Constitutional Jurisprudence in Times of Financial Crisis

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1. Introduction

Slovenia is facing a crisis – we call it the public finance crisis, some even speak of the economic crisis, there is talk of the political and social crisis, the crisis of (financial) capitalism, or even the crisis of democracy. However, the daily lives of the people are most significantly affected by the overall deterioration of living conditions – the fall and a further decline in the standard of living and social security, insecurity, anxiety, fear of the future. The macroeconomic data speak for themselves – unemployment, decline in investments, economic downturn, internal debt, government deficit, high borrowing rate. To identify the causes of the widespread deterioration and their origins is a matter of economic, sociological, systemic, political science analysis (and speculation). In times of crisis, life events are concentrated, dramatic, and convulsive. They themselves call for action due to their acuteness and fatality. In such periods, the regulatory role of the state intensifies, as it must. The state must act as this is its fundamental duty and the very purpose of its existence. Its legislative body is the first in line that is called upon to adopt appropriate anti-crisis measures in order to respond to the needs in all areas of social life. This applies even more so if such needs relate to the foundations of the functioning of the state or its ability to effectively ensure human rights and fundamental freedoms. Among the principles of a state governed by the rule of law is the principle of the adjustment of the law to social relations and the development of society. This principle, adopted by the Constitutional Court (Decision No. U-I-69/03, dated 20 October 2005, OdlUS XIV/2, 75), is inherent to the very nature of law. Life is namely a sequence of changes, a unique continuum— and a chain of events to which the law responds. However, the measures by which the legislature responds must be in harmony with the pressing social reality, which is what we might call the normative power of the crisis.\(^1\) Since the crisis brings new (im)balances in the functional systems (subsystems of the society) and because due to their mutual intertwining and points of intersection the crisis is transferred from one system to another until in the end it covers the entire global society, the legislature that must often act quickly and radically is in a difficult position. In such periods, namely, the resurgence of conflicts is more likely and these tend to be more pronounced and fierce. It is difficult to coordinate competing and even contradictory interests where, due to the crisis, the competition among them becomes even sharper and more serious. Such is even more difficult when it is necessary to act fast. It may happen that the elimination of one of the imbalances results in another imbalance. What is then the role of law in a time of crisis, what should be given priority – the public interest that at this point entails the effectiveness of the state's anti-crisis measures or the law, more precisely constitutionality? Another question is how far the Constitutional Court can intervene, where the boundary between the legal and the political lies. The Constitutional Court is namely a player in the political arena and its decisions have political consequences; the fate of legal acts of general application that are nothing but a legal expression of political will, as such was formulated in the legislative body – where the

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\(^1\) Paraphrase of Gurvitch's and Jellinek's idea of a normative power of facticity.
political interests meet and are synchronised – is in the hands of the Constitutional Court. However, there is an essential, insurmountable difference between the legislative body, which is a political body, and the Constitutional Court, whose decisions also have political consequences that are comparable with the decisions of the legislative body. The decisions of the legislature are political decisions, they are adopted in a political manner, through apolitical discourse and with political responsibility. The decisions of the Constitutional Court on the other hand are legal, adopted on the basis of constitutional law arguments and through a constitutional discourse. There are no people above the Constitutional Court to whom the Court would need to answer to every four years at the elections; there are only two things above the Constitutional Court – the Constitution and constitutional arguments – and the professional public, of course. The weapons and legitimacy of this institution are its arguments: the more convincing, reasonable, and professionally justified they are, the greater the internal legitimacy of the decision based on such arguments is. And the greater the reputation and authority of the highest guardian of the Constitution are.

In the current period of crisis, the Constitutional Court was searching for a balance between the public interest (eliminating or at least reducing the effects and causes of the crisis) on the one hand and the price paid for the realisation of these interests on the other. This usually entails a diminution, reduction, narrowing of rights of individuals or legal entities or an increase in their burdens. This contribution deals firstly with some speculations about the sources of the financial crisis and then with some of the most typical "crisis" cases that the Constitutional Court adjudicated in the last two years.

2. What are the reasons for the crisis

The reasons for the (Slovene) crisis are both external and internal, they are intertwined with one another and in synergy. The global financial (and, consequently, economic) crisis is probably, as established Teubner, really the consequence of the collective dependence on the [economic] growth, which is so characteristic of the post-modern globalised (world) society.¹ The question is whether self-restoring systems (autopoiesis) tend to be self-destructive and whether autopoiesis also includes growth – and if it does, what happens in the events of excessive growth. Are we perhaps in social systems dealing with turbo autopoiesis (which has a similar effect on the social tissue as does malignant growth have on human tissue)? Is pathological growth and opaqueness, uncontrollability, unpredictability, perplexity, tension, and omnipresent unrest and discomfort connected therewith what could be the reason for the crisis?

