una visión de derecho comparado, Tomo III, 2009, Madrid, Dykinson, p. 759 ff.

[8] As claimed by M. González Pascual, "Welfare Rights and Euro Crisis - The Spanish Case", in C. Kilpatrick and B. de Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, Law 2014/05 EUI Working Paper, p. 98, 'the Spanish legal system does not provide many opportunities for claiming welfare rights in courts'.

[9] See recurso de amparo no 5241-2011.

[10] See F. Balaguer Callejón, 'Presentación', Revista de derecho constitucional europeo, n. 16, 2011.

[11] The procedure for the total revision of the Constitution and for amending fundamental right provisions, which has never been applied since 1978, is more complex than Art. 167 Sp. Const. procedure. The constitutional revision has to be agreed twice, firstly by the Parliament in office and subsequently by the new Parliament each time by two-thirds majority of the members of each House.

[12] See Auto 9/2012, BOE no. 36/2012, 11.02.2012, p. 152.

[13] See P. Dermine, "La Discipline Budgétaire Européanisée À L'Aune De La Constitution Belge - Obs. Sous C. Const., N° 62/2016", Journal des Tribunaux, 2016/27, n°6655, pp. 470 et seq.

[14] German Constitutional Court, 2 BvR 987/10, 7 September 2011; 2 BvE 8/11, 28 February 2012; 2 BvR 1390/12 – 2 BvR 1421/12 – 2 BvR 1438/12 – 2 BvR 1439/12 – 2 BvR 1440/12 – 2 BvE 6/12 12 September 2012; and 2 BvR 2728/13, 21 June 2016.

[15] See M Wendel, "Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference", 10 European Constitutional Law Review, 2014, p. 263-307.