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THE CONSTITUTIONAL CONSEQUENCES OF FINANCIAL CRISIS AND THE USE OF EMERGENCY POWERS: FLEXIBILITY AND EMERGENCY SOURCES

1. Introduction. – 2. The recent use of emergency sources. – 3. An unusual (or abnormal?) emergency source: the letters by ECB and by the Commissioner for Economic and Monetary Affairs to Italy. – 4. Crisis can make flexible some rigid Constitutions. – 5. Emergency and the undifferentiated primary normative power in European Union: is the legal principle in danger? – 6. Conclusions.

1. Introduction

It would be better to wonder at the beginning of this article¹ if it is correct to speak today about crisis and if this one is responsible for the changes that occurred in Constitutional law. In other words, I have wondered whether the economic emergency and new order of political powers could be explained through the financial crisis².

The most part of the transformations on law and widely on constitutional law and its system of sources come from so far away. The process of globalization is largely responsible for the crisis of the domestic sources. This process, viewed as a strict relationship between all parts of the world as regards institutions and economic affairs, overcome the national

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¹ A short version of this article has presented to the World Congress of Constitutional Law, Constitutional change: Global and Local, Workshop XII, Constitutions and financial crisis, Oslo, 18 June 2014.

² The definition of the crisis carried out by I. E. M. MACHADO is appropriate: « The present economical and financial crisis emerged like a perfect storm, causing panic and extreme devastation on transnational scale. Its causes are as numerous as they are complexes, having political, legal, economic and social underpinnings. Some point to concurring and sometimes contradictory factors. In absence of centralized political and economic leadership, the level of constitutional, political and economic readiness to deal with such emergency situation varied according to very different levels of awareness, social attitudes, political culture and institutional fitness», ID. *The sovereignty debt crisis and the Constitution's negative outlook: a Portuguese preliminary assessment*, in X. CONTIADES, *Constitutions in the global financial crisis. A Comparative analysis*, Ashgate, England/USA, 2013, 219- 242, at 219.

boundaries. The State loses its exclusive sovereignty on its national territory where more other institutions insist³. Furthermore, the transformation of the sovereignty caused by the globalization produced a new phenomenon: a decoupling of territory and sovereignty so similar to the Middle Ages when various institutions and its norms co-existed in the same territory⁴. Therefore the fallout on the legal categories is multiple. Firstly because national sovereignty has been fragmented and it has been substituted by some polycentric institutions or different sovereignty of markets that adopt its own sources and norms. Opposite to the markets, national States withdraw and try to suit to new rules to regulate transnational market. It implies States adapt their rules to promote access to capital in their boundaries. Flexibility finds these origins in this context: national State needs the market for its survival, market requires a quick regulation for moving goods and capital from a place to another in the world in a short time; so rules become soft (as treaty, contract, agreement, negotiation), snapshots and without a territory anchorage.

The most recent transformation of globalization consists of a more sophisticated step: to make flexible national sources and to make use of a law that abandons its categories of space and time: rootedness and long durability are no longer available as it needs new faster and valid sources on even wider territories. This explains the success of *lex mercatoria*, which is a “central and crucial mediator of domestic and global political/legal orders that it enables the extraterritorial application of national law as well as the domestic application of transnational commercial law. *Lex mercatoria* provides norms governing property, contract and dispute resolution functioning very much as a juridical foundations for global capitalism. It provides a body of norms, practices and common language that is the characteristic of the new juridical orders and those bind and unify a global corporate elite, named “mercatoracy”⁵. Traditional national or international law is in great difficulty to dominate these new scenarios and using the only tools at its disposal, the emergency sources that ensure quick regulation even if they renounce democratic decisions. The Rodrik’s model well explains this mechanism: globalization produces a Trilemma when the coexistence between democracy, national State and markets at the same time and space is not possible, only two out of three

³ About the rupture of bynome national sovereignty and territory see A. DI MARTINO, *Il territorio: dallo Stato-Nazione alla globalizzazione. Sfide e prospettive dello Stato costituzionale aperto*, Milano, Giuffrè, 2010, at 270-391; L. RONCHETTI, *Il nomos infranto: globalizzazione e Costituzioni. Del limite essenziale degli ordinamenti giuridici*, Napoli, Jovene, 2007, at 163-182 for a history of the evolution of territory and institutions see I. CIOLLI, *Il territorio rappresentato. Profili costituzionali*, Napoli, Jovene, 2010 at 11-69. See also the acute reflexions of K. JAYASURIYA, *Globalization, sovereignty and the rule of law: from political to economic Constitutionalism?* 4, *Constellations*, vol. 8, 2001, 442-460.

⁴ About the decoupling between territory and sovereignty of the national State see A. DI MARTINO, *Il territorio: dallo Stato-Nazione alla globalizzazione. Sfide e prospettive dello Stato costituzionale aperto*, cited *supra* note 3, at 22 and 23.

⁵ A C. CUTLER, *Private power and Global authority. Transnational merchant law in the global political economy*, Cambridge, Cambridge University Press, 2003, at 4 -5; A. DI MARTINO, *Il territorio: dallo Stato-Nazione...*, cited *supra* note 3, at 359.

can cohabit in the same model⁶. In this historical moment one gets the impression that the waiver relates to the national State.

Economical and financial crisis is a part of this framework of loss of sovereignty and a weakness of constitutional law. The State becomes a part of the market and depends on the financial market as other private companies or institutions⁷. In this way, it is of major importance that a body of national norms match this identikit: it is not only as Decree-laws and other emergency sources, but also a progressive flexibility of national sources that are recognized as superior in national territory and that for this are bind and equipped with effectiveness. Markets need to bind rules for sustaining their evolution. In the first age of globalization markets has been limited to an economical integration (or colonization) in national governments, now they try the next step, which is to rule from within the domestic markets. Markets no longer satisfied with ruling the big cities like London, Tokyo and New York that represent a common element to the States and to the global spaces, but they would like to enter into the national rules⁸. Markets experimented that are not able to make it alone, so they take what they need from the States; they emptied these norms of national sovereignty and use them for different purposes⁹.

In this economic crisis States promote the use of emergency sources and constitutional amendments to follow and to reassure markets and, at the same time, markets try to acquire the status of a sovereign institution in an attempt to replace policy that has always been its deepest aspiration¹⁰. Financial and economic crisis are not the cause but the result of these changes.

⁶ Rodrik speaks about a fundamental political Trilemma of the world economy (or probably of the world's order): "we cannot have hyperglobalization, democracy and national self-determination at all once. We can have at most two out of three. If we want hyperglobalization and democracy we need to give up on national State; if we must keep nation state and want hyperglobalization too, then we must forget about democracy, and if we want combine democracy with the national state, then it is a bye-bye deep globalization", D. RODRIK, *The paradox of globalization. Democracy and the future of world economy*, New York, W. W. Norton & Company, 2011, at 200.

⁷ This is the dilemma: «Modern constitutionalism was set up as a way to limiting and diffusing power. Today many financial institutions have more power than many States, being able to inflict severe costs on a substantial group of them, while lacking in credibility, transparency, deliberation, accountability and contestability.», said I. E. M. MACHADO, *The sovereignty debt crisis and the Constitution's negative outlook: a Portuguese preliminary assessment*, cited *supra* note 2, at 222.

⁸ The acute analysis of S. SASKEN in *The Global City: New York, London, Tokyo*, New York, Princeton University Press, II ed. 2001, *passim*, have therefore been overcome by this next step of the global market.

⁹ As claims R. BIN "lo Stato garantisce l'effettività di scelte normative assunte altrove" [State guarantees the effectiveness of rules, which are decided elsewhere] in R. BIN, *Soft law, nolaw*, in A. SOMMA, (Ed.) *Soft law, hard law nelle società postmoderne*, Torino, Giappichelli, 2009, 31-40. About soft law see also J.E. GERSEN, E. A. POSNER, *Soft law: Lessons for congressional practice*, 61, *Stanford Law review*, 2008, 573-627.

¹⁰ As argued P. ROSANVALLON, *Le libéralisme économique: histoire de l'idée de marché*, Paris, Editions du Seuil, 1989.

During the last years many scholars have discussed about the recent crisis. This word is used in a generic way, and we have forgotten that it derives from the Greek «κρίσις» that means « change», or «passage between two different situations»¹¹.

In the XX century different moments of crisis occurred: starting with the Big Crash in 1929, and some other periods of crisis market by a deep transformation of Law and State. This process also invested sources of law.