In the genome of the western civilisation is obviously written the code of dependency on the growth. Nothing is yet wrong with that in itself. Problems only arise at the point when this addictedness becomes self-destructive. The crisis as the consequence of the expansionistic addictedness, i.e. addictedness to an ever higher production, namely engulfed virtually all

functional systems – not only the economic-financial system (in which this is demonstrated most obviously, simply because money makes the world go round). The motto in sports has been (since 1924 Olympic Games in Paris) faster, higher, stronger, which leads towards twistedness of sports – instead of protecting a healthy mind in a healthy body it forces that prohibited stimulants be used and that the organism be inhumanly exhausted, resulting in what is the exact opposite; in science, the research of what is unknown and the uncovering of answers on what is unknown in fact only opens further and new questions that multiply uncertainties and the need for further researching; the law is choking in the hyper production of norms and judicial decisions. The society is addicted with the judicialisation of everyday life – economic, political, and scientific life. Since a long time ago (also in states with the tradition of common law), the law is not (only) a means for the resolution of disputes, the law is more and more a means for the implementation of certain interests. And not only public interests. In reality, interests and benefits of lobbies, networks, and interest groups are hidden behind the façade of "democratic" defenders of the public interest and that of rhetoric ombudsmen. Therefore, the law, which is supposed to prevent and resolve disputes, generates disputes by itself which then in return require an even greater regulation (an illustrative proof for that is the vast and entirely unmanageable Slovene legislation regulating insolvency proceedings), which carries in itself new interpretative problems and therefore new conflicts, including between norms themselves (a characteristic example that will be explained below was the Real Property Tax Act, abrogated by the Constitutional Court, together with all the accompanying regulation) – and so forth. Especially in crises such as the financial, economic, and social crisis, the production of law is correspondingly higher (i.e. the normative power of crisis) due to the need for state intervention, in fact due to the constitutional requirement of a response by the law on the crisis (which the Constitutional Court clearly explained in Decisions Nos. U-I-69/03 and U-II-1/12, U-II-2/12). And, if these are external stimuli, the legal hyper formalism of the judiciary is the next – internal – stimulus to which the legislature (which is always in an interactive relationship with the judiciary) responds with the further hyper production of norms, ad hoc solutions, and detailed prescription and regulation of every life situation, all of which leads, together with the growing corpus of domestic and supranational case law and literature, to an even larger and completely unmanageable normative chaos.

2.1. Fiat money!

The fundamental paradigm of the crisis is financial – the crisis is expressed most tangibly and with broadest effects in the economic-financial field of the global turbo capitalism – already because this functional system is connected with the majority of others, the crisis is transferred from it also to other systems, which already by themselves autochthonous suffer from the same syndrome – the syndrome of dependency on growth. What is actually at issue? To put it simply, what is at issue is a situation in which the desire (lust or greed) for profit is greater than the true capacities of the real growth and the human creativity and inventiveness. In other and simpler terms: when economy is at issue, when more is spent than it is created – because the desires that are greater than the capacities can be fulfilled by an illusion – an illusion based on future borrowing, on anticipated and speculative growth, and on the current
consumption. In short, the following motto applies: I want to have, here and now, what I will be (if I will actually be) entitled to (depending on the input of knowledge and effort, as well as on good fortune) – only tomorrow or even what only next generations will be entitled to. Therefore, what is at issue is the problem of the asymmetry of the expansion of subsystems, where the obviously prime subsystem is the financial one – its growth exceeds all others. Why – because it is so easy to create money. For commercial banks, this is *creatio ex nihilo*. Fiat money!

It is not difficult to determine why this has happened; the formula is simple: The globalisation, the information technology that allows for an uncontrollable diffusion of information all around the world in a matter of seconds (the infrastructural framework, the environment in which or within which pathological growth can develop), and the collective addictedness with growth (the energy that fuels the crisis) have brought to a discrepancy between virtual cash flows and (virtual) speculative financial profits connected therewith on the one hand (a fetish of the post-modern capitalism) and the situation in the real economy on the other (with all the symptoms characteristic therefore – borrowing, unemployment, growth of poverty, ecological devastations, and degradations). Precisely the private emission of non-cash money (fiat money) is exploited for an unpredictable increase in self-reference financial speculations. With the creation of value, the emission of money necessarily increases profits – and vice versa, the increase in profits increases the emission of money and the creation of virtual value. This entails spiral growth, which in the end grows into a self-destructive excessive growth. What is then the difference between the necessary dynamic of growth and pathological growth? To a certain degree, a comparison with an individual’s addictedness and dependency seems appropriate. However, the definition of one individual’s dependency as the compulsive acceptance of self-destructive activity, i.e. activity despite lasting negative consequences, is with regard to social systems not sufficient. When financial crisis is at issue, non-cash money created *ex nihilo* by commercial banks entails a dependency mechanism: the chaining of transactions of payments releases excessive compulsions of growth in both the financial and real economy. The commercial banks’ increasing of expected profits inherent in the supplementing creation of money through credit guarantees causes pressure on the real economy to produce more and to [increase] growth, which further increases the expectancies of profits. This releases a dynamics that no longer corresponds to the static economic cycle, but [represents] an accelerated and uncontrollable spiral of growth. Together with the dynamics of monetary multiplication, bank loans are not requested for the financing of productive investments, but for investing in speculative property or, when the state is at issue, for the financing of poorly controlled non-productive spending, for social transfers, etc. When the interests on bank loans then exceed the expected income gained by such property, a collapse happens, together with a financial crisis and, as a consequence, also an economic crisis.
3. How the state should have dealt with the (financial) crisis and how it did deal with it

