



UNIO
EU LAW JOURNAL

**Justice in a time of crisis:
the role of European courts as guardians of democracy**

Alessandra Silveira

*Director of the Centre of Studies in European Union Law (CEDU) of Minho University
and Jean Monnet Chair in EU Law*

Sophie Perez Fernandes

*FCT doctoral fellow at Minho University
and Assistant Professor at Minho University Law School*

ABSTRACT: Examining some recent examples from the Court of Justice of the European Union case law, this article intends to unravel the direction to which the European courts turn towards in times of crisis. The fiscal restraint and socioeconomic restructuring dictated by considerations of public debt reduction affect the daily lives of European citizens. However, the crisis and the austerity measures framed by Union law follow the new visibility that fundamental rights assumed in the integration process with the entry into force of the Charter of Fundamental Rights of the European Union. Therefore, in accordance to the motto proclaimed by Cunha Rodrigues, the crisis highlights the role of jurists and, in particular, the judges while guardians of democracy – understood as the safe exercise of fundamental rights. This paper therefore considers the transformative potential of the current crisis and its implications on the deepening of citizenship rights in the European Union.

KEYWORDS: crisis – courts – democracy – fundamental rights – citizenship of rights.

1. Introduction

In a paper published in 2012, Cunha Rodrigues notes that the crisis challenges jurists and appeals to their responsibilities. But the author wonders, puzzled: «Where are the jurists then?».¹ Since the crisis began – explains the former judge of the Court of Justice of the European Union (ECJ) –, the screens are occupied by economists, summoned to explain the reasons for the crisis that, in many ways, they helped to produce. «And here the question of the role of the law returns.» In conclusion, he adds: «It is up to jurists, based on the notion of the European Union as a community of law, to provide answers to the situations which demand an idea on the defence and reconstruction of the social model and, therefore, institute by institute, to have the capacity to launch a new look at the legal order. To some extent, it is about not leaving the politicians alone on the road mulling over feelings of operative enmity towards law».²

Cunha Rodrigues then concludes that the role that lawyers should play in this time of crisis – and that politicians should adopt using legal tools – «is to question European policy makers on whether, after the Charter of Fundamental Rights of the European Union [CFREU], it is legitimate and possible to return to the time of economic freedoms».³ From this motto, the challenge of this paper is to try to unravel, in the light of recent ECJ case law, the direction to which the European courts are moving towards in times of crisis: «Will jurisdictions continue, particularly the ones in the European Union, to accept the mandate by the legislature to integrate, with a sense of progress, a poorly intertwined law, for lack of consensus or confidence in the praetorian path? Or are they sensitive to the spirit of the

¹ Cf. José Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, *Revista de Finanças Públicas e Direito Fiscal*, 3 (2012), 22 (the translation of the quotes made originally in Portuguese was revised and approved by the author, Cunha Rodrigues). Along the same lines, cf. Viriato Soromenho- Marques, “Are we on the way to creating a European Behemoth? A Portuguese perspective”, *Europe – the final countdown or resurrection time? Reclaiming the European project*, Henrich Böll Stiftung, http://www.boell.eu/sites/default/files/uploads/2013/12/building_an_european_behemoth.pdf, 1, where we can read: «The European Union and the eurozone seem to have lost the teleological goals that provide a fair democratic ground for public policies: the pursuit of justice, social wellbeing within the limits of a sustainable economy, abiding by uncompromising ecological boundaries. Europe has lost the sense of a common purpose, the thirst for a better future».

² Cf. Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, 23.

³ Cf. Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, 24.

times, reversing the direction of the case law, namely through emergency clauses or the suspension of the principle of social non-regression stated in some latitudes, when threatening clouds were already looming in the air?».⁴

2. Democracy and courts

As suggested by Paulo Rangel, the XXI century is, and increasingly will be, the century of the courts. The XIX century was the century of the legislative, the XX century was the century of the executive (government and administration), and the XXI century is likely to, markedly, be the century of the courts as guardians of democracy⁵. But a democracy in a somewhat different perspective from the one we are used to – that is, not so much from the perspective of participation/intervention in decision making, but from the perspective of the safe exercise of fundamental rights.⁶ So it is because we live in an era of «deterritorialization of power» – as the author explains – i.e., power is not exercised territorially in terms of the classical notion of the State (a people, a territory, a sovereignty). And the decisions that affect our collective daily lives are not taken in the territory/space in which we vote, as the elected representatives of a constituency no longer influence the decisions that affect it.⁷

So citizens are increasingly convinced that governments change but policies do not – and they do not change because the organizational structure of the state is out of step with the needs. States can no longer meet the transnational demands they do not control. And in this sense, the gap between the expression of political preferences and the actual capacity of this expression to reflect itself in decision-making processes that affect the daily lives of voters is increasingly widening. However, in a context where the vote (or the will) of the majority

⁴ Cf. Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, 22.

⁵ Cf. Paulo Rangel, «Transconstitucionalismo *versus* interconstitucionalidade. Uma leitura crítica do pensamento “transconstitucional” de Marcelo Neves», in *Tribunal Constitucional - 35.º Aniversário da Constituição de 1976*, vol. 1 (Coimbra: Coimbra Editora, 2012), 172.

⁶ Cf. Paulo Rangel, *O Estado do Estado. Ensaios de política constitucional sobre justiça e democracia* (Alfragide: Dom Quixote, 2009), 11-37.

⁷ Cf. Paulo Rangel, «Transconstitucionalismo *versus* interconstitucionalidade», 158 and 161.

of the citizens in a territory no longer has the same impact on decision-making processes as before, the role of the courts in the protection of fundamental rights becomes essential.⁸

It is no coincidence that at the roots of modern democracies are the declarations of the rights of man and citizen – alien to ancient democracies. If there is a fundamental element for the positive judgment of modern democracy it certainly is the recognition of human rights/fundamental rights and the idea of equality that underlies them. However, the current democratic paradox (due to the «deterritorialization of power» referred by Paulo Rangel) rehabilitates the material dimension of democracy (that is, at heart, the vision of democracy as *rule of law*), linked to the «affirmation of a core of rights and freedoms in force beyond the conjectural majorities». This entails the strengthening of the role of the courts in ensuring the material substrate of democracy. And the crisis, as we shall see throughout this paper, has proved to be an excellent laboratory for this purpose.

