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Edited by Tom Ginsburg , Mark D. Rosen , Georg Vanberg
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CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS

Many constitutions include provisions intended to limit the discretion of governments in economic policy. In times of financial crises, such provisions often come under pressure as a result of calls for exceptional responses to crisis situations. This volume assesses the ability of constitutional orders all over the world to cope with financial crises, and the demands for emergency powers that typically accompany them. Bringing together a variety of perspectives from legal scholars, economists, and political scientists, this volume traces the long-run implications of financial crises for constitutional order. In exploring the theoretical and practical problems raised by the constitutionalization of economic policy during times of severe crisis, this volume showcases an array of constitutional design options and the ways they channel governmental responses to emergency.

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Foreword

It is well known that the world financial crisis of 2007 and 2008 posed several challenges to the constitutions of the affected countries. These challenges were faced not only by countries which were directly affected and had to implement austerity measures, but also by countries whose economies were compelled to rescue others from the economic turmoil. This was particularly evident in Europe. Europe became, in this sense, a constitutional laboratory, given the effects of the financial crisis on economies, especially on the sovereign debt markets, on public finance, and ultimately, on the ability of governments to sustain the welfare state.

Constitutions might be prepared to respond to emergencies, but often the relevant provisions were drafted to deal with major catastrophes, or acts of war, and focus on the suspension of rights. In the context of the financial crisis, governments and courts felt reluctant to use concepts that were designed for very different purposes.

Furthermore, the global nature of the crisis undermined the traditional local constitutional responses. Protectionism and legal parochialism could not isolate states from the impact and spillover effects of a crisis that originated transnationally. One of the first reactions was for countries to distance themselves from those contaminated: 'We are not Greece, we are not Ireland, we are not Portugal' were expressions often used until they became useless. It was clear that the crisis had a potential to affect us all, even those not directly harmed by it. Again, in the context of the European Union – and because of the eurozone, the impact on the euro, and the absence of a common European debt sovereign market – those spillover effects were much more evident.

Not only were governments not prepared for the necessity – or perhaps inevitability – of this cross-national dialogue, but courts were even less prepared for it. This does not mean that courts did not incorporate international or comparative elements in their decisions, but they were probably unable to fully consider the cross-border effects of adjudication in their decisions.

An example of that impact was the jurisprudence of the Portuguese Constitutional Court on the reduction of pensions and salaries, at the same time that the German Constitutional Court was adjudicating decisions on the Outright

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Monetary Transactions (OMT) program announced by the European Central Bank. At least psychologically, the OMT program would enhance the likelihood that Portugal could return to the markets and eventually pay the pensions and salaries that the government was cutting, as it later happened. Deeply intertwined decisions, with direct impact on one another, were taken as if they were totally independent. In that sense, the German Constitutional Court was wise enough to defer the case to the Court of Justice of the European Union, thus at least acknowledging the due relevance of the application of European law. In any event, it seems clear that little or no inter-court dialogue was undertaken at the time.

Awareness of constitutional constraints was also limited. This is not to say that the drafters of the austerity programs, especially those negotiated with the European Union and the IMF, ignored the constitutional risks of such programs. But these risks became more evident as the programs were implemented and sometimes amended. It is possible that the designers were not aware of the risks to the extent of acknowledging that they could jeopardize the programs as a whole, and thus the stability of the neighboring countries.

Again, this was the case with Portugal, where several regular evaluations nearly failed due to legislative measures rejected by the Constitutional Court. Only *in extremis* decisions by the government and parliament enabled the country to comply with international demands.

Fundamental constitutional concepts such as sovereignty, fiscal autonomy, human rights, and the welfare state were disputed during the crisis. Of course, to discuss these concepts in the first place, a country must have sound finances and financial independence. The discussion alternated between those who claimed that a country could only be independent with financial stability, and those who argued that sovereignty was lost from the moment a state asked for international rescue, and accepted the implementation of an austerity program. Perhaps there was a need for a middle ground between these positions, simply recognizing the inevitable impact of sovereign decisions from one state to another, and thus the need for supranational regulation and harmonization.

***

Portugal was deeply affected by the financial crisis, having undergone a very harsh adjustment program, from which it has now been able to recover completely, having returned to the sovereign debt markets in an autonomous fashion. In that way, it can be pointed to as an example of success. But the Portuguese people suffered greatly along the way, so we must all learn from the past, not only from the achievements, but also from the difficulties.

The mission of the Francisco Manuel dos Santos Foundation is to promote and improve knowledge about Portuguese reality, thereby contributing to the development of society, the consolidation of citizens' rights and the improvement of public institutions. By supporting the publication of this book, the Foundation advances

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one of its goals. Not only does the book dedicate a chapter to the constitutional performance of austerity in Portugal, but it also allows for a contextualization of the constitutional reaction to the crisis in a broader sense, analyzing several aspects of its impact, through very thorough research and extremely interesting taxonomies.

I hope the book will become a reference work of the field for many years to come, so that it will help us all to better prepare for the constitutional impact of future crises. If nothing else, it will contribute to open, free and informed debate, which is so much needed in an age of toxic and fake news. Promoting such a debate is, after all, precisely the mission of the Francisco Manuel dos Santos Foundation, and we are pleased to present this volume.

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