3.1. Plain-money reform

As Teubner convincingly concludes, the dynamics of the crisis cannot be successfully (successfully from the viewpoint of the elimination of the crisis) established by means of factor analysis in accordance with which individual reasons are isolated, blamed for causing the crisis, and then neutralised with the introduction of opposite factors into the causal chain that causes the crises, hoping that its repetition will be thereby prevented. All such measures are seriously flawed: No sooner has a law been passed than the loophole appears – either in the form of a possibility to circumvent the law or in the form of its unconstitutionality. A deeper understanding of the crisis is offered by an analysis which regards the factors of factor analysis simply as interchangeable activating conditions, and which attempts to discover the underlying dynamic. Teubner thus suggests the transformation of the "internal constitution" of the global financial economy (societal constitution), namely by the constitutional symbol of the economic functional system, i.e. by transforming the creation of money.

Today, this function is less and less the prerogative of central banks (which only operate in the field of primary emission, which is not bound by the gold standard). With regard to the expansion of non-cash cash flows via bank accounts, non-cash payments and transactions, new communication technologies, and especially the globalisation of financial and capital transactions, the monopoly of the emission of money has been transferred from the hands of central banks to globally active commercial banks. Commercial banks give loans freely and thus create non-cash money (in Europe, the ratio of non-cash to cash money is 4:1). Central banks can influence the emission of non-cash money only indirectly – by prescribing interest rates.

I very much agree with the proposal of a plain-money reform, according to which, on the one hand, the creation of non-cash money should be the sole prerogative of national and international central banks, whereas, on the other, commercial banks should be prohibited from creating new money based on the current account credit and should instead be limited to

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3 Teubner, p. 5.
4 By the Council Decision of 19 January 2010 it was established that there exists an excessive deficit, which is not only the result of the temporary excess of reference values regarding the admissibility of the deficit. In the framework of these proceedings, the Council adopted, on 7 June 2013, a Recommendation in which it established that Slovenia is faced with a significantly growing public debt due to persistently high primary deficits, wherefore Slovenia should adopt, inter alia, measures for decreasing the wage bill in the public sector, as well as social transfers. And what is the meaning of that? Certainly, it is a threat for the constitutionality. The resolving of the crisis of public finances is a threat for the constitutionality already due to the fact that it its connected with fast and thus less well-thought taking of measures that are radical as well (dismissing in the public sector, the reduction of social transfers, the introduction of new taxes and the increase of existing burdens, etc.). The fact that this threat is real is also proved by the Council Recommendation, which envisages a secondary plan due to the possibility of the constitutionally-judicial abrogation of anti-crisis measures.
5 Teubner, p. 13 et seq.
6 Teubner, p. 22.
offering loans based on existing credit reserves. I also agree that central banks should be politically independent guardians of the economic constitution in a manner comparable with constitutional courts (guardians of political constitutions), which stand right at the hierarchical peak of legal systems and which are responsible for the adoption of highly political decisions without thereby becoming a part of the political system. However, at this moment I do not see any possibility how such a plain-money reform as proposed by Teubner and several finance experts who would transform constitutional programs both in the law and in the economy on a global scale could be introduced. Since financial markets operate globally, such a reform would only be fully effective as a global fully-fledged money-creation reform.

3.2. Fiscal rule

Therefore, the dynamics of the excessively growing indebtedness of the state budget caused by commercial banks' creation of money, which fuels the development of always new avoidance strategies, should be, for a while, tamed only by transforming the "constitutional symbol or the heart" of the national public financial economy, i.e. the state budget.

This symbol namely also influences other subsystems – depending on how etatised the society is, i.e. what is the degree of state intervention in individual social subsystems. From the viewpoint of the influence that the state has on other subsystems, the state budget can be of key importance. The spiral of the increasing of the public debt can thus be halted only by changing the budgetary mentality of consumerism and the borrowing connected therewith, which is fuelled by the easiness of running into debt as a consequence of the easiness of the creation of non-cash money by commercial banks – and the vicious circle is complete. But how can this be done? There is once again the same dilemma: Either by challenging the individual factors of the crisis, i.e. individual budget users, or by terminating the fundamental dynamics of the crisis of public finances – meaning by [implementing] a fiscal rule. The more the functional systems (subsystems) are etatised, the more important is the anchor (the self-limiting mechanism) in the form of the fiscal rule, which introduces automatism in the planning of the fiscal policy. If I apply the example of the Swiss formula of the fiscal rule (which is also called »Schuldenbremse«, i.e. »debt brake«), the fiscal rule precisely determines, on the basis of the condition of the economic cycle and the correspondingly estimated amount of the public income, the allowed amount of public expenses. In simple terms, if the state is in recession, then its factual GDP is lower than its potential GDP (this is the so-called negative output gap), due to which the fiscal rule allows to the state that the expenses of public finances exceed the income, namely by a factor in the amount the predicted GDP is lower than the potential GDP.