The ECJ has proven to be sensitive to the specific circumstances of the economic and financial situation in some Member States in the assessment of various issues, either on preliminary rulings, or on other forms of Union litigation. However, it did not stop there; with regard to the so-called «subjective dimension of the preliminary ruling» – the one relevant to the defence of individual rights –, such sensitivity has been revealed. Moreover, it is always worth remembering the words of the Court of Justice itself in the famous *Van Gend & Loos* judgment of 1963⁹ according to which «the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted (...) to the diligence of the Commission and of the Member States» through infringement proceedings [Articles 258 and 259 of the Treaty on the Functioning of the European Union (TFEU)].

The ECJ recognizes that the individual play an active role in the legal construction of the European Union going beyond the mechanisms of participation (in a representative way) in

⁸ Cf. Paulo Rangel, «Transconstitucionalismo *versus* interconstitucionalidade», 172.

⁹ Cf. Judgment *Van Gend & Loos*, 5 February 1963, Case C- 26/62.

decision-making procedures provided for in the Treaties. What Pierre Pescatore soon linked to one (more) manifestation of the democratic ideal underlying the integration process has been transformed, as Joseph Weiler stresses, to its driving force.¹⁰ The doctrine has considered that individuals interested in promoting the correct application of Union law in the Member States and optimizing the effective judicial protection that follows it, have contributed to reveal apparently invisible dimensions of European Union law. And the economic difficulties that characterize their daily life, their states and their enterprises, give citizens one more opportunity to exercise such democratic supervision and guarantee the respect for the rights recognized by the legal order of the European Union.

3. Crisis and courts

Nevertheless, the ECJ is in a position to do more. The ECJ has already been confronted with preliminary rulings, especially in the field of labour, aiming to find out whether the adjustment/austerity reforms demanded by the European Union and implemented by the Member States are compatible or not with the protection of the fundamental rights recognized by the CFREU. The ECJ has deemed itself incompetent to respond to the concerns of the national judges, for alleged lack of a sufficient nexus of the situation in the main proceedings with Union law. In other words, these situations did not fall within the scope of Union law and, to that extent, would not allow for their assessment under the CFREU pursuant to Article 51.¹¹

The reluctance of the ECJ, to some extent understandable, can be attributed to the risks that its decision would entail: large sums of money are involved and, ultimately, the very future of the economic and monetary union.¹² However, the growing volume of existing

¹⁰ Cf. Joseph Weiler, “The transformation of Europe”, *Yale Law Journal* 100 (1991), later published in *The constitution of Europe: “Do the new clothes have an emperor?” and other essays on European integration* (Cambridge University Press, 1999), 19-20.

¹¹ Cf. Order *Corpul Național al Polițiștilor*, 14 December 2011, Case C-434/11; Order *Corpul Național al Polițiștilor*, 10 May 2012, Case C-134/12; Order *Sindicato dos Bancários do Norte*, 7 March 2013, Case C-128/12.

¹² Cf. Catherine Barnard, “Equality, solidarity and the Charter in time of crisis. A case study of dismissal”, in *Citizenship and solidarity in the European Union. From the Charter of Fundamental Rights to the crisis, the*

legislation on social protection at European level – as well as the responses developed by the European institutions and Member States to overcome the crisis – allow us to question the alleged judicial incompetence of the ECJ. Especially as regards the “troika” (European Commission, European Central Bank and International Monetary Fund) interventions in Member States such as Portugal.

Moreover, before the grant of financial assistance to Portugal, the adoption of austerity measures had been justified by the Portuguese authorities through the decision of the Council of the European Union,¹³ adopted on 2 December 2009, which urged the Portuguese state to reverse its excessive deficit by 2013 at the latest, in accordance with Article 126 (7) TFEU and Article 3 of Regulation 1467/97, of 7 July 1997, on speeding up and clarifying the implementation of the excessive deficit procedure.¹⁴

It should be noted that financial assistance to Portugal was granted pursuant to EU law [Article 122(2) TFEU and Article 3 of Regulation 407/2010] and is regulated by European legal acts (decisions of the Council), including Implementing Decision 2011/344 of 30 May 2011, and the Implementing Decision 2012/409 of 10 July 2012 amending the first. All these instruments demand that Portugal take measures in the field of labour, especially with regard to the reduction of compensation for dismissal, the easing of rules on working times, flexibility in overtime payments, etc. (pursuant to Article 3 of the referred Decision 2011/344), i.e., all matters that are not exactly “alien” to EU law.

However, in a context of correcting excessive deficit (disciplined and monitored by the EU institutions), followed by financial assistance (granted and regulated by EU legal acts), it is difficult to deny that the concrete austerity solutions implemented economic and financial

state of the art, ed. Alessandra Silveira, Mariana Canotilho, Pedro Froufe (Bruxelles/Bern/Berlin/Frankfurt am Main/New York/Oxford/Wien: Peter Lang, 2013), 303.

¹³ Cf. Relatório do Orçamento de Estado de 2011, Ministério das Finanças e da Administração Pública (Report of the 2011 State Budget, Ministry of Finance and Public Administration, available at www.portugal.gov.pt), 26.

¹⁴ Cf. Council Recommendation with a view to ending the excessive government deficit in Portugal, 18 June 2013, paragraph 3.

measures under the EU law framework mentioned above – recognized to some extent by the ECJ as a «regulatory framework for strengthened economic governance of the Union», which «establishes closer coordination and surveillance of the economic and budgetary policies conducted by the Member States and is intended to consolidate macroeconomic stability and the sustainability of public finances».¹⁵

Admittedly, the concrete adjustment measures to adopt are ultimately decided by the Member States – and they do have some leeway in reaching agreed goals (moreover, in the Portuguese case, it is rather limited, taking into account the detail of the provisions of the Decisions granting financial assistance). But such discretion to implement the guidelines on budget policy agreed with the EU institutions does not release Member States from the obligation to respect the general principles of EU law and the fundamental rights it recognizes, pursuant to Article 51(1) CFREU.