We have already experienced the naissance of new instruments to support and interpret the globalization, such as soft law and the phenomenon of regulation: now flexibility and emergency sources have the role to overcome the limits and the guarantees that Constitutions impose¹². The new trend is weakening the soundness of the guarantees and limits provided by constitutional law. It is a phenomenon internal to Constitution papers and regarding both the legitimacy of public institutions and the legal superiority of constitutional source¹³.

¹¹ J. CLAM provides a different definition of the term “crisis”, in ID., *What is a crisis?*, in P. F. Jaer, G. Teubner, A. Febbrajo (Eds.), *The financial crisis in Constitutional perspective*, Oxford, Hart Publishing, 2011, at 189 ss.

¹² A. DI ROBILANT, *Genealogies of soft law*, in *The American Journal of Comparative Law*, vol. 54, 2006, at 499-554, She argues that “In the last decade soft law, in the form of recommendation, opinions, restatement-like codes, and soft modes of governance has come to be seen as a promising tool for the armonization of European law, providing a viable complementary or even alternative, to traditional hard law”, at 501. For more references about the difference between soft law and rule of law, see E. PARIOTTI, *Soft law» e ordine giuridico ultra-statuale tra «rule of law» e democrazia*, *Ragion pratica*, 2009, 87-106.

See also Ch. BRUMMER, *Soft Law and the Global Financial System: Rule Making in the 21st Century*, New York, Cambridge University Press, 2012, especially at 210-221. He claims that in the recent financial crisis soft law cohabits with others international financial sources that is often more coercive than classical theories of international law predict. So, binding and not binding law coexist.

In Italy some scholars speak of a “constitutional soft law” as integration of constitutional principles or an interpretation of the written Constitution in line with the times of crisis through instruments of soft law, which are more effective than constitutional reforms. See A. SPERTI, *Una soft law costituzionale?*, *Politica del diritto*, 2012, 107-148 at 134-148. I agree with the Author when recognizes the existence of sources of soft law that intervenes on the written Constitution but with I note the different aim to modify the text of the written Constitution. Soft law is no longer satisfied to give to the constitutional text a new meaning, it wants to change it. In addition, SPERTI also considers as soft law certains activity of interpretation of the Constitution given by the constitutional institutions (i. e. the president of the Republic trough his letters of other informal acts). I do not agree with her because in the one hand I think it is an ordinary interpretation of the constitution, on the other hand, the phenomenon of soft law is emerging especially with activities, acts and facts that do not depart from national institutions. Lately the phenomenon of interpretation of the Constitution is implemented by discretionary authority (i.e ECB) involved with the “interpretative accomodation”, which is a typical tool of emergency times.

¹³ About the legitimacy of law and its complex relationship with political and economic system See M. RENNER, *Death of complexity-the financial crisis and the crisis of law in the world society*, in P. F. Kjaer, G. Teubner, A. Febbrajo (Eds.), *The financial crisis Constitutional perspective*, cited *supra* note 11, 93-112. The author that provides a luhmanian reading of the Law- says about the concept of legitimacy: “Through the concept of Constitution and legislation, it can externalize the question of legitimacy to the political process by pre-supposing (and, if necessary, simulating) the validity of the collective decisions made under certain procedural pre-conditions”, at 97. See also G. AZZARITI, *Il costituzionalismo può sopravvivere?*, Roma-Bari, Laterza, 2013, at 26-39; A. SIMONCINI, *Back to “flexible” Constitutions? The impact of financial crisis and the decline of the European constitutionalism*, *Italian public law review*, 2013, at 77 et seq. R. H. FALLON, Jr., *Legitimacy and the Constitution*, *Harvard Law Review*, Vol. 118, No. 6 (Apr., 2005), 1787-1853.

The principles of constitutionalism are in danger: the protection of political minorities in the majority systems, parliamentary decisions and parliamentary representation are set aside.

The impact of this tendency is impressive. In this field, we will put in evidence the effect of the emergency on European constitutional law and on the Member State law.

The crisis showed the limits of the contemporary constitutionalism and its way of making laws. Crisis has unveiled the fragility of EU model and of its regulation, but also the weakness of contemporary democracies, which are no longer able to give priority to the will of parliament and its representatives.

Since 2007 economical and especially financial crisis break the already precarious equilibrium between national and EU sovereignty and both national and supranational sources has been likely to fall. Emergency unveils how it is difficult to govern within Member States and Europe Union having to take account of globalization and the power of markets. Emergency condition forces the European Union to prefer the faster intergovernmental cooperation instead of the more democratic Community method (e.g. bilateral loans to Greece on May 2010 had been adopted by a statement of the Head of the State or Government)¹⁴. Subsequently, it becomes the method preferred for sensitive political decisions that would not have easily passed the scrutiny neither by the European Committee nor by the European Parliament. However, it would be too long, being in a hurry, to respond to the markets¹⁵.

The use of preferably Euro-summits, that are not formally envisaged by the Lisbon Treaty, even if informal, provoke some questions: i) only the Euro-zone Countries can participate in; the European policy makers become weak, and equality of all EU member States is seriously questioned; ii) the democracy of EU becomes a *chimera*: intergovernmental cooperation is very similar to a decision made at international level where positions of the strongest Countries prevail. One of the most recent successes of the European Union, thanks to the Lisbon Treaty, had been to enhance the transition of the decisions in Parliaments where the majority represents EU citizens and not just the States.

It is clear that the transformation of constitutional law is not entirely caused by the crisis, but this one provokes further transformations of the constitutional system¹⁶. There is an increase of the use of emergency power and emergency instruments for contrasting the cri-

¹⁴ E. CHITI, P. G. TEIXEIRA, *The constitutional implications of the European responses to the financial and public debt crisis*, in *Common Market Law Review*, 2013, at 685-686; B. EBERLEIN, D. KERWER, *New Governance in the European Union: A Theoretical Perspective*, *Journal of 42, Common Market Studies*, 2004, 121-142. About a general crisis of democratic decision see J. HABERMAS, *Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts*, ID., *Zur Verfassung Europa. Ein Essay*, Berlin, Suhrkamp Verlag, 2011.

¹⁵ I refer to different decisions from European financial Stability Facility to Fiscal compact that are missing of shared decision-making procedures.

¹⁶ See the reflexion of M. RUFFERT, *Public law and the economy: A comparative view from the German perspective*, *International Journal of Constitutional Law*, 2013, Vol. 11 N. 4, at 925-939. He claims of German economic Constitution, which becomes the model for the others European democracy. As regards Italy accepting this model is hard and difficult because our Constitution does not contains any choose in economic field .

A detailed analysis of the effects of the economic crisis of law and of Constitutionalism is contained in E. CHITI, P. G. TEIXEIRA, *The constitutional implications of the European responses to the financial and public debt crisis*, cited *supra* note 14 , at 685- 708.

sis; this phenomenon of transformation is well known and quite radical, as crisis presents these aspects.

In 1973, Habermas had already spoken about crisis and had identified the origin and causes in late capitalism: "Crisis suggests the notion of an objective power depriving a subject of part of its normal sovereignty. If we interpret a process as a crisis, we are tacitly giving it a normative meaning. When the crisis is resolved, the trapped subject is liberated"¹⁷. Although Habermas said this crisis could be temporary, it is cyclic. Marx conceived crisis as a ridden process of economic growth¹⁸. The idea that it could be considered occasional may be excluded.

Analysis of Habermas is still useful and acute with regard to interpreting crisis through Marx's theory, but today there are new several factors that modify the framework. The philosopher of Frankfurt school remembered that: "The State regulates the overall economic cycle by means of global planning. On the other hand, it also imposed the conditions for utilizing capital"¹⁹. In the contemporary economy the State no longer manages capital and even less the crisis. These latter continue to be a factor of capital growth but they lost their characteristic of cyclic and became a factor so important than permanent. In this way could be justified both a use of permanent emergency instruments and the economy's ability to intrude in politics and in the law through the use of emergency sources. These ones meet lower limits and lower legal guarantees comparing with ordinary rules.

Even after the attack on the Twin Towers in the United States, when some constitutional guarantees were suspended, it is clear that is for a limited period and for limited rights²⁰. Even in this case there were States to decide the procedures. In this most recent

¹⁷ J. HABERMAS, *What does a crisis mean today? Legitimation problems in late capitalism*, 4 *Social Research*, Vol. 40, 1973, 643-667. In this article Habermas reconstructs a history of the idea of crisis from its use in medicine, to Greek tragedy up to the sociological concept of system crisis conceived by Marx. See also Id., *Legitimationsprobleme im Spätkapitalismus* Taschenbuch, Edition suhrkamp, 1973, (english translation: *Legitimation crisis*, Beacon press, 1975).