The fiscal rule thus functions counter-cyclically. When the state is in recession, the fiscal rule automatically allows it to create a higher deficit, whereby it can increase social transfers and stimulate the economy by reducing taxes or by creating public investments. When the

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7 Teubner, pp. 19 et seq.
8 Ibidem and 39 et seq.
economy flourishes, however, the fiscal rule requires that the state have a surplus of public finances and thus create a reserve for bad times. The fiscal rule thus automatically leads to the situation that the state budget – or broadly, the balance of public finances – is balanced throughout the economic cycle (the phase of recession and the phase of flourishing), due to which the public debt is gradually and proportionally decreasing while the GDP is increasing. This is an efficient fiscal automatism that has also been introduced a decade ago by Switzerland and Sweden (in fact, each one has its own version of it) and which functions very well, because it prevents politicians from spending too much, i.e. living beyond their means.9

This is precisely where the similarity is with the Teubner's proposal [to ensure] supervision over the creation of non-cash money – the reason for both the excessive emission of money by the state and for the excessive borrowing by the state is the same: excessive spending by the state. And if Hayek correctly drew attention to the fact that where democratic governments have unlimited political power with regard to the money one should not expect that they will resist inflationary pressures, in fact political temptations,10 then these temptations are completely the same where the state in fact does not have the emission of money completely under its control (because the latter passed in the predominant part onto commercial banks in the form of the emission of non-cash money), but it does have unlimited discretion with regard to the borrowing. And because there is more and more non-cash money, the borrowing is easily accessible and the circle is complete. For such reason, we can classify the fiscal rule among the necessary instruments of fiscal constitutionality – which is what nonetheless proves the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union in conformity with which the budgetary position of the general government of a state must be balanced or in surplus (item (a) of the first paragraph of Article 3).11 By the way, it was Eskimos who discovered the fiscal rule long before us.

Therefore, Article 148 of the Constitution (as amended on 31 May 2013) lays down the following provision: "Revenues and expenditures of the budgets of the state must be balanced in the medium-term without borrowing, or revenues must exceed expenditures. Temporary deviation from this principle is only allowed when exceptional circumstances affect the state." However, this rule is not self-executing. For such reason, the following paragraph determines: "The manner and the time frame of the implementation of the principle referred to in the preceding paragraph, the criteria for determining exceptional circumstances, and the course of action when they arise, shall be determined by a law adopted by the National Assembly by a two-thirds majority vote of all deputies". So far, the implementing law has not yet been adopted, even though the amendment of the Constitution required that the law be adopted within six months after the amendment entered into force – whereas the new fiscal rule and

9The logic of the fiscal rule is the logic of Odysseus who was bound to the mast of the ship when passing the Isle of the Sirens. The threat of excessive running into debts is a typical long-term temptation of politicians.
11 The rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0.5 % of the GDP at market prices.
the implementing law are first to be applied in the drafting of the budget for 2015. Hence, it is very likely that an unconstitutional legal gap will emerge in the near future. The fiscal situation is namely rapidly deteriorating and the public debt is increasing - politicians who still think that the money grows in cash machines are pushing Slovenia to the edge of its financial dependence with excessive borrowing.

3.3. Increasing the tax burden, selling off assets owned by the state

A further measure to recovery of the state budget, although not capable of healing the core source of the pathological growth, but at least capable of temporarily extinguishing the consequences of such a growth, could be to sell off assets owned by the state (the so called family silver – systemic banks, insurance companies, companies in the fields of energy, telecommunications...). In addition, state owned property is fertile soil for corruption where largely incompetent, embittered, visionless, and in many cases corrupt economic elites intertwined with politics dominate. Still, the Constitutional Court has no power to command or directly impose the selloff. However, that possibility could be indicated by a decision of the Constitutional Court when considering a tax law and its interference with property rights (the question of necessity – or proportionality in the narrow sense).

In the field of public finances the legislature enjoys a wide margin of appreciation. What will the budget amount to, how will it be structured, and from which sources will it draw are a matter of its political assessment that is subject to political accountability. The Constitutional Court has to apply restraint with regard to such. However, the situation may be different when it is obvious that certain budgetary revenues can be realised in another manner, one that is less invasive from the perspective of the human right to private property. Such concerns the possibility to sell off (privatise) state assets – not in the sense of a general sell off (these decisions also fall within the prerogative of policy), but in exceptional cases when the state owns disproportionately large agglomerations, where, for example, the share of the state's assets in the national economy is extremely dominant (energy, telecommunications, banks, insurance companies, and other large corporations, all of these are still in majority state-ownership). If the aim of public finances that is pursued by a property tax is evidently also attainable through the sale of such property (and therefore by means of a less severe interference with the property rights of citizens), such may demonstrate that an interference with the property of the citizens is not necessary.