In the same way, the European institutions, by defining and monitoring the measures introduced by successive State Budgets – and by urging the Portuguese state to fulfil them «in full» – cannot evade their responsibilities regarding the compliance with primary EU law.¹⁶ Thus, the doctrine according to which adjustment/austerity reforms demanded by the European Union, especially with regard to Member States under intervention, could be

¹⁵ Cf. Judgment *Pringle*, 27 November 2012, Case C-370/12, recital 58. This framework would consist of several regulations of the European Parliament and the Council adopted on 16 November 2011, namely, Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, Regulation 1175/2011 amending Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances, and Regulation 1177/2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, and Directive 2011/85 on requirements for budgetary frameworks of the Member States.

¹⁶ Pursuant to Article 3(5) of Decision 2011/344, the Council determined that before the end of 2011 and according to the specifications of the Memorandum of Understanding, Portugal should adopt a series of measures described in detail, namely «implement fully the fiscal consolidation measures foreseen in the 2011 budget», as well as «fully implement the measures foreseen in the new Budgetary Framework Law». And pursuant to Article 3(9) of Decision 2011/344, «within the framework of the assistance to be provided to Portugal, together with the IMF and in liaison with the ECB, it shall periodically review the effectiveness and economic and social impact of the agreed measures, and shall recommend necessary corrections».

scrutinized in light of the general principles and fundamental rights recognized by the European Union, is becoming more consistent.¹⁷

It is therefore understandable and expected that individuals argue in court that the reforms introduced by the austerity measures (especially where labour is concerned) violate the fundamental rights protected by EU law. But even if they do not, national courts, aware of these developments due to functional imperatives, are required, as European courts, to ensure the protection of fundamental rights within the scope of EU law. It is natural and desirable that national courts question the ECJ on the compatibility with the requirements of CFREU of the “troika” demands and the measures taken by Member States to comply with them. As Cunha Rodrigues wisely explains, «it is not conceivable to interpret Union law at different speeds, depending on whether you are in countries (such as Germany, Sweden and Finland) where there is no crisis, or Greece, Ireland and Portugal, where it does exist».¹⁸

It is in this context that the appeal made by Cunha Rodrigues reveals its urgency in the sense that «jurists have a duty to confront European policy makers with the real challenge they face, to avoid a step backwards for civilization».¹⁹ As regards the profusion of rights in times of crisis, Cunha Rodrigues explains that «In no other period a generation has enjoyed as many rights as ours does. Consequently, in recent times, the feeling of disappointment and bewilderment by the abysmal distance separating the rights from reality was rarely evident.²⁰ (...) Were the so called ‘wasteful’ Member States of Southern Europe the ones who agreed to this profligacy? They were not. It was Europe and its institutions».²¹ And for this reason European courts cannot conveniently take refuge in the said «purely internal» situations to evade their responsibilities with regard to the protection of fundamental rights recognized by the legal order of the Union.

¹⁷ Cf. Barnard, “Equality, solidarity and the Charter in time of crisis. A case study of dismissal”.

¹⁸ Cf. Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, 22.

¹⁹ Cf. Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, 24.

²⁰ Cf. Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, 13.

²¹ Cf. Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, 22.

4. Crisis and constitutionalism

From a long-term historical perspective, it may be possible to state that, just as the Revolution is for public law, the crisis also appears to be for European Union law. If the French Revolution is the birthplace of public law as it is understood today, a succession of crisis is at the origin of the European integration project and it continues to deepen the legal and political construction of the European Union set in motion since the early 1950s. Today there is, however, the sense that “this time it is different”. Different, for the better or worse, depending on the perspective. But given that the crisis of the war is the one from which the European Union has emerged – and the one to which it prevented the united Europe to return to –, history taught us that the Union has perhaps surpassed worse challenges than the crisis it faces today.

The European construction started as a mere extension of certain military alliances formed during World War II. The first embodiment of the integration process was the establishment of the European Coal and Steel Community (ECSC) with the signing of the Treaty of Paris of 1951 which was followed by the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) with the signing of the Treaty of Rome in 1957. Thereupon the 1960s were characterized by the sovereign resistance to the construction in motion and by a serious questioning of the fundamental principles of European integration. As of July 1965, in opposition to a set of proposals from the Commission concerning in particular the financing of the common agricultural policy, France ceased to attend meetings of the Council – the episode known as the «empty chair crisis».

This crisis was overcome thanks to the Luxembourg Compromise (January 1966), in which it was held that whenever very important interests of one or more States are concerned, members of the Council shall endeavour to reach solutions which can be adopted by all while respecting their mutual interests. The 1970s saw the first enlargements accompanied by two major global crises: the dollar and the oil crisis. But integration made significant progress in the following decades: in addition to the successive enlargements, the first

institutional reforms took place with the signing of the Single European Act of 1986 and the Maastricht Treaty of 1992 – establishing the European Union –, thus marking perhaps the greatest turning point in European integration, which has taken on a political dimension, followed by successive patches to the Treaties introduced by the Amsterdam Treaty of 1997 and Treaty of Nice 2001.

The immediately preceding crisis to the current one was formally dubbed «constitutional crisis», since it resulted from the frustration of the first major attempt to consolidate 50 years of «constitutionalization of the Treaties» through the so-called «Treaty establishing a Constitution for Europe» (signed in 2004). The issue stemmed from its non-ratification – driven by the “rejections” in the French and Dutch referenda in which it was not possible to «neutralize and solve various problems of manipulation and abuse».²² So far – as Habermas explains – European elections or referenda in all Member States in which anything other than national issues or themes were decided have yet to take place.²³ As the author explains, no political party has tried so far to politically shape public opinion through an incisive clarification.²⁴ Political parties avoid talking about unpopular issues (...) since the objective of the parties must be to win elections.²⁵

²² About referenda in general, cf. J. J. Gomes Canotilho, “Pode o referendo aprofundar a democracia?”, in *“Brancos” e a interconstitucionalidade. Itinerários dos discursos sobre a historicidade constitucional* (Coimbra: Almedina, 2006), 305, where the following is stated: «As análises empíricas demonstram também que os instrumentos referendários não conseguem neutralizar e resolver muitos problemas de manipulação e abuso» («Empirical analysis also demonstrates that the referenda instruments fail to neutralize and solve numerous problems of manipulation and abuse»).