¹⁸ J. HABERMAS, *What does a crisis mean today?*, cited *supra* note 12, 644.

¹⁹ *Ivi*, 646.

²⁰ For Ackerman, emergency should be a democratic response to extraordinary situation. He argues emergency needs to democratic conditions: limit of time, respect of the fundamental rights, a bit of separation of power (even if executive power prevails, Parliament must validate its choices and watch on it), confirmation of emergency power with progressive qualified majorities, consensus of public opinion. For this author emergency asks a flexible democracy, which does not renounce to its principles and values, B. ACKERMAN, *The emergency Constitution*, 113 *The Yale Law Journal*, 2004, 1029-1091.

See, also for a different idea of emergency in the United States K. L. SHEPPELE, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 *University of Pennsylvania Journal of Constitutional Law*, 2004, 1001-1083; O. GROSS, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 *Cardozo Law Review* 1825-1868, that speaks about a dichotomy between norm and exception which can not overcome with a constitutional legal provision of state of exception : response to emergency could be not democratic. He explains after the Twin towers attack: «The Business as usual model is based on notion of constitutional absolutism and perfection. According to this model, ordinary legal rules and norms continue to follow strictly with no substantive change even in times of emergency and crisis. Other model of emergency power may be grouped together under the general category of "model of

period we assist to a global crisis and the Rodrik's Trilemma comes true: where democracy is to fall out: the binomial composed by national State and global enterprises has prevailed: "It's tempting to respond to this grim prospect with an absolutist traditional freedom"²¹.

Evoking the emergency even in cases of economical crisis means a full freedom of choice of more sophisticated (but also discretionary) regulatory emergency instruments to use in different economical fields. It may use exceptional rules²²; it may be admitted legislative accommodation²³, or even interpretative accommodation²⁴. It may involve arbitrary or dis-

accommodation" insofar as they attempt to accommodate, within the existing normative structure, intact as much as possible, some exceptional adjustments are introduced to accommodate exigency. [...] I suggest that these traditional models may not always be adequate: both as a matter of theory and practice», in O. GROSS, *Chaos and rules: should to violent crisis always be constitutional?*, 112, *The Yale law journal*, 2003, 1011-1134, at 1021-1026, at 1058-1081. Gross criticizes this model because it is naive and hypocritical in the sense that it disregards the reality of governmental exercise of emergency that is hidden by ordinary system and especially because this model is likely to make permanent the emergency. The author considers that for each type of emergency there should be an adequate response. Even J. FERREJOHN, P. PASQUINO, *The law of exception. A typology of emergency powers*, 210, *International journal of constitutional law*, 2004, 210-239, at 215 argue that "this model risk to be too familiar especially when we speak about economic crisis that is now cyclical and repeated over time, which cannot easily be limited in time and space", at 228, but they are aware that modern democracies prefer this system.

²¹ B. ACKERMAN had guessed as already in the attack of the Twin towers were at stake democracy because the emergency powers that tried to steer the crisis suspend too many liberties and guarantees, *Id. The emergency Constitution*, cited *supra* note 20, at 1030.

²² As suggests O. GROSS, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 *Cardozo Law Review*, 2000, 1825-1868; L. H. TRIBE, P. O. GUDRIDGE, *The antiemergency Constitution*, 113, *The Yale law journal*, 1801-1870, that contains a strong criticism of Ackerman's thought.

²³ O. GROSS, *Chaos and rules: should to violent crisis always be constitutional?*, cited *supra* note 20, at 1064-1067 that explains how this model works. It may be divided in two distinct models: ordinary legislation and special emergency legislation. In both cases it is a ordinary legislative power that adopt legislation directly or indirectly empowering the executive power. About this model see J. FERREJOHN, P. PASQUINO, *The law of exception. A typology of emergency powers*, 210, *International journal of constitutional law*, 2004 at 215 *et seq.* that wrote: «...ever unusual it may be, [that] emergency legislation remains ordinary within the framework of the constitutional system: it is an act of the legislature working within its normal competence. Such legislation is, in the post-war constitutional systems, reviewable by the constitutional court (if there is one) and is regulated in exactly the same manner as any other legislative act. For example, in Britain we see the succession of Defense Against Terrorism acts and the United States has the Patriot Act.¹⁶ Each is ordinary though time-limited legislation. Many antiterrorist laws have been passed in the same way by the German and Italian parliaments in the 1970s and the 1980s.»

²⁴ It is one of the most used procedures during emergency periods. Generally it is a power conferred to the judges and Courts. Some scholars argues it is a solution that complete legislative model. Even Italian constitutional court decided a case of emergency power during the terrorism (Italian Constitutional Court, decision 15/82), just like the Supreme Court of United State in *Korematsu vs. United States* on 1944, *Rasul vs. Bush*, *Hamdi vs. Rumsfeld*, *Rumsfeld vs Padilla*, all three on 2004 and the most recent *Hamdam v. Rumsfeld* on 2006. This model can lead to solutions not necessarily accommodating: the reading on Constitution could take decisions that –in name of the emergency- overturned the meaning of the Constitution although for a limited period of time. In fact, the balance between rights and emergency procedures does not follow pre-established procedures, so whether in Italy the suspension of rights was less harsh, in the US Supreme Court has endorsed limitations to very important rights and it decided that the wartime internment of American citizens of Japanese descent was constitutional (in *Korematsu v. United States*).

cretionary authority²⁵, the use of unusual sources or ordinary sources but with emergency purposes, it may be admitted a strong activity of judges and Courts intent to interpret the sources in conformity with the crisis. Having a wiggle room to accommodate emergency within the framework of the existing legal system it is part of the role of judges, but during the emergency period the usual flexibility of the rules could be so distorted as to create new rules completely different from those that the legislative power had created and judiciary should not get replace Parliament. Times of crisis often require emergency powers and they represent the greatest and the most serious danger for constitutional freedoms and principles²⁶,

2. The recent use of emergency sources

Crisis evokes a state of emergency. It implies a restriction of some constitutional guarantees and the use of emergency instruments. Not all scholars agree that the economic crisis can be considered a state of emergency²⁷, but Carl Schmitt had just equated economical and financial crises with “armed insurrections” thereby for justifying executive recourse to emergency power²⁸. Emergency allows the amendments of Constitution for adapting it to the performance of financial markets. Even Constitutional law is a victim of the “spread”; both national-States and European Union have suffered from the decisions of financial markets without being able to govern them, so it seems better to change rules and try to comply with a criterion of efficiency rather than of representativeness. Also European Union decided to adopt special law strategies to have much flexibility required to overcome the current eco-

Some other Authors consider this a way to overcome emergency situation: «While the law on the book does not change in times of crisis, the law in action reveals substantial changes that are introduced into legal system by way of revised interpretation of existing legal rules.», O. GROSS, F. NI AOLAIN, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge, Cambridge University Press, 2006, at 72-73.

As regards the the interpretation of the Italian Constitutional Court in times of crisis, See R. BIN, *Democrazia e terrorismo*, available at: *Forum di Quaderni costituzionali*, 2006; G. DI COSIMO, *Costituzione ed emergenza terroristica*, available at: *Forum di Quaderni costituzionali*, 2012.

M. TUSHNET, *The Political Constitution of Emergency Powers: Some Lessons from Hamdan*, 91 *Minnesota Law Review* 2007, 1451-1484.

²⁵ As argued Dicey the occasional use of arbitrary (discretionary) authority it is admitted in two way: when discretionary authority are given by legislative power to executive one and by exceptional legislation. Dicey did not speak about ordinary rules when he reflects on martial law. The classic schema provides extra ordinem solutions for the times of crisis, ID., *Introduction to the study of the Law of Constitution*, London, MacMillan, 1915, VIII ed., at 271-273.

²⁶ As remembers O. GROSS, *Chaos and rules*, cited *supra* note 20, 1011-1134, at 1027.

²⁷ As regards italian scholars, A. PIZZORUSSO, *Emergenza (Stato di)* in *Enciclopedia delle Scienze sociali*, Roma, Istituto dell'Enciclopedia italiana, vol. III, at 448, 552, 559 and G. MARAZZITA, *L'emergenza nella teoria giuridica*, Milano, Giuffrè, 2003, at 11, 14. They believe that the economic crisis is within the constitutional category of emergency. *Contra*, V. ANGIOLINI, *Necessità ed emergenza nel diritto pubblico*, Padova, CEDAM, 1986, at 184 et seq. and F. MODUGNO, D. NOCILLA, *Problemi vecchi e nuovi sugli stati di emergenza nell'ordinamento italiano*, in AA.VV., *Scritti in onore di Massimo Severo Giannini*, vol. III. Milano, Giuffrè, 1988, at 515.