When reviewing the Real Property Tax Act (a characteristically "fire-extinguishing measure") the opportunity to evaluate the possible normative power of those facts and circumstances has been missed. The Constitutional Court, while abrogating the Act, limited itself to the principle of legality in taxation matters (Art. 147 of the Constitution, which provides: "The state imposes taxes, customs duties and other charges by law. Local communities impose taxes and other charges under conditions provided by the Constitution and law."), equality before the law (Art. 14, para. 2), the right to legal remedies (Art. 25), and the constitutionally protected financial autonomy of municipalities (Art. 142, which provides: "A municipality is financed from its own sources. Municipalities that are unable to completely provide for the
performance of their duties due to insufficient economic development are assured additional funding by the state in accordance with principles and criteria provided by law."). yet avoided to assess the interference with the right to property – and to reconsider its previous position that reads as follows: "In addition to other taxes, property tax may be extended to a yield from a property only if the full taxation of an alleged yield – what is considered are taxes and deductions and other allowances – represents approximately a half division between the private and the public and if such taxation is at the same time in conformity with the principle of equality in taxation. Accordingly, the Constitutional Court established that the taxation in this case, insofar as it exceeded the half of the yield, entailed an interferences with the constitutional right determined in Art. 33 of the Constitution" (Constitutional Court Decision No.U-I-91/98, dated 16 July 1999, Official Gazette RS, No. 61/99, and OdlUS VIII, 196 ). The Constitutional Court here followed the position of the German Federal Constitutional Court that the state may not impose a burden on private property that would exceed half of the value of the taxed object (income). The so-called Half-Division Principle (Halbteilungsgrundsatz) derives from the structure of Art. 14, para. 2 of the German federal Constitution(GG), which states: "Property entails obligations. Its use shall also serve the public good." In the original text this reads as follows: "Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen", which in fact entailsthat it shall serve the public and private good equally(zugleich = zu gleichen Teilen = by equal parts). However, in the Decision No. 2 BvL 37/91 the Chamber also stated that property tax, regarded in combination with other tax burdens, in the overall effect shall not interfere with the very substance, the core of the property – the affected party must be able to pay the tax from the common and expected incomes (Sollerträge) – otherwise the outcome of the taxation will be the gradual confiscation of the private property.

3.4. Decision No. U-II-1/12, U-II-2/12 (establishment of the "bad bank" and the Slovene National Holding Company)

Regarding some other "crisis" cases, two referendum cases should be highlighted. In both cases, the laws, which were under review, were dealing with peripheral sources of the crisis. The first challenged law was namely aimed at ensuring the effective functioning of the bankingsystem and in this regard the need to eliminate the so-called credit crunch, where what is at issue is a situation in which the banks fail to perform one of their basic roles in the economic system (the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act – the so-called Bad Bank Act – MSSBA). The second law (the Slovene National Holding Company Act – SNHCA) was aimed at ensuring effective and transparent management of state assets.

By Decision No. U-II-1/12, U-II-2/12, the Constitutional Court decided that unconstitutional consequences would occur due to the suspension of the implementation or the rejection of the two above mentioned laws in referenda. The Constitutional Court decided that priority must be given to the constitutional values that due to the calling of referenda and even more so due

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12 See Decision No. 2 BvL 37/91, dated 22 June 1995.
13 Decision No. U-II-1/12, U-II-2/12, dated 17 December 2012 (Official Gazette, No. 102/12, and OdlUS XIX, 39)
to the possible rejection of the SNHCA and the MSSBA would remain unprotected to such an extent that the balance between different constitutional values would be jeopardized. Therefore, the right to request a call for a legislative referendum had to give way. The values emphasized by the National Assembly that in the assessment of the Constitutional Court have priority over the right to request a call for a referendum in the circumstances of severe economic crisis were the following:

- efficient exercise of state functions, including the creation of conditions for the development of the economic system;
- exercise of human rights, in particular the rights to social security, security of employment, and free enterprise;
- respect for the binding international law obligations of the state; and
- ensuring the effectiveness of the legal order of the European Union in the territory of the Republic of Slovenia.

3.4.1. Between law and politics

The National Assembly demonstrated that immediate implementation of the statutory measures was necessary in order to protect the mentioned values in the circumstances of the economic crisis. Submitting the adopted laws for decision-making in referenda and their potential rejection at such referenda would therefore constitute unconstitutional consequences. Hence, the Constitutional Court held that the referenda regarding the SNHCA and the MSSBA were not constitutionally admissible.