²³ Cf. Jürgen Habermas, *Um ensaio sobre a Constituição da Europa* (Lisboa: Edições 70, 2012), 169.

²⁴ Cf. Habermas, *Um ensaio sobre a Constituição da Europa*, 161 and 174, where the following is stated: «Para alguns partidos políticos, ainda poderia valer a pena arregaçar as mangas, para lutar ofensivamente nas ruas pela unificação europeia. A situação não se resolve com a renúncia a grandes projetos» («For some political parties, it could still be worth rolling up their sleeves to fight offensively in the streets for European unification. The situation is not solved by renouncing to great projects»).

²⁵ Cf. Habermas, *Um ensaio sobre a Constituição da Europa*, 169-170, where the following is stated: «O facto de os cidadãos estarem enganados quanto à relevância daquilo que acontece em Estrasburgo e Bruxelas, lugares que, em termos subjetivos, são afastados, justifica efetivamente uma dívida que os partidos políticos têm para com os cidadãos, mas à qual fogem teimosamente. A política, em geral, parece estar a passar atualmente por uma situação marcada pela renúncia a uma perspetiva e vontade criadora» («The fact that citizens are deceived as to the relevance of what happens in Strasbourg and Brussels, places that are, subjectively, removed, effectively warranted a debt that the political parties have towards the citizens, but to which they stubbornly flee. The policy, in general, seems to be currently going through a situation marked by the resignation of a perspective and creative will»). In the same sense cf. Ulrich Beck, *A Europa alemã. De*

Nevertheless, the constitutional impasse was settled in 2007 with the signing of the Lisbon Treaty (in force since December 2009). Any alternative to the Constitutional Treaty could not be a simplified (and therefore impoverished) version of a broad consensus: it necessarily had to maintain its essential dimensions – and this is what the Lisbon Treaty did. Thus, faced with so many and successive crisis, perhaps the biggest misconception about the current European crisis is to underestimate its transformative potential and the structural implications of a “citizenship of rights” in the integration process. The financial assistance to Member States experiencing particular difficulties and the strengthening of economic and fiscal coordination between Member States (“economic governance”) are the two pillars of the current political and economic architecture of the Union. It is undeniable that the actions carried out in this context will have a significant institutional and constitutional impact in the integration process (“federalizing process”) that is advancing towards a higher level of political integration.

The major question in this context is whether the crisis reveals some crucial dysfunction between the expectations of European citizens and the mechanisms of political integration available to them – and whether the extended notion of citizenship of rights that the European courts helped to forge plays some role in this scenario. To this extent, the current crisis definitely questions the relationship between national policy and European policy. This is an inevitable path – moreover, the version of the constitutive treaties resulting from the entry into force of the Lisbon Treaty already pointed in that direction. In order to do so, we need only to look at two provisions: the Articles 6(1) and 4(2) of the TEU.

Under the first, the CFREU now has the «same legal value as the Treaties». The CFREU proclaimed in Nice in 2001, gained legally binding force, that is to say, the status of primary law enforceable by individuals, which has undeniably marked a new page in the European integration process. In turn, Article 4(2) TEU brings together the key elements of

Maquiavel a “Merkievel”: *estratégias de poder na crise do euro* (Lisboa: Edições 70, 2013), 99, which reads: «Seria necessário que neste processo os partidos políticos estabelecidos conseguissem algo como a quadratura do círculo: têm de conseguir o salto, em termos organizacionais e programáticos, para a transnacionalidade da política europeia, ganhando, simultaneamente, as eleições nacionais» («In this process, it would be necessary for the established political parties to be able to do something like squaring the circle: they have to leap, in organizational and programmatic terms, towards transnational European politics, while winning national elections»).

the status of Member State of the European Union: the equality of Member States, respect for their national constitutional identities, together with respect for their essential functions. Presently, it probably is the provision that better expresses the pluralism that has characterized the legal construction of the European Union, which never was to build Europe «without the states, much less against the states», as Jean Monnet would say, and that was always guided by the principle of loyalty.²⁶

Note, therefore, that the banking crisis of 2008 and the consequent public debt crisis of 2010 are contemporary to the new visibility that fundamental rights and the status of Member States of the European Union took on the European integration process with the entry into force of the Lisbon Treaty. And both have been put to the test in the management of the crisis. To illustrate, here are some examples of ECJ case law – this particular institution has always dictated the tone of the integration process, to the point where it is said that the future of the European Union is a future for which the ECJ has already prepared for us.²⁷

5. Crisis and fundamental rights

Regarding the first point, let's focus on the protection of fundamental rights of the European Union. The fiscal restraint and socioeconomic restructuring dictated by considerations of public debt reduction affect the daily life of the EU citizen, whether static or dynamic, economically active or not. The flexibility in what concerns the labour market, the reform of the pension system, cuts in social spending (health, old age, education, public transportation), the increase in social security contributions, higher taxes, especially indirect (VAT), are measures particularly likely to affect, directly or indirectly, the exercise of fundamental rights concerning labour rights; protection in the event of redundancy, sickness or old age, access to services of general economic interest such as health or

²⁶ Under the principle of loyal cooperation (or European loyalty) the Union and the Member States respect and assist each other in carrying out tasks which flow from the Treaties [Article 4(3) TEU].

²⁷ Cf. Daniel Sarmiento, *Poder judicial e integración europea. La construcción de un modelo jurisdiccional para la Unión* (Madrid: Civitas, 2004).

education – rights with a social dimension enshrined in the CFREU (particularly in its Title IV dedicated to «Solidarity», Articles 27 to 38), whose legally binding force is, as mentioned, a (another) new page in the European integration process.