²⁸ See W. E. SCHEUERMAN, *The economic state of emergency*, in 21 *Cardozo Law Review*, 2000, 1868-1894, at 1869 and G. AGAMBEN, *State of exception*, Chicago University Press, Chicago, 2005.

conomic crisis: emergency clauses are often used in this period also in breach of European Union institutions.

In times of crisis democracy and popular participation are questioned and often are hampered by fast solutions that should not be wasting time with shared decisions. In others words, although a Constitution could be democratic but not deliberative²⁹, but in the most recent cases deliberation is only a technique to approve amendments of Constitution without legitimacy, therefore procedures of revision of Constitution or vote of citizen cannot be discussed enough; or, better, we have only the moment of voting but the phases of arguing and bargaining have cancelled as well as there being a lack of recognizing and settlement of the conflict through discussion and deliberation³⁰. This behaviour is both the cause and the consequence of a lack of political choices, which “to be legitimate must be the outcome of deliberation about ends among free, equal and rational agents”³¹. During the crisis democracy decisions must be shared more than in other periods otherwise the penalty is a progressive loss of political and legal legitimacy of rules. When decisions are not taken by representative powers but by technocracy or financial markets, democracy suffers as well as popular sovereignty. It does not mean to prefer a plebiscitary decision instead a representative democracy but to recognize that the decisions taken only by the Executive power constitute a wound in the sovereignty because making decisions is not the same as having political choices. This is the case of most recent constitutional reforms that are simply imposed by financial markets. Reactions of Constitutions and their degree of the adaptability to new financial dictates have been different and proportionate to the different forms of the government and of the structures of political system and political parties.

In Italy the loss of any resistance to the political system and an absence of long term political strategies has allowed some very large amendments to the text of the Constitution, as well as an implicit and silent adaptation to the crisis through the instrument of the interpretation accommodation of the Constitution³². Overcoming the crisis through a model of inter-

²⁹ As claims J. ELSTER, *Deliberative democracy*, New York, Cambridge University Press, 1998 at 99.

³⁰ About complex concept of deliberative democracy and the importance of the procedure for democratic system, see S. BENHABIB, *Toward a deliberative model of democratic legitimacy*, ID., *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, Princeton University Press, 1996, 67-87, at 79 et seq., see also R. BIFULCO that recognizes the principle of public discussion for deliberation but includes also the participation of all interested people to the decision, ID., *Democrazia deliberativa*, *Enciclopedia del diritto*, Milano, Giuffrè, 2011, Annali IV, 271-294 at 271.

³¹ J. ELSTER, *Deliberative democracy*, cited *supra* note 29, at 5. He says that these conditions are recognized as fundamental of idea of democracy both by Habermas and Rawls.

³² As explain X. CONTIADES, A. FOTIADU, *Constitutional adaptability: bouncing back after the financial crisis*, Draft paper for the workshop “Constitution and financial crisis, Oslo, International congress of constitutional law, 18 June 2014. About the recent crisis and the role of Italian constitutional court, see M. BENVENUTI, *La Corte costituzionale*, F. Angelini, M. Benvenuti (Eds.) *Il diritto costituzionale alla prova della crisi economica*, Napoli, Jovene, 2012, 375-419, at 375 et seq. who believes that the Court has maintained a certain autonomy of decision even during the crisis. It shares this opinion T. GROPPI, I. SPIGNO, M. VIZIOLI, *The Constitutional consequences of the financial crisis in Italy*, in X. Contiades, *Constitutions in the global financial crisis. A Comparative analysis*,

pretative accommodation has been used in Italy especially by Constitutional court and sometimes by political system. During this recent crisis, Constitutional court have defended principles and values from emergency. It has interpreted Constitution in a different way: in the struggle between rights and resources available to enforce them sometimes rights have won sometimes the reasons of the crisis prevailed³³.

Some scholars argue that Constitutional court has been strongly influenced by economical crisis and it has even anticipated some economical restrictions then approved by the legislative (or executive) power and by the constitutional amendment³⁴. In both cases of interpretative accommodation and of amendment of the Constitution we are seeing a distortion of the functions of the constitutional bodies, which are called to play a role different from that which the Constitution assigned them. The interpretative accommodation as a method to respond to the economic crisis allows the judiciary to take the place of the legislative and political power. In this way the judges take on a discretionary function that does not belong to them and overexpose and delegitimize them³⁵.

There is an excessive use of emergency sources in Italy, even before the times of crisis, but the crisis has exacerbated the phenomenon³⁶. Parliamentary Acts can be used in a distorted way to manage this particular moment of disorder and even the constitutional reform as it has happened with the reform of the balanced budget rule: enhanced procedures provided by Italian Constitution have been respected, but only in formal terms³⁷. The original meaning of the constitutional amendment process has been distorted and betrayed: the long procedure provides the electoral body and the public opinion are informed and actively involved; for this reason is expected a period of reflection (at least three months away between

cited *supra* note 2, 89-113, at 104. As regards the relationship between crisis and Italian constitutional court decisions see also A. RUGGERI, *Corte e diritti in tempo di crisi*, available at: www.gruppodipisa.it.

³³ See the Italian Constitutional court decisions 10/2010 and 223/2012 for different approaches of the crisis into the Constitutional rights.

³⁴ See G. RIVISECCHI, *Il c.d. pareggio di bilancio tra Corte e legislatore anche nei suoi riflessi sulle Regioni*, in *Rivista AIC*, 2012, 5 *et seq.* and I. CIOLLI, *I diritti sociali*, F. Angelini, M. Benvenuti (Eds.) *Il diritto costituzionale alla prova della crisi economica*, Napoli, Jovene, 2012, 83-114, at 93-100.

³⁵ For a critical position about the role of the constitutional judges during the crisis at the thesis of the superiority of political decisions see G. FERRARA, *Corte costituzionale e principio di uguaglianza*, N. OCCHIOCUPO, *La Corte costituzionale tra norma giuridica e realtà sociale*, Bologna, Il Mulino, 1978, 101 *et seq.*

³⁶ For a critical position about this normalization of emergency G. AZZARITI, *L'eccezione e il sovrano. Quando l'emergenza diventa ordinaria amministrazione*, *Costituzionalismo.it*, 2010 and A. CARDONE, *La normalizzazione dell'emergenza*, Torino, Giappichelli, 2011.

³⁷ In Spain crisis gives rise to special behaviors and measures: for the first time general elections had been announced so far in advance (in June 2011 Zapatero announced the election in November 2011 instead of the natural end of legislature in March 2012); an extensive use of Decree-Laws; a quickly reform of Article 135 of Spanish Constitution was approved by a delegitimate Parliament at the end of the legislature with a special procedure. See A. RUIZ ROBLEDO, *The Spanish Constitution in the turmoil of the global financial crisis*, in X. Coniades, cited *supra* note 2, 141-165; E. ÁLVAREZ CONDE, C. SOUTO GALVÁN, *La constitucionalización de la estabilidad presupuestaria*, Madrid, Instituto de Derecho Público de la Universidad Rey Juan Carlos, 2012 and V. RUIZ ALMENDRAL, *The Spanish Legal Framework for Curbing the Public Debt and the Deficit*, 9, *European constitutional law review*, 2013, 189-204.

the first and the second approval in each of the two Chambers of Parliament), in this case, the absolute silence has accompanied every step of this procedure and the approval. No newspaper reported the reform, no comments or parliamentary hearing of the experts happened, at least until the final approval³⁸.

When an ordinary source disciplines the effects of the crisis, we have as result a kind of normalization of the state of emergency and its extension with no time limit. The goal of these measures is to justify the need of faster procedures. They give the impression of looking like the markets that are rapid and ever changing, while the essence of the constitutional law is to impose general and abstract rules, which limit any power, even the economic one, and that requires durability and long-term solutions.

We are witnessing a centralization of political decisions (and power) in the Government and to a lesser involvement of Parliaments: it means less Act of the Parliament and more Decrees-laws. Another consequence of this requirement of faster procedures is a sort of “undifferentiated primary normative power, free for limitations and procedures, and which can assume the form of most suitable, or appropriate to individual decisions” (Decree-laws. Legislative Decrees)³⁹.