The Constitutional Court also stated the following: »In this Decision, the Constitutional Court is facing a special situation as the SNHCA and the MSSBA are two specific legislative measures among the measures which not only the Government and the National Assembly, but also important international subjects assess to be necessary to ensure the sustainability of the public finances and sufficient resources for enabling the functioning of the state and respect for human rights, which the state has to take care to efficiently ensure. Also at issue is that this concerns statutory measures that are not only important each in itself, but which are even more important as a group of measures by means of which urgent objectives are pursued. Therefore, the urgency of each individual measure on the level of the system is convergent with the urgency of the adoption and realisation of other measures. As far as the SNHCA and the MSSBA are concerned, also their mutual interconnectedness is demonstrated.« (para. 55 of the reasoning of the Decision).\(^\text{14}\) The Constitutional Court then

\(^{14}\) These arguments resemble those, proposed by two legal rapporteurs of the Greek Council of State, assigned to study the Greek case of civil suits seeking the cancellation of the Memorandum (law no. 3845/2010) challenging the constitutionality of wage and benefit cuts. The rapporteurs stated that the goal of the measures was to protect the higher public good, serving the need to cut the country's excessive fiscal deficit and external debt, and abide by the obligations Greece has under-taken within the framework of the Economic and Monetary Union, and proceeded to examine the necessity and proportionality of the measures. They stressed that these measures were a part of a whole series of measures which sought not only to cut expenses but also to augment state revenues to save Greece from defaulting on its debts. What seems to be of vital importance is that the impugned measures constituted only a part of the broader agenda of promoting fiscal consolidation and structural reforms
continued by stating: »Whether the SNHCA and the MSSBA introduce measures which by their nature constitute the correct answer to the alleged situation existing in the state is not something that the Constitutional Court can assess. Whether these Acts are thus statutory measures that in terms of content are good or bad or the most appropriate for regulating the issues that obviously must urgently be regulated, depends on the suitability and appropriateness of the statutory regulation with which the legislature must respond to the existing social needs. Therefore, the suitability and appropriateness of the statutory regulation cannot have an influence on the decision regarding the existence of unconstitutional consequences itself. As the Constitutional Court has already underlined in Decision No. U-II-I/11, also responsibility for the content of statutory regulation, in the case at issue for the content of two economic policy measures that refer to the functioning of the banking system and to the management of state property, for the stated reasons falls entirely on the National Assembly and the Government. A different position would inadmissibly interfere with the principle of the separation of powers (the second sentence of the second paragraph of Article 3 of the Constitution)« (para. 56 of the reasoning of the Decision). Thereby the Constitutional Court also explained where the line separating political and constitutional law arguments lies and what the equilibrium between law and politics should be like.

However, the question of whether such an approach, while it is in any event consistent with the Constitution, as it (relatively) clearly differentiates between the competences of the legislative branch of power and the Constitutional Court, does not on the other hand open the door for fictitious reactions to unconstitutional situations brought about by (a certain) chain of events or (a certain kind of) crisis? Does it not namely entail that it does not matter how the legislature responds to the crisis, but it is only important that it responds to it and that it substantiates the need for the response by claiming the necessity of such a response, while it is not important whether the measure is in fact capable of bringing about the wanted (targeted) effects? Does it not entail that from a constitutional law perspective there is nothing wrong if the measure is not effective – since there is no mechanism that would force the

of the Greek economy. Being part of a wider program of fiscal consolidation, the attempted reform was not focused on measures to cut wages and benefits for employees of the public sector and pensioners. Contrary, it was aimed at the fulfilment of the country’s commitments, undertaken to activate the mechanism of financial support of the Greek economy, and of the obligations stemming from the Treaty provisions of the Economic and Monetary Union. See Xenophon Contiades, Alkmena Fotiadou, Social Rights in the age of proportionality: Global economic crisis and constitutional litigation, International Journal of Constitutional Law, 10(2012), pp. 682, 683. Nevertheless, the Supreme Court abrogated a part of the austerity measures that the Greek Government had introduced due to requirements of the EU and the IMF with regard to the bail-out. These concerned a decrease in wages in 2012 in the police and the military. Even though the Ministry of Finance had stressed that the Court’s decision may result in a hole in the state budget the size of half a billion EUR and that that may entail a discontinuation of all further payments. However, it did not come to this. The Court actually abrogated as unconstitutional the decrease in wages in the police and the military by 10%, while it did not abrogate the decrease of wages of other public servants. It stated that the reason for the different treatment lay in the fact that the police and the military perform key tasks within the state and are therefore entitled to a different treatment than the rest of the public sector, which was affected by a decrease in wages. In circumstances such as they were in 2012 in Greece, the highest court in the state deemed that “police officers and soldiers are the heart of the country” and therefore “deserve special protection.” Wages of other public servants who earned more than 1,500 EUR had been decreased by 20 to 30%. With the help of the bail-out and without additional austerity measures, Greece will allegedly reach a deficit of 4.5% of its GDP by 2016.
legislature to, for example, respond to a financial crisis that is threatening human rights by means of an effective measure?