The banking crisis of 2008 and the consequent public debt crisis of 2010, “compete” with the new visibility that fundamental rights assumed in the European integration process with the entry into force of the Lisbon Treaty in 2009. And the anti-crisis measures that have been adopted since then must be considered in this context. As Koen Lenaerts teaches, the CFREU as a means of primary law is now 1) a standard of interpretation, not only of the legal acts of the European Union, but also national measures which fall within the scope of application of European Union law, and 2) is likely to serve as a basis for invalidating a legal act of the Union or setting aside national law that contravenes it.²⁸

Indeed, pursuant to Article 51(1) CFREU, it not only binds the institutions, bodies, offices and agencies of the Union, but also the Member States themselves «when they are implementing Union law», a criterion that must be interpreted to determine the applicability of the CFREU when Member States act in the scope of EU law, especially in the fulfilment of obligations under Union law. Thus, since the various anti-crisis measures amount, more or less directly, to the fulfilment of obligations arising from Union legal acts (regulations, directives or decisions), they are likely to be monitored in light of the standard of protection of fundamental rights resulting from the Union legal order and whose ultimate guardian is the ECJ.

The *Thomas Hogan* case of 2013²⁹ provides an example of the added value in a crisis situation of the preliminary ruling as an indirect mechanism of access to Union justice for individuals – although the fundamental rights discourse is absent from the reasoning behind the decision. The case concerned the protection of employees in cases of insolvency of the respective employers, a situation more common than desirable, and in particular the

²⁸ Cf. Koen Lenaerts, “Exploring the Limits of the EU Charter of Fundamental Rights”, *European Constitutional Law Review* 8 (2012), 376.

²⁹ Cf. Judgment *Thomas Hogan*, 26 April 2013, Case C-398/11.

guarantee of pensions. In Ireland, beyond the «statutory pension» (paid by the State to all persons who reach retirement age and have paid a certain level of social security contributions linked to remuneration during their career), there are supplementary occupational pension schemes, fed by contributions from both the employer and employees – and which constitute a separate group of assets from the employer's assets.

In this case, ten employees³⁰ who worked at Waterford Crystal, an Irish company specialized in the manufacturing of crystal, which was declared insolvent in 2009, disagreed with the calculation made by the insolvency administrator regarding the occupational pensions to which they were entitled. The calculation amounted to less than half the amount they would be entitled if they had retired at the normal age.³¹ The workers claimed, in court, that Article 8 of Directive 2008/94 on the protection of employees in the event of the insolvency of their employer, as interpreted by the ECJ, in particular in the *Robins* judgment of 2007,³² had been incorrectly transposed.

Pursuant to Article 8 of Directive 2008/94, Member States shall ensure that the necessary measures are taken to protect the interests of employees as well as persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect to rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes. In the mentioned *Robins* judgment, the ECJ recognized that Member States have considerable latitude in determining both the means and the level of protection of rights to old-age benefits under supplementary occupational pension schemes in the event of the insolvency of the employer; but also considered – and therein lies the heart of the matter – that Article 8 of the Directive opposed national provisions that may lead to a guarantee of benefits

³⁰ For eight of them, the date of retirement was planned between 2011 and 2013, and for the remaining two in 2019 and 2022.

³¹ In this case, the calculation was as follows: the old-age benefit is based on the last effective compensation, from which the statutory pension is deducted; after the deduction, two-thirds of the amount represented the old-age benefit.

³² Cf. Judgment *Robins*, 25 January 2007, Case C -278/05.

under a supplementary occupational pension scheme limited to less than half of the benefits to which an employee could otherwise be entitled.

In the *Thomas Hogan* judgment, the ECJ had no difficulty in considering that Ireland had not correctly transposed this provision and that it did not provide the minimum level of protection laid down in the *Robins* judgment. Note that the Irish court expressly asked the ECJ, in order to know if the «economic situation (...) constitutes a sufficiently exceptional situation to justify a lower level of protection of the plaintiffs' interests than might otherwise have been required».³³ There was, therefore, an intention to make use of the argument based on the particularly difficult economic and financial situation of Ireland to justify a lower level of protection of the interests of workers. But the ECJ rejected the argument: «the economic situation of the Member State concerned does not constitute an exceptional situation capable of justifying a lower level of protection of the interests of employees as regards their entitlement to old-age benefits under a supplementary occupational pension scheme».³⁴

The ECJ explained that the minimum level of protection resulting from the *Robins* judgment already considered «the need for balanced economic and social development, by taking into consideration, on the one hand, divergent and rather unpredictable developments in the economic situations of the Member States and, on the other, the necessity of ensuring that employees have a minimum guarantee of protection if their employer becomes insolvent owing, for example, to unfavourable developments in economic conditions»³⁵ – i.e., economic conditions do not develop unfavourably for States only, but also for citizens. In the context of the economic and financial crisis affecting the Union in general (and some Member States in particular), the ECJ does not seem to lose sight of the difficult situations that result from the inability of workers to obtain the payment they are due, mainly when it comes to workers close to retirement age; and

³³ Cf. Judgment *Thomas Hogan*, recital 21, sixth question referred.

³⁴ Cf. Judgment *Thomas Hogan*, recital 47.

³⁵ Cf. Judgment *Thomas Hogan*, recital 44.

attention is paid not only to insolvency payments, but also to other types of benefits provided under national laws.

Thus, and with regard to this case, the ten Waterford Crystal workers would be entitled to at least half of the complementary old-age pensions, and moreover the ECJ stated that, since Ireland did not correctly transpose Article 8 of Directive 2008/94 following the *Robins* judgment, this was a sufficiently serious breach of a provision of EU law «in the context of any examination which might be carried out in respect of that Member State's liability for damage caused to individuals».³⁶ Answering the last question referred by the national court, the ECJ considers that two of the conditions for infringement of EU law by Member States³⁷ are demonstrated – 1) Article 8 of Directive 2008/94 «is intended to confer rights on individuals»³⁸ and, having not been properly transposed, 2) it constitutes a «sufficiently serious breach of that rule of law» – strengthening, also in this way, the legal position of individuals in this case.