During the last Berlusconi Government and then Monti, Letta, Renzi Governments, the Executive has taken sensible political and economic decisions and parliamentary procedures have been strained, probably in violation of articles 72 and 76 (sometimes also 77) of Italian Constitution⁴⁰.

³⁸ Here the text of Article 138 Italian Constitution: “Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting.

Said laws are submitted to a popular *referendum* when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes.

A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members.”.

³⁹ A. SIMONCINI, *Back to “flexible” Constitutions? The impact of financial crisis and the decline of the european constitutionalism*, cited *supra* note 13, at 84.

⁴⁰ As claims A. GUAZZAROTTI, *Riforme del mercato del lavoro e prescrittività delle regole costituzionali sulle fonti*, 3, *Costituzionalismo.it*, 2014 1-27; R. CALVANO, *La crisi e la produzione normativa del Governo nel periodo 2011-2013*, 3 *Osservatorio sulle fonti*, 2013, 1-24; M. LAZE, *La produzione normativa del governo Monti tra decreti legge, questioni di fiducia e spinte esterne. ruolo della legge in un sistema delle fonti in transizione*, 4 *Rivista AIC*, 2012, 1-10; M. FRANCAVIGLIA, *La decretazione d’urgenza nell’esperienza del governo Monti*, 4 *Rivista AIC*, 2012, 11-19.

In times of crisis even the role of Parliament has been changed⁴¹. As regards economic policy, the legislative power and its sources (i.e. the economic annual plan, called DEF, Document of economics and finance) lost its centrality. There is not much time for parliamentary Committees discussion and for the approval of Parliament. It gradually loses importance and Governments with its Decrees often substitute it⁴². Decrees-laws are not used because they ensure quick time, because since the parliamentary passage is rather too fast and the timing of the discussion are now very restricted by the same parliamentary rules. The reason is the involvement of executive power and the strict parliamentary majority in the sensitive decision and especially in the reforms⁴³. It means that during the crisis Decree-Laws and government sources have undergone a qualitative evolution⁴⁴ that has got worse a malfunctioning of parliamentary democracy⁴⁵. This trend has been maintained during the last legislature⁴⁶

⁴¹ See N. LUPO, *La lunga crisi del procedimento legislativo e l'impossibile qualità delle regole*, *Analisi giuridica dell'economia*, 2013, 421-436; G. RIVISECCHI, *Il Parlamento di fronte alla crisi economica e finanziaria*, *Rivista AIC* 2012, M. LUCIANI, *Il Parlamento negli anni Novanta*, in L. VIOLANTE, F. PIAZZA (Eds.), *Il Parlamento*, Storia d'Italia, Annali 17., Torino, Einaudi, 2001. See also C. FASONE, *National Parliaments under 'external' fiscal constraints. The case of Italy, Portugal, and Spain facing the Eurozone crisis*, 2014, available at: www.astrid-online.it, F. MARANGONI, L. VERZICHELLI, *From a Technocratic Solution to a Fragile Grand Coalition: The Impact of the Economic Crisis on Parliamentary Government in Italy*, 21 *The Journal of Legislative Studies*, 2015, 35-53.

⁴² Decree-law have used also when EU had asked to Italy additional economic measures to contain the debt and the deficit. After some informal "letters" sent by EU institutions to Italian government, Berlusconi Government approved the called «Decreto sviluppo» [development decree] n. 70/2011, converted by the Italian Parliament by Law no. 106/2011 and the Decree n. 98/2011, containing «urgent measures for financial stabilization», converted by the Italian Parliament by Law n. 111/2011.

⁴³ M. LAZE, cited *supra* note 40, at 2, *et seq* demonstrates how Monti Government have regulated all important sensible question often through Decrees and rarely through Act of Parliament of which, however, the government had presented its own text, protected by the distortions of the minority through the question of the confidence.

⁴⁴ M. LUCIANI, *Atti normativi e rapporti fra Parlamento e Governo davanti alla Corte costituzionale: tendenze recenti*, *Scritti in onore di Valerio Onida*, Milano, Giuffrè, 2011, 1151-1180 at 1152; M. FRANCAVIGLIA, cited *supra* note 40, at 2,

⁴⁵ At least from the point of view of H. KELSEN, *Das Problem des Parlamentarismus*, 1926, Wen-Leipzig, W. Braumüller, 1924, 1-44, See also G. AZZARITI, *Critica della democrazia identitaria*, Roma-Bari, Laterza, 2005 and about the importance of the presence of the *démós* in the democratic process, which can not therefore be reduced to a simple voting procedure, See M. LUCIANI, *La formazione delle leggi, tomo I,2, Il Referendum abrogativo, Commentario della Costituzione*, Bologna- Roma, Zanichelli- il Foro italiano, 2005, at 1-49.

⁴⁶ The XVII Legislature began on 15 mars 2013 and still ongoing. It includes the last period of the Monti Government (from 15 march to 28 april 2013), The Government Letta (from 28 april 2013 to 22 february 2014) and the Government Renzi (from 22 february 2014 to today). During the period from 15 march 2013 to 30 september 2014 it has counted 192 primary rules of which 83 Acts of parliament, 48 Decree-laws, 46 legislative Decrees and 15 other acts of the government; it can therefore be argued that the production of primary rules by the government remains higher than the Parliament Acts. Moreover, among the 83 Acts of Parliament there are 39 which are Law that converted Decree-Laws and in 70 Acts of Parliament on 83 legislative initiative was exercised by the government. See Servizio Studi della Camera dei Deputati, Osservatorio sulla legislazione, *La produzione normativa nella XVII legislatura*, available at: www.camera.it/application/xmanager/projects/leg17/attachments/documenti/pdfs/000/001/107/CL0003.pdf.

3. An unusual (or abnormal?) emergency source: the letters by ECB and by the Commissioner for Economic and Monetary Affairs to Italy.

European institutions have sent several letters to Italy (and to other national State members) all suggesting precise economic measures and policy choices that the Country had to adopt to cut the deficit and the debt⁴⁷. It was not a usual correspondence between institutions, but the true and proper charges outside the tasks and roles that the Treaties assign to the Community institutions. They are typical rules of soft law adopted during the crisis. In fact they are not legally binding, they do not have the typical form and procedure of legal acts, but they are perceived as such⁴⁸. Through these informal acts, the EU has tried to impose political and legal choices to Italy that considered appropriate and effective, although they did not concern the EU competences but of the member States. In fact, it is not only a question of economic choices, but also a specific and timely political question. For example, in the annex to the letter to Olli Rehn to Italy (on 4 November 2011), consisting of 39 points, he even asks how Italy wants to solve the current pension legislation and the age for old age pension (point 5); or at point 13) asking for a restructuring program for individual schools with unsatisfactory results of INVALSI tests (which measure students' skills); at point 16) the European commissioner "ask for university reform measures implemented what still needs to be adopted. At last Rehn asks about the constitutional reforms (point 37-39) "suggesting" a reduction of number of members of Parliament, in theory at least, regards the national sovereignty more than anything else.

Before the letter of Rehn, there was the letter by the President of the ECB Jean-Claude Trichet and his designated successor, then a member of the Executive Board of the ECB, Mario Draghi, to the President of the Italian Council of Ministers Berlusconi on 5 August

⁴⁷ The most important is:

1) the letter by the President of the ECB Jean-Claude Trichet and his designated successor, then a member of the Executive Board of the ECB, Mario Draghi, to the President of the Italian Council of Ministers Berlusconi, on 5 August 2011. The first letter was published in the newspaper *Il Corriere della Sera* on 11 September, 2011. The English text are now available in E. OLIVITO, *Crisi economico finanziaria ed equilibri costituzionali. Qualche spunto a partire dalla lettera della BCE al Governo italiano*, *Rivista AIC*, 2014.