Firstly, (from the viewpoint of mechanical logic) I would say "I do not think so" – and then also that the Constitutional Court (more or less) clearly stated this when it later added: "In the framework of this constitutional review of the admissibility of the referenda, what is in the forefront is neither the question of the constitutionality of the statutory regulation in force nor the question of the constitutionality of the adopted statutory regulation, i.e. the constitutionality of the SNHCA and the MSSBA, which would be submitted for approval in a referendum. When the Constitutional Court does not permit the realisation of a referendum and thus the implementation of the newly adopted act occurs as priority must be given to other constitutionally protected values, not to the right to request the calling of a referendum, such does not entail that after the act is implemented, in the case at issue the SNHCA and the MSSBA, it will not be possible to request a constitutional review thereof and to remedy possible unconstitutionalities on the basis of an appropriate decision of the Constitutional Court. In this case, the above-mentioned possibility of subsequent assessment of the constitutionality of these Acts works as an argument in favour of the other constitutionally protected values which have already been demonstrated to be substantially jeopardised or limited, in comparison to the right to request the calling of a legislative referendum" (para. 57 of the reasoning of the Decision).

However, am I really correct when I say no? The mentioned positions of the Constitutional Court namely speak only of a possibility of constitutional review of an austerity measure that has come into force, while it said nothing about a possibility to review the legislature's failure to respond to the crisis and also nothing about a possibility of effectively remedying the unconstitutional state of affairs brought about by the spiral of crisis. I believe that the Constitutional Court should have such a competence (and it also does have it) and that this derives from the mere purpose of the Constitutional Court as the ultimate guardian of constitutionality (even though I am aware that such a position is controversial – due to the, in my opinion, too rigid understanding of the division of competences, which is expressed in the above cited part of the reasoning of the Decision). Thus, if the crisis results in an unconstitutional legal gap (e.g. the collapse of the system of healthcare insurance), then the state must respond – if it does not respond, it violates its constitutional obligation – such does not only concern one of the principles of a state governed by the rule of law, namely the principle that requires the legislature to adapt to social circumstances, but the state's constitutional obligation to ensure the exercise of positive rights. Therefore, the Constitutional Court is entitled (and obliged) to review also whether an austerity measure that is necessary from the viewpoint of constitutionality is also appropriate for remedying the unconstitutional consequences of the crisis. If such is not the case, the unconstitutional state of affairs continues to exist (a different interpretation of para. 56 of the reasoning of Decision No. U-II-1/12, U-II-2/12 would be hyper-positivist and mechanical). In addition, the Constitutional Court is entitled to intervene in instances when the legislature fails to respond (or fails to respond sufficiently) to cases of crises that result in unconstitutional circumstances (regardless of which subsystem of society they affect).
3.4.2. A short remark

In the light of all of the above, we can at this point draw a parallel with Teubner’s model for resolving the crisis. If Central Banks are, or as in his opinion they should be, the guardians of economic constitutionality, then Constitutional Courts are the guardians of political constitutionality – both types of bodies are namely outside of the scope of political power – both concern the safeguarding of constitutionality on grounds of expert and independent decisions that are not politically motivated – despite this they of course produce political consequences *par excellence*. None of these bodies participates in the production cycle of political power – Central Banks are guardians of the economic constitution, Constitutional Courts are guardians of the political constitution. Both types of institutions must enjoy a high level of autonomy (they function according to their own internal, autonomous logic). Both types of institutions are of crucial importance for attaining capillary constitutionality – and they are responsible for a reasonable and public substantiation of their decisions.

3.5. Review of the Fiscal Balance Act

In Cases No. U-I-186/12\(^{15}\) and No.U-I-146/12\(^{16}\), the Constitutional Court furthermore reviewed the Fiscal balance Act (already stating its aim in its title) and established the unconstitutionality of certain of its provisions. By the first Decision it established the unconstitutionality of certain provisions of Article 143 of the mentioned Act on the basis of which pensions were decreased that were in part or in their entirety not based on contributions paid, but were acknowledged and determined under special conditions and their payment was provided by the state from the state budget. It established that the legislature treated essentially similar positions of beneficiaries of pensions differently, although they should have been treated equally. It namely decreased pensions that were allegedly not based on the payment of contributions also in relation to beneficiaries who paid their contributions to pension and disability insurance funds of other former Yugoslav Republics or to one of the federal funds that existed at that time. With regard to the criterion that pensions depend on contributions paid, such thus concerned essentially similar positions. As the legislature did not demonstrate a sound reason for the different treatment of these pension beneficiaries, such regulation was inconsistent with the Constitution. Moreover, the legislature treated some essentially different positions of beneficiaries of pensions equally without a sound reason for their equal treatment that would derive from the nature of the matter. Firstly, such concerns beneficiaries of pensions that enjoy special protection with regard to social protection according to the Constitution (war veterans and victims of war). With regard to such beneficiaries, the circumstance that their pensions are not entirely based on contributions paid does not entail a constitutionally admissible reason that could justify their equal treatment regarding the decrease in pensions in relation to other beneficiaries of pensions who do not enjoy special constitutional protection. The same applies to beneficiaries of pensions who had a period of unjustified deprivation of their liberty included in their pension-qualifying period.