Like the Irish court in the *Thomas Hogan* case – that questioned the ECJ in order to know if the «economic situation (...) constitutes a sufficiently exceptional situation to justify a lower level of protection of the plaintiffs' interests than might otherwise have been required» –, a question referred by a German court is currently waiting for a decision³⁹ in which it is asked whether EU law, especially in matters of social protection (Regulation 883/2004 on the coordination of social security systems) and EU citizenship (Articles 18 and 20 of the TFEU and Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States), precludes a Member State, «in order to prevent an unreasonable recourse to non-contributory social security benefits (...) which guarantee a level of subsistence, from

³⁶ Cf. Judgment *Thomas Hogan*, recital 52.

³⁷ On this subject, cf. Sophie Perez Fernandes, *A responsabilidade civil do Estado-legislador por violação do direito da União Europeia. Breves notas sobre o caso português* (Cascais: Príncipe, 2013).

³⁸ Cf. Judgment *Thomas Hogan*, recital 52.

³⁹ Cf. Request for a preliminary ruling *Dano*, Case C-333/13, OJ C 226, 3 August 2013, 9.

excluding in full or in part European Union citizens in need from accessing those benefits which are provided to their own nationals who are in the same situation».

Unfortunately, the details of the factual, legal, and economic/financial situation eventually underlying the problem in question are not available at the moment – one which does not seem, at first glance, to deserve a positive response, taking into account the settled case law of the ECJ on the matter.⁴⁰ But in any case, such questions are indicative of the attention given by national courts while facing and questioning some of the budget restraining measures in light of EU law, seeking to optimize the judicial protection of rights for individuals under European law. As Cunha Rodrigues explains, it stems from the economic analysis of law that every fundamental right represents a cost, generally enforceable against public authority, and, under certain conditions, to individuals.⁴¹ There is nothing new about it – fundamental rights necessarily involve financial costs. Therefore, to use the allegedly inevitable argument of «there is no money, rights must be limited, adapted, restructured» cannot prevent us from scrutinizing its consequences in the sphere of law.

6. Crisis and loyalty

European courts are not only aware of the unfavourable economic conditions of EU citizens in the context of crisis. The ECJ has also proved sensitive to the unfavourable economic conditions evolution of Member States particularly affected by the crisis, as demonstrated by the *Greece v. Commission* order of the General Court seized on interim measures (Articles 278 and 279 TFEU).⁴²

The process that gave rise to the order dealt with a decision of 7 December 2011 in which the Commission, on the one hand, qualified as state aid incompatible with the internal

⁴⁰ Cf. Judgment *Martinez Sala*, 12 May 1998, Case C-85/96; Judgment *Grzelczyk*, 20 September 2001, Case C-184/99; Judgment *D'Hoop*, 11 July 2002, Case C-224/98; Judgment *Collins*, 23 March 2004, Case C-138/02; Judgment *Michel Trojani*, 7 September 2004, Case C-456/02; Judgment *Bidar*, 15 March 2005, Case C-209/03; Judgment *Ioannidis*, 15 September 2005, Case C-258/04; Judgment *Commission v. Republic of Austria*, 4 October 2012, Case C-75/11.

⁴¹ Cf. Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, 21.

⁴² Cf. Order *Greece v. Commission*, 19 September 2012, Case T-52/12 R.

market a total amount of EUR 425 million paid in 2009 by the Greek authorities to the Greek agricultural sector, designed to repair damages that occurred after adverse weather conditions (experienced in the 2008 and 2009 campaigns – drought, high temperatures, excessive rainfall and diseases), and, on the other hand, ordered the authorities to recover the sums paid from the beneficiaries.⁴³

After having brought an action for the annulment of this Decision before the General Court, the Hellenic Republic submitted an application for the suspension of the operation of the Decision. In essence, the question raised was of whether, given the «quite particular and exceptional difficulties linked to the austerity measures which have been a feature of the reality of the Greek economy for several years»,⁴⁴ the obligation to recover the sums granted from the beneficiaries must be described as «excessive», insofar as it imposed the recovery of aid until 7 December 2011, although the plight of the Greek agricultural sector had degraded further since its allocation.

The President of the General Court found that the answers to these legal issues were not immediately obvious and called for a detailed examination in the main proceedings, for they seemed, at first sight, to be sufficiently serious to establish a *prima facie* case (meaning that the main proceedings did not appear, at this stage, manifestly unfounded). As regards the urgency of the application, the President of the General Court recalls that Member States may «seek the grant of interim measures by asserting that the contested measure could seriously jeopardise performance of their State tasks and public order».⁴⁵

It is unfortunate that no reference was made to the «essential functions» of the States within the meaning of Article 4(2) TEU, which may be understood as regarding the ECJ's relative shyness to lay hold of this still new and sensitive provision. However, the reasoning put forward in the case by the Hellenic Republic, and to which the Union interim measures

⁴³ Cf. Decision 2012/157 of 7 December 2011 concerning compensation payments made by the Greek Agricultural Insurance Organisation (ELGA) in 2008 and 2009, OJ 2012 L 78, 21.

⁴⁴ Cf. Order *Greece v. Commission*, recital 31.

⁴⁵ Cf. Order *Greece v. Commission*, recitals 35 and 37.

judge was sensitive to, denotes how the performance of «State tasks» or «essential functions» of the States in times of crisis are duly taken into account.

In the case, the Hellenic Republic claimed that a forced immediate recovery of the disputed sums by the officials of the tax administration from several hundreds of thousands of farmers would entail «administrative difficulties liable to cause it serious and irreparable harm»: the Hellenic Republic intended to concentrate its resources on the establishment of «effective tax authorities that are capable, in particular, of identifying and pursuing the ‘big tax avoiders’ and combating tax fraud; the volume of which, in terms of loss of revenue, was assessed at the hearing as being EUR 20 billion».⁴⁶

However, requiring the aforementioned massive intervention of the agents of the Greek tax authorities, this forced mass recovery would have prevented this administration to devote itself «to one of their priorities, namely combating tax avoidance and collecting sums eluding tax that are nearly 50 times greater than the contested payments».⁴⁷ Furthermore, and in relation to the public order argument, the social climate in Greece was marked by «a deterioration of confidence in the public authorities, generalised discontent and a feeling of injustice», in particular the violent demonstrations against the austerity measures adopted by the Greek government were «constantly increasing».⁴⁸

In such circumstances, the President of the General Court concluded that «the risk, invoked by the Hellenic Republic, that immediate recovery of the payments at issue in the agricultural sector may trigger demonstrations liable to degenerate into violence appears neither purely hypothetical nor theoretical or uncertain».⁴⁹ Thus the President of the General Court acknowledged that in «the exceptional circumstances which currently obtain in relation to the economic and social situation in Greece», it was legitimate to accord priority to the interests invoked by that Member State, consisting of, «first, preserving

⁴⁶ Cf. Order *Greece v. Commission*, recitals 43 and 44.