The response of Italian President of Council of Ministers is available at: www.ilsole24ore.com/art/notizie/2011-10-26/nella-bozza-inviata-bruxelles-185744.shtml?uuid=Aas1BFGE ;

2) the letter by the Commissioner for Economic and Monetary Affairs and European Commission Vice President Olli Rehn to the Italian Minister of Economy and Finance, Giulio Tremonti, containing the request of clarification about the adoption of measures for curbing debt and deficit, on 4 November 2011. It is available at: www.ilsole24ore.com/pdf/2010/SoleOnLine5/_Oggetti_Correlati/Documenti/Finanza%20e%20Mercati/2011/11/olli-rhen-tremonti.pdf?uuid=97b64544-0a36-11e1-902a-5584c7c5a689 and the attached questionnaire is available at: http://download.repubblica.it/pdf/2011/economia/CAB10_1104184608_001.pdf

3) a response to the President of the Council of Ministers of the Ministry of Economy and Finance on 14 November 2011 to the Commissioner and Vice President Rehn, available at: www.legautonomie.it/Documenti/Attualita/Crisi.-La-lettera-di-risposta-dell-Italia-all-UE

⁴⁸ A. DI ROBILANT, *Genealogies of soft law* cited *supra* note 12 at 499 et seq., E. PARIOTTI, *Soft law» e ordine giuridico ultra-statuale tra «rule of law» e democrazia* cited *supra* note 12, at 89 et seq.

2011. Even this letter “suggests” not only a series of economic and financial measures, but also constitutional and structural reforms.

The letter not only urged Italy to implement rules for the restriction of the deficit and public debt, in order to reach a balanced budget in a short term, but also shows how can get it without taking into account that the means to achieve a balanced budget can be different and freely evaluated by the Member State. ECB believes that the reduction had to be achieved primarily through decreasing public sector expenditure, and by a stricter control on debt and the costs of regional and local authorities. The letter also asked for the adoption of a “credible reform strategy, including the full liberalization of local public services and of professional services is needed. This should apply particularly to the provision of local services through large scale privatizations”. ECB also encourages “the government to immediately take measures to ensure a major overhaul of the public administration in order to improve administrative efficiency and business friendliness. It asks for a systematic use of performance indicators (i.e. standard costs, especially in the health, education and judiciary systems). It suggests abolishing or consolidating some intermediary administrative layers (such as the provinces). Actions aimed at exploiting economies of scale in local public services should be strengthened.” This “suggestion” in a period of financial crisis when Italy was subject to various financial speculation in which the credibility and reliability of the Country are key to get out of it, constituted a guideline “almost binding” for Italian governments that it has approved and is approving various reforms to comply with the letter.

It is pointed out that these letters represent an informal but effective interference in political decisions of a member State of EU. Neither The ECB nor the Commissioner for economic and monetary affairs are a representative institution of EU, they do not enjoy the political responsibility. They are part of important technical institutions but they cannot dictate the political agenda and the policy choices to an EU member State.

A further demonstration that the two letters may be defined rules of soft law but they have been perceived as a binding rules, is confirmed by the fact that the letter of the ECB has been invoked before the constitutional Court to defend some cuts on budget⁴⁹.

Other demonstration could be founded in the last Governments programs, which can be overlapped with the requests contained in the two letters; Monti had as immediately presented the so called Decree-law “Save Italy” (Decree-law 201/2012 converted by law n. 214/2011) that contained the programs defined by IFM and ECB and European Union. The abolishing of Province required by the ECB letter is contained in the “Spending review Decree-law” (Decree-law n. 52/2012 converted by law n. 94/2012), although a constitutional reform needed to abolish them. Monti Government also complies with the request of the ECB to reform of pensions (Law n. 92/2012). Fortunately Constitutional Court plays its role of gua-

⁴⁹ Italian constitutional Court decision n. 7/2014.

ranteeing of the Constitution and with the decision n. 220/2013 rejected the possibility to have a reform of Province with a Decree-law⁵⁰.

This needed to prove to be obedient and is also affecting the Renzi Government and law production is aimed at carrying out the purposes lay down by the markets and international or supra-national institutions such as the IMF and the ECB.

Renzi Government must lead the reform of Province with ordinary tools, so he presented a Bill approved on 3 April 2014⁵¹. The bill plans a merging of some provinces and a substitution of some provinces with other institutions, the metropolitan cities. The reform of the labour market and the provisions of some constitutional reform complete the range of demands of the “European discretionary authority” and the “homework” carried out by Italy in order to recover the confidence of the markets have been done. All doubts of constitutionality of some decrees remain intact as well as the assurance that a clearly attack on the constitutional rigidity has been launched.

4. Crisis can make flexible some rigid Constitutions

One of the most important responses of the crisis is due to the introduction of strict budget rules (required by financial markets) in the euro-zones Constitutions. It is interesting to note that Countries, which have resorted to constitutional changes having reliability problems in the financial markets more than serious budgetary problems and deficits⁵². The lack of reliability “forced” the European Central Bank to send a letter to Italy and Spain that asked not only for changing rules on budget but also for the reducing regionalism and decentralization of the two States, but for promoting constitutional reforms and for suggest a greater use of government decrees or others emergency sources.

Constitutional amendments are a new way to weaken the rigidity of the Constitution and to have a flexible source more adaptable to economic changes⁵³. The real reason is to make available to the majority parties the amendments of the Constitution. The participation of electoral body is as limited as possible: this is not required in Italy and Spain to approve

⁵⁰ Constitutional court declares the unconstitutionality of the Article 23 of Decree-law n. 201/2011 and the Articles 17 and 18 of Decree-law n. 95/2012. See S. SPINACI, *Intorno alla tentata riforma delle province*, 3, *Diritto Pubblico*, 2012, 945-964.

⁵¹ Legge n. 56/2014. See P. BILANCIA, *Regioni, enti locali e riordino del sistema delle funzioni pubbliche territoriali*, 4, *Rivista AIC*, 2014, 1-19.

⁵² It seems to be agreed V. RUIZ ALMENDRAL, *The Spanish Legal Framework for Curbing the Public Debt and the Deficit*, cited *supra* note 37, at 189. When she says: «This constitutional reform was primarily intended to ‘appease’ financial markets and instill credibility in the Spanish economic system.», at 189. See also P. DERMINE, *Le Traité de Stabilité, de Coopération et de Gouvernance et l’internalization de la Golden Rule par les Etats membres de l’Union Européenne*, Draft paper for the workshop “Constitution and financial crisis, International Congress of Constitutional Law, Oslo, 18 June 2014.

⁵³ D. PICCIONE, *Revisione e legislazione costituzionale ai tempi delle crisi (Riserve sul procedimento di codificazione costituzionale del principio di pareggio di bilancio. In ricordo di Federico Caffè, a venticinque anni dalla scomparsa)*, *Giurisprudenza Costituzionale*, 2012, 3859-3883, at 3869 *et seq.*

budget reform; this is not allowed in Greece to accept the European economic measures and cuts (the will to hold a *referendum* in Greece was opposed by the European institutions). Even if in the representative democracy the direct deliberation of citizen is not required to amend Constitution, the bargaining, the discussion and the debate are needed. Moreover, Constitutions could lose their legitimacy by rapid and repeated amendments: Constitutions aspire to be eternal and they contain values and principles non-negotiable as well the Act of the Parliament. They are not within the political system, they could be superior to it, and otherwise they lose their function and their rigidity. However, flexible Constitutions are more useful to the markets that always need of rapid changes.

The Treaty on Stability, Coordination and Governance (TSCG) provided the entering into force “*through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes*”⁵⁴. The reform of the Constitution is not formally required, but it is “advocated” to ensure that the provisions of the Fiscal Compact were modified by next political majorities⁵⁵. Moreover, modifying Constitutions of the European Member States creates a «“mutual anchoring” in a Constitution has as an effect of the “self appropriation” by the Member States of such principles, as they commit themselves through the sovereign exercise of their treaty making power»⁵⁶.

Xenophon Contiades analysed how the Constitutions react to the stress caused by the crisis and he classified different reactions as 1) adjustments, 2) submissions, 3) breakdowns, and 4) stamina⁵⁷. Countries that belong to the first group had put together a combination of formal and informal change as the Constitutions adopt to keep up with developments. Italy and Spain, Ireland, Latvia and the United Kingdom are in this group; Greece

⁵⁴ Article 3,2 of the TSCG. About the Treaty see P. CRAIG, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, 37 *European Law Review*, 2012, 231 and on the peculiarity of this Treaty, which was formally outside the EU legal order, see S. PEERS, *Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework*, 9 *European Constitutional Law Review*, 2013, 37.

⁵⁵ On balanced budget rule in European Countries See L. F. M. BESSELINK, J. H. REESTMAN, *The Fiscal Compact and the European constitutions: ‘Europe speaking German’*, 8 *European Constitutional Law Review*, 2012, 7; X. PHILIPPE (Ed.), *Le juge constitutionnel et l’équilibre des finances publiques*, XXVIIIe Table ronde internationale, Aix-en-Provence, 14 et 15 septembre 2012, *Annuaire international de justice constitutionnelle 2012*, vol. 28, Paris, economica, 2013.