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\(^{15}\)Decision No. U-I-186/12, dated 14 March 2013 (Official Gazette RS, No. 25/13).
\(^{16}\)Decision No. U-I-146/12, dated 14 November 2013 (Official Gazette RS, No. 107/13).
and who during this time did not pay any contributions. There was also a violation of the principle of equality in relation to other groups of beneficiaries of pensions with regard to whom the state is responsible for the reasons that their pensions are not entirely based on contributions paid. Such concerns beneficiaries whom the former state of Yugoslavia prevented from joining the general system of old-age insurance or beneficiaries who upon the fulfilment of certain conditions had to retire early in accordance with the laws which in the past determined mandatory retirement. Even though their contributions were not paid, the legislature should have treated these persons differently and exempted them from the pension decrease. Finally, the Constitutional Court established that the legislature also did not establish sound reasons for the different treatment of certain groups of beneficiaries of pensions whom it had exempted from the pension income decrease. The exemptions namely also included beneficiaries of pensions who, as regards the criterion of the non-payment of contributions, were in an unequal position in relation to those affected by the measure of decreasing pensions.

By Decision No. U-I-146/12 the Constitutional Court reviewed the provisions according to which the employment contract of a public servant is terminated due to the fulfilment of the statutory conditions for obtaining an old-age pension. The Constitutional Court reviewed the challenged regulation from several viewpoints, with the main emphasis on an assessment of whether the regulation violated the prohibition of discrimination on grounds of age or sex. The prohibition of discrimination is a universal principle of international law. In addition to the Constitution, it is protected by a number of international instruments that are binding on the Republic of Slovenia and by EU law. In addition to the Treaty on the Functioning of the European Union, two Directives in particular were important, i.e. Directive 2000/78/EC and Directive 2006/54/EC, which are implemented into the national order inter alia by the challenged provisions of the Fiscal Balance Act. The Constitutional Court, therefore, considered the primary and secondary legislation of the European Union and the case law of the Court of Justice of the European Union when interpreting the challenged provisions of the Fiscal Balance Act and when reviewing their consistency with the right to non-discriminatory treatment in accordance with the Constitution. The Constitutional Court firstly reviewed if the case at issue concerned an interference with a human right. The answer was in the affirmative: Legal protection with regard to a termination of the employment contract falls within the ambit of the third paragraph of Article 49 of the Constitution. The case thus concerned an allegation of inadmissible discrimination in the exercise of this human right. The Court found that the challenged regulation entails different treatment of public servants on grounds of their age in the event of termination of an employment contract due to the fulfilment of the conditions for obtaining an old-age pension. In accordance with such, the Constitutional Court firstly established that the main objective of the challenged measure is to ensure the sustainability of public finances. This aim (decreasing expenditures for wages in the public sector) by itself (also considering the standpoints of the Court of Justice of the European Union) is not a constitutionally admissible reason that could render discrimination admissible. However, as the regulation also aims to achieve two additional objectives (the establishment of a balanced age structure of public servants and the prevention of disputes over whether a public servant is able to perform his or her work after a certain age)
that maybe constitutionally admissible reasons for interferences with the right of older public servants to non-discriminatory treatment (but which by no means entail public finance measures intended to fight the crisis – in spite of the Act's title), the challenged measure passed the first stage of the proportionality test, which requires that the objective as well as the measure be constitutional and legal (the test of legitimacy). The Court then also found that the measure was appropriate and necessary for the attainment of the set objectives. Finally, it further established that it is proportionate in the narrower sense. The affected persons are namely entitled to the full amount of their old-age pension, and apart from that, the challenged regulation in fact did not introduce mandatory retirement, but merely a termination of the employment contract (which does not prevent the affected persons from finding new employment or continuing their professional activities elsewhere). The picture changes if we consider the termination of the employment contract due to the fulfilment of retirement conditions from the viewpoint of discrimination on the grounds of sex. As the conditions for obtaining an old-age pension are determined differently for men and women (which is not an issue with regard to voluntary retirement), the measure of mandatory termination of an employment contract also treated men and women differently – such different treatment, however, entails a violation of the prohibition of discrimination on grounds of sex. As the interference with the right of female public servants was not supported by a constitutionally admissible objective, the Constitutional Court decided that such a measure was unconstitutional.

4. A short concluding comment

The common message of the cases discussed above can be summarized as follows: the principle of the adjustment of the law to social relations (as one of the principles of a state governed by the rule of law) obligates the legislature to respond to the crisis. However, this does not entail a carte blanche for selecting anti-crisis measures. The crisis cannot be tackled by unconstitutional means or in an unconstitutional manner. Such may reduce the effectiveness of its resolution. However, this is only on the face of it. Unconstitutional measures, even though they may seem to be effective at first glance, entail a loosening of the social cohesion, they shatter constitutional integration and contribute to (further) anomie.