⁴⁷ Cf. Order *Greece v. Commission*, recital 47.

⁴⁸ Cf. Order *Greece v. Commission*, recital 48.

⁴⁹ Cf. Order *Greece v. Commission*, recital 49.

social peace and preventing social unrest and, second, being able to concentrate the capacities of its tax authorities on the tasks which it regards as paramount for the country»,⁵⁰ while suspending the execution only exposed the interests of the Union to the risk of postponing the national measures for recovery to a later date, without evidence that, by itself, this postponement would harm the chances of success of these measures. In so doing, the implementation of the contested decision, in so far as it forced the Hellenic Republic to recover sums paid from the beneficiaries, was suspended until the outcome of the main proceedings.

The same attention to economic circumstances is paid within the framework of infringement proceedings. For example, in 2012, the ECJ took into account Ireland's economic situation to scale back the amount of the penalty indicated by the Commission in a second action for infringement. In the *Commission v. Ireland* judgment of 2008,⁵¹ the ECJ declared that Ireland had failed to correctly transpose the Directive 85/337 on the assessment of the effects of certain public and private projects on the environment. Since Ireland had not adopted the necessary measures to comply with the judgment, the Commission brought an action against Ireland for not complying with the judgment of the ECJ, specifying, pursuant to Article 260 TFEU, the amount of the penalty which it considered appropriate in the circumstances.

Within this second action for infringement, Ireland argued in its defence that the reduction in the amount requested by the Commission was not likely to put the goal of deterrence of the penalty in question, to the extent that, in times of crisis, a reduced amount has a deterrent effect on the state equivalent to a higher amount in «normal» economic conditions.⁵² The ECJ was sensitive to the argument. In the *Commission v. Ireland judgment* of 2012, taking into account the available economic data, the ECJ concluded that

⁵⁰ Cf. Order *Greece v. Commission*, recital 54.

⁵¹ Cf. Judgment *Commission v. Ireland*, 20 November 2008, Case C-66/06.

⁵² Cf. Judgment *Commission v. Ireland*, 19 December 2012, Case C-279/11, recital 62.

Ireland's capacity to pay had been subject to a certain regression in an economic context of crisis and thus lowered the amount specified by the Commission.⁵³

7. Crisis and European citizenship

In a 2012 study coordinated by Miguel Poiares Maduro, the author argues that the root causes of the crisis are democratic problems. In other words, the origin of the crisis can be found in democratic failures: 1) whether they are Member States' failures (which impose externalities on others in the context of the Economic and Monetary Union and are not able to control a set of mobile interests that escape their sphere of activity), 2) or failures of governance of the Union (which has not been able to infuse its institutional system with a true democratic potential nor the capacity of effective governance that the crisis requires).

Maduro argues that the failures in resolving the crisis are attributable to the diffuse nature of European political authority and its excessive reliance on national policies. Furthermore, Member States are unable to internalize the consequences of the interdependence generated by the euro, the integrated markets, as well as the European and global movement of capital. Consequently, the Union cannot govern effectively and its policies are prisoners of national policies. Just pay attention, we would add, to the genetic defect of the Economic and Monetary Union: the Member States sovereign power over the issuance of currency and its value (i.e., monetary and exchange sovereignty) is removed without sharing sovereignty in taxation and budget matters – which continue to be controlled by the Member States, without moving towards a genuine economic union.⁵⁴ For these reasons,

⁵³ Cf. Judgment *Commission v. Ireland*, 19 December 2012, recitals 78-80.

⁵⁴ In this sense, cf. Habermas, *Um ensaio sobre a Constituição da Europa*, 155, where the author refers to the birth defect from a political union that was left halfway in the absence of an effective coordination of economic policies of the Member States. And he concludes: «É necessário consolidar os orçamentos nacionais, como é óbvio. No entanto, não estão só em causa as “batotas” gregas e as “ilusões de riqueza” espanholas: também está em causa uma uniformização dos níveis de desenvolvimento dentro de uma área monetária com economias nacionais heterogéneas». («It is necessary to consolidate national budgets, of course. However, it is not just a question of Greek “cheats” and Spanish “illusions of wealth”: it also concerns standardization of levels of development within a currency area with diverse national economies»).

Maduro concludes that «the real democratic deficit in the Union is the absence of public policies».⁵⁵

Therefore, if Maduro is correct – that is, if democratic failures are the root of the crisis –, could the crisis have been avoided (or at least minimized) if the problems of governance in the European Union were resolved (i.e., problems of coordination and convergence between the political entities involved)? Probably so. The legal and political solution to the problems faced by the Union depends on the deepening of the federal component of the European system. Only that deepening can prevent the financial problem of a Member State from becoming a problem of credibility of the Union as a whole. Only that deepening may allow the Union to play economic and social functions that act as a support network for the economic development of Member States.⁵⁶

And such deepening of the federal system components (as a solution to the crisis and answer to the democratic problems of the Member States and the Union) is necessarily accompanied by the deepening of citizenship rights that European courts helped to forge. In this scenario it is indispensable to discuss the extent to which the dynamics of fundamental rights affect the integration process itself – or scrutinize the potential of the citizenship of rights in times of crisis. And do it while wielding political and constitutional tools that already exist (or may emerge) during a crisis context.

The debate on European citizenship arose in the 1970s in order to grant a set of civil, political and social rights to the nationals of a Member State who were exercising economic freedoms in another Member State so as to put them on an equal footing with the nationals of the host Member State, and in this way promote the trend towards equality of legal positions among nationals of Member States in the then Community. In this sense, European citizenship has always been related to the need for equality among nationals of

⁵⁵ Cf. Miguel Poaires Maduro, “A new governance for the European Union and the euro: democracy and justice”, *European University Institute, Global Governance Programme, RSCAS Policy Paper 2012/11*, http://cadmus.eui.eu/bitstream/handle/1814/24295/RSCAS_PP_2012_11rev.pdf?sequence=1, 1.