About the reasons of the Constitutional reform in Italy, see M. LUCIANI, *L’equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità*, available at www.cortecostituzionale.it/documenti/convegni_seminari/Seminario2013_Luciani.pdf; T. GROPPI, *The impact of the financial crisis on the Italian written Constitution*, *Italian Journal of Public law*, 2012, 1-14; G. BOGGERO, P. ANNICHINO, *Who Will Ever Kick Us Out?: Italy, the Balanced Budget Rule and the Implementation of the Fiscal Compact*, 2, *European Public Law*, 2014, 247–262, and I. CIOLLI, *The balanced budget rule in the Italian Constitution: it ain’t necessarily so... useful?*, 4, *Rivista AIC*, 2014, 1-21.

⁵⁶ L.F.M. BESSELINK, *Parameters of Constitutional development: The Fiscal compact between EU and members State constitutions*, in L. S. ROSSI, F. CASOLINI (Eds.), *The EU After Lisbon: Amending Or Coping with the Existing Treaties?*, Heildeberg, Springer, 21-36, at 31.

⁵⁷ X. CONTIADES, A. FOTIADU, *Introduction: The global financial crisis and the Constitution*, in X. CONTIADES, *Constitutions in the global financial crisis. A Comparative analysis*, cited *supra* note 2, 9-59, at 10.

and Portugal are experiencing the submission; Hungary and Iceland are in the group of breakdown and the USA follow the stamina behaviour.

Mr Contiades takes into consideration the financial crisis more than the emergency instruments, because he considers the two processes distinct and non-overlapping. Mr. Beselink seems to consider in the same time the two type of reaction of the crisis and he adopts a different classification to explain the response of the European Constitution to the financial crisis. He distinguishes between “revolutionary” and “evolutionary” approach of Constitutions⁵⁸. The revolutionary case corresponds to a strong response to the crisis while evolutionary stands for a less strong incorporation of change, for example through a process of interpretation of the Constitution. He includes France, Italy and Germany in the first category and Great Britain in the second one. In principle, the distinction is in compliance with the historical processes that have involved Constitutions: France has often changed its Constitution to adapt it to the natural evolution of the political system and Germany has sometimes done the same, but Italy has often preferred an evolutionary interpretation of the Constitution rather than changing the text.

This model is not suitable for the recent crisis when the patterns are skipped and the response of the different Countries has been different: France has not modified the text of the Constitution for introducing Fiscal Compact and it has resorted to the organic law; Italy has provided many constitutional reforms as well as that of 2012, which introduced the principles of the Fiscal Compact into the Constitution.

The group that reacts to the crisis by constitutional “adjustment” seems to be too heterogeneous, probably because adjustments are proportionate to the different legal traditions. It includes Common law and Civil law countries that naturally respond differently to changes in the constitutional and political system. The element common to all should be the fact that they have met a “combination of formal and informal change as the Constitution had adopted to keep up with developments.

Some of these Countries shared a common path; in their experiences the “adjustment” is not necessarily seen in a positive way because it indicates flexibility, which could be associated of the idea of a lack of resistance to change because the political and constitutional system is too fragile and not very consolidated. Ireland, Spain, and Italy had amended their Constitutions for introducing the prescription of fiscal compact.

The Thirtieth Amendment of the Irish Constitution allows Ireland to ratify the Fiscal Compact avoiding inconsistency with the Irish Constitution⁵⁹. This change requires a *referendum*, which will have taken place on 31 May 2012. The *referendum* was fundamental because for the application of ESM was requested but not received, for this reason Thomas Pringle decided to challenge the European Court of Justice to explain the role of emergency in Euro-

⁵⁸ L.F.M. BESSELINK, *Parameters of Constitutional development: The Fiscal compact between EU and members State constitutions*, cited supra note 56, at 24.

⁵⁹ Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union), 27 June 2012, after the approval of referendum on 31 May 2012, by 60.3% to 39.7%.

pean and State measures⁶⁰. The ratification of the Treaty may be stopped by a decision of the national constitutional Court, as it was attempted in Germany. In alternative there may be a change by governments after the signature, as the new government may be unwilling to proceed with ratification of the treaty text as it stands. The Irish case explains well how this was an “adjustment”, which I still consider a modification of the ordinary rules in the name of the emergency. Both the Irish more change, and the decision of the court of justice PRINGLE show how the emergency would affect both the interpretation of the judges is the use of the same constitutional rules.

Mr. Contiades includes Greece and Portugal in the second group, among the Countries that have their Constitutions subservient to the crisis: they are the most vulnerable Countries in EU. Their Constitutions may react to the crisis adopting sleep-mode, conveying the impression to be stunned by the new demands⁶¹. These Constitutions seem to succumb to all deviation without authoritatively providing and to be unable to absorb change (in fact ,did not have formal amendments to their Constitutions).

Just like Argentina in times of the financial crisis, they have been subjected to the claim of their creditors and above all they had to give up an additional part of sovereignty more than other EU Countries. First, the agencies of rating downgraded the Greek sovereign debt. Later, The European Central Bank (ECB) and The International Monetary Fund (IMF) had granted a loan conditioned upon users acceptance of draconian economic and political measures by Greece: Troika (some experts of European commission, ECB and IFM) and rich Euro zone Countries thwarted the *referendum*, which Greek people could decide the opportunity of economic measures. It was an attempt to Greek Constitution⁶².

⁶⁰ Pringle v. Ireland, Case C-370/12. See, for a constitutional reconstruction of this affair, D. G. MORGAN, *The Constitutional and the financial crisis in Ireland*, in X. Contiades (eds.), cited *supra* note 2, 63-88; for an European point of view, see P. CRAIG, *Pringle: legal reasoning, text, purpose and teleology*, 20 *Maastricht Journal*, 2013, 3-11 that wrote about the respect of rule of law by Eu law after the ESM Treaty: «A partial explanation to this response is that the CJEU was dealing with the question of whether Article 136(3) TFEU could be introduced pursuant to the simplified revision procedure. The legal reality was, as we have seen, that the ESM took effect as an international agreement because Article 136(3) had not yet come into effect. The legal reality was, however, also that the EU institutions were central to the ESM, and the CJEU provides scant if any guidance as to the legitimacy of such involvement.

This reticence was doubtless due in part to the legal difficulties that might be raised by such involvement. It was also doubtless due to the fact that when Article 136(3) comes into effect it will provide a more secure foundation for EU institutional involvement with the kind of assistance dealt with via the ESM. It is true that Article 136(3) does not explicitly address EU institutional involvement, but it is a good deal easier to infer EU institutional capacity to participate in such a schema when it is grounded in the primary treaty itself». See also P.-A. VAN MALLEGHEM, *Pringle: A Paradigm Shift in the European Union's Monetary Constitution*, 14 *Germann law journal*, 2013, 142-168 especially at 156-168; J. TOMKIN, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, 14 *German Law Journal*, 2013, 169-190.

⁶¹ X. CONTIADES, A. FOTIADU, *Introduction: The global financial crisis and the Constitution*, in X. CONTIADES, (Ed.), *Constitutions in the global financial crisis*, cited *supra* note 57, at 49.

⁶² For a reconstruction of the Greece case and his influence of Constitutionalism, See Th. SKOURAS, *The euro crisis and its lessons from a Greek perspective*, 35 *Society and economy*, 2013, 51-69. The author argues that root of the crisis is the unfinished construction of euro and the absence of the common treasury. From his

Portugal did not show the same degree of acquiescence than Greece. The structure of their Constitution is different: the special guarantees of Portuguese Constitution, which provide a reinforced procedure for declaring a state of emergency (Article 19) and prohibit retroactive taxations (Article 103, 3) make the Constitution impervious to external influence. On 2010 with the decision n. 399/2010 and on 2011 with the decision 396/2011, Portuguese Constitutional Court endorses the measures required by the Troika and decides not to declare unconstitutional both the retroactive effect of new taxation (399/2010) and the wages in the public sector, because the public interest to avoid the crisis prevails on these constitutional guarantees. On 5 April 2013, with the decision 187/2013⁶³, Portuguese Constitutional Court declared some measures contained in the annual budget (cuts on public salary and on other public insurances) in contrast with Portuguese Constitution. The Federal tribunal claimed a violation of the principle of equality and proportionality. A continuous violation of the Constitution could not be legitimated again.

Hungary and Iceland are in the group of breakdown, because they assist to a rupture of the old Constitution and they rewrite the entire text of the Constitution that now includes new economic rules. In these Countries, economic and financial crisis provoked a collapse of institutions, political parties and their legitimacy. In Iceland, the breakdown of the Constitution is not coincided with the collapse of constitutionalism. It was an opportunity to rebuild through citizen participation. Iceland is a little Country with a small population, but it was not assumed that citizens could participate in the discussion and the process of constitutional revision. Hungary that was a model democracy in 1990 after the entry into the European Union has had some political problems more than economic ones in fact its reaction after the collapse was different: authoritarianism and total loss of democratic legitimacy had been the result. Crisis influenced process but the structure, the tightness and the strength of democracies make the difference.

Indeed, the USA did not amend the Constitution (stamina reaction) and came out of the crisis with autonomous decisions that relate more to economic and political choices. The differences between Portugal, Greece and the United States who did not submit amendments in their constitutions reside in a common rigidity of the Constitution. However, they are placed in different groups and are valued differently just because of their economic and political condition is different to the world, not because of their different constitutional structure.

Similarly Italy and Spain have changed their constitution and have adopted many other measures under the pressure of the emergency and not because their constitutions ha-

point of view, it is inevitable that the weakest countries with the least healthy public finances would sooner come under attack.; For a constitutional perspective, See X. CONTIADES, J. A. TASSAPOULOS, *The impact of the financial crisis in the Greek Constitution*, in X. Contiades, *Constitutions in the global financial crisis. A Comparative analysis*, Ashgate, England/USA, 2013, 195-218 and G. GRASSO, *Il costituzionalismo della crisi*, Napoli, Editoriale scientifica, 2012, at 67-74..

⁶³ The decisions of the Portuguese Constitutional Court are available at: www.tribunalconstitucional.pt/acordaos/20130187.html

ve well accepted the adjustment. Probably in both cases one can speak of a break in the constitution that caused political and social conflicts. Only between different years will be able to understand how the break was important.

About Italian Constitution, the reform required by the letter of ECB is developing. Also Italian institutions agree with a new set of amendments to the Constitution. They modified a significant part of the Constitution, although this reform is opposed even within the majority. The reform of the bicameralism and a strong recentralization of the State are the aims of the constitutional reform. Continuous amendments of the Italian constitution are likely to break its legitimacy and supremacy. Once again it has been used abnormal procedures: the project of reform was presented by the Government and not by Parliament; the meaning of Article 138 was overturned: it provides for the approval of every single constitutional amendment and not an entire reform of Part II of the Constitution.

5. Emergency and the undifferentiated primary normative power in European Union: is the legal principle in danger?

From 2008 to present most of European decisions in the field of economic crisis consisted in special procedures often in violation or in substitution of those provided by the Treaties and by EU regulations. After a successful approval of Lisbon Treaty, the crisis appears and reveals a lack of effective legal instrument to overcome debt. Only the article 136 TFEU can contribute to manage the exceptional situation with the ordinary legal tools. So, we assist to an emergency reaction. Greek situation became no longer solvable in 2010. There were not the European institutions to intervene with a loan agreement on May 2010 but Euro zone State members and IMF. A Council decision of 10 May 2010 endorsed the loan package in the context of the Greek deficit proceedings. A Troika surveyed the Political and financial implementations of a new agreement entered into force on March 2011. Europe soon realizes that the problem is not only of Greece and its debt or its inability to manage the national budget. For this reason, ECOFIN drawn up a general bailout schema and passed for all the Regulation No. 407/2010 on the European Financial Stabilization Mechanism (EFSM), based on Article 122(2) TFEU. From EFSM to EFS and ESM loans are all conditioned and answer for the needs of speedy procedures through sources outside of the Treaties. ESM is a Treaty that creates an intergovernmental organization under public international law. Even when EU follows its procedures to stem the crisis, as did by modifying the 136 TFEU, the result generates new conditions and perhaps new transfers of sovereignty. ESM was approved by a simplified revision procedure under Article 48(6) TEU. The Euro Member States can establish a stability mechanism to safeguard the stability of the Euro area "The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."(Article 136 TFEU Amendments) The loan is subject to the adoption of certain fiscal

and economic policies that are not discussed by the Community institutions⁶⁴. The decision of the Board is taken according to the monetary weight of Member State: a qualified majority is formed counting the Member States' respective capital subscriptions⁶⁵. The internal disputes in this strange non-EU institution are subject to submission to the ECJ under Article 273 TFEU, a slight confusion reigns between legal orders⁶⁶. ESM is an evident rupture of the unity of EU⁶⁷.

Even the adoption of the Fiscal compact represented a rupture. It is not needed because the rules of economic governance at the European level could have been adopted through an enhanced cooperation within the EU or by means of a modification of Protocol No. 12 on the excessive deficit procedure. Choosing an International Treaty just like Fiscal compact had two advantages that EU legislation could not ensure: as first a quick change, because its adoption would have been faster than any European legislative procedure, which must involve the Commission and European Parliament; secondly, it must be taken into consideration a physiologic element. An international Treaty seems to be a strong and rapid emergency solution for reassuring financial markets.⁶⁸

6. Conclusions

It cannot be denied that many transformations on constitutional law occurred in this period of crisis even if they date from the beginning of globalization and now came forward with greater intensity. However, it is with the economic emergency that it has seen the major modifications of the text of the Constitutions. Only the collapse of communism had brought the same constitutional transformations in the nineteenth century⁶⁹. The Big Crash of 1929 was followed by changes in law, but the revision of Constitutions is a recent tendency and in 1929 Constitutions were not so strong and so fundamental. But we have to wait until 2012 and the approval of fiscal compact to see constitutional amendments related to the crisis and to the economy questions. Spain and Italy did an important reform for adopting fiscal measu-

⁶⁴ The decisions are taken by the Boards of Governor of ESM (composed by the Ministers of Finances of the Euro area, the Commissions for Economic and Monetary Affairs and the President of the ECB holding observer status.

⁶⁵ Other decisions are taken by unanimity.

⁶⁶ Ch. OHLER, *The European Stability Mechanism: The long road to financial stability in the Euro area*, 54 *German Yearbook of International Law*, 2011., at 47-74.,

⁶⁷ Unless we accept the thesis that Schwarz suggests. He found a more legitimate route: ESM could be integrated into the EU's legal order by article 20 TEU which provides a Enhanced cooperation that is currently very fragile., M. SCHWARZ, *A memorandum of misunderstanding-the doomed road of the European Stability Mechanism and a possible way out: enhanced cooperation*, 51 *Common market law review*, 2014, 389-424.

⁶⁸ B. DE WITTE, *Treaty Games - Law as Instrument and as Constraint in the Euro Crisis Policy*, in F. ALLEN, E. CARLETTI, S. SIMONELLI (Eds.), *Governance in the Eurozone – Integration or Disintegration*, FIC Press Wharton Financial Institutions Center, Philadelphia, 2012, 153, available at: www.astrid-online.it/Riforma-de/GOVERNANCE/Studi--ric/CEPR_Governance-for-the-Eurozone_policy-report-nov-2011.pdf#page=173

⁶⁹ As claimed by Th. GYLFASON, *Constitutions: financial crisis can lead to change*, *Challenge*, 2012, at 107.

res of control of budget. While the reform in France, Iceland Germany are focused on the technical procedures to arrange a better system of control, the impression is that in weak States, just like Italy, Spain, Croatia, the reform of the text of constitutional papers is a sort of demonstration of their attitude to bend to financial and economic markets.

Other sources of emergency have been used, and the types and models fall under the classification given by the doctrine because they provide quick answers and valid in all world markets. In addition, it is an increasing use of sophisticated soft laws that no longer have the aim to support and supplement rules of law or to specify them, but to replace them but keeping their characteristic of binding rules.

Resorting to emergency sources has been necessary both for EU institutions and for national States. Emergency has upset the established order and has lost its fundamental characteristic of temporariness. The downside is a less legitimacy of the institutions, even those the European ones, which on the rules of law had placed the best hope for greater democratization and legitimacy⁷⁰.

The crisis has confirmed the validity of the Trilemma formulated by Rodrik, who had explained the impossibility of holding together globalization, state sovereignty and democracy. At this time democracy has been excluded from that triangle and it seems to be hidden in the shadow.

⁷⁰ See A. VON BOGDANDY, M. IANNIDIS, *Systemic deficiency in the rule of law. What it is, what has been done, what can be done*, *Common market law review*, 2014, 59-96.