⁵⁶ In a similar sense, cf. Viriato Soromenho-Marques, “Are we on the way to creating a European Behemoth? A Portuguese perspective”, 8.

different Member States – that would enjoy the rights and be subject to the duties provided for in the Treaties.⁵⁷ And this idea of shared rights and duties (which are provided for by EU law and do not depend on the Member State)⁵⁸ is able to foster a sense of belonging to the Union among individuals.

Since the idea of national citizenship is traditionally anchored to the preservation of the nation-state (or to the definition of “us” and the “other”), the recognition of the European citizenship by the Maastricht Treaty, raised the question of 1) what kind of political community could be created beyond the nation-state, 2) what relationship would it have with national political communities, 3) who could enjoy such a status and which rights would they have – all issues that are at the heart of European integration as a political project and are still subject of ongoing debate.⁵⁹ Nevertheless, since it does not serve the preservation of the nation-state and it is based on a plurality of nationalities, European citizenship could not have – and does not have – the exact same nature of national citizenship, being originally and essentially an inclusive citizenship.⁶⁰

European citizenship, unlike national citizenship, does not presuppose the community of which the citizen is a member – it creates this community (of rights). In other words, European citizenship is built and developed through the exercise of rights – and for this the case law of the ECJ contributed greatly, evolving from the provocation of national courts via preliminary ruling (Article 267 TFEU). For no other reason the debate on European citizenship developed in parallel (and eventually was confused with) to that of the

⁵⁷ Clearly reflected in the current Articles 9 of the TEU and 20(2) of the TFEU.

⁵⁸ Cf. Opinion *Rottmann*, 30 September 2009, Case C-135/08, recital 23.

⁵⁹ These issues are framed by Damian Chalmers et al, *European Union Law Text and materials*, (Cambridge University Press, 2006), 561-562, which reads: «the debate surrounding citizenship concerns the nature of political community».

⁶⁰ On the ideas of inclusion and exclusion in the context of European citizenship, cf. Catherine Barnard, *The substantive law of the EU. The four freedoms* (Oxford University Press, 2007), 411. For a vision of European citizenship as «constructive, transformative and multiple identity», cf. Amarillys Verhoeven, *The European Union in search of a democratic and constitutional theory* (The Hague/London/New York: Kluwer Law International, 2002), 168 et seq. On the connection between citizenship and the «constitutional framework» of the Union and its emergence as a political community, cf. Jo Shaw, *Law of the European Union* (Palgrave Law Masters, 2000), 381 et seq.

protection of fundamental rights within the Union: if Union citizens are holders of rights provided for in the Treaties (pursuant to Article 20(2) TFEU), they are also (and especially) holders of fundamental rights recognized by the European legal order. In this context it is arguable that the essence/substance of European citizenship resides precisely in the protection of fundamental rights.

As explained by Cunha Rodrigues, soon the case law of the ECJ «showed the potential of the new institute». Since the *Grzelczyk* judgment of 2001,⁶¹ European citizenship has come to be referred to by the ECJ as «aiming to become the fundamental status of nationals of Member States». Therefore, as explained by the former judge of the ECJ, through «the application of the principle of non-discrimination but also by the recognition that citizenship entails a hard core of rights that cannot be postponed and even tends to expand (hence, citizenship aims to become a fundamental status), the case law of the Union found answers to many weaknesses and deficiencies of protection».⁶²

Cunha Rodrigues continues: «It created, as it were, an interaction between citizenship and fundamental rights which most sensitive and well observed effect by the doctrine is the application of Union law to situations that have, hitherto, tended to be regarded as purely internal. The number of decisions in which, under the status of European citizen, rights were recognized is significant, in matters as diverse as the right to move and reside, protection of family life, the right to a name, or access to education».⁶³ For this reason, we would add, the idea that European citizenship (Article 20 TFEU) may allow individuals to access the standard of fundamental rights protection of the Union, and therefore, the highest level of protection it pursues⁶⁴ (when another link/connection to Union law does not become obvious), is so important in the current times of integration.⁶⁵

⁶¹ Cf. Judgment *Grzelczyk*, 20 September 2001, Case C-184/9.

⁶² Cf. Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, 18.

⁶³ Cf. Cunha Rodrigues, “Sobre a abundância de direitos em tempo de crise”, 19.

⁶⁴ On this subject, cf. Leonard Besselink, “Multiple political identities: revisiting the maximum standard”, in *Citizenship and solidarity in the European Union – from the Charter of Fundamental Rights to the crisis, the state of the art*, ed. Alessandra Silveira, Mariana Canotilho, Pedro Froufe (Bruxelles/Bern/Berlin/Frankfurt am Main/New York/Oxford/Wien: Peter Lang, 2013), 235-252; Bruno De Witte, “Tensions in the multilevel

Following the well-known *Zambrano* judgment of 2011,⁶⁶ some doctrine has argued the importance of defining the substance of European citizenship by reference to the substance of the rights conferred by the Treaties.⁶⁷ Armin von Bogdandy even suggests the «reverse of the Solange doctrine»,⁶⁸ now applied to Member States from the legal order of the Union. In this sense, the disregard of fundamental rights protected by the Union, by a Member State, even on a so-called «purely internal» issue, could be a violation of the substance of European citizenship – and would allow the individual to invoke the status as a European citizen (and the rights that it entails) before national courts, without having to search for fictitious or hypothetical connections with EU law to benefit from the European standard of protection of fundamental rights.⁶⁹

It would be a kind of «European rescue mechanism for fundamental rights», as it was named by Viviane Reding in her opening speech on the XXV FIDE Congress (Federation of European International Law, Tallinn/Estonia, 31 May 2012), specifically referring to such doctrinal current.⁷⁰ For no other reason did the European Commission recently launch

protection of fundamental rights: the meaning of article 53 EU Charter”, in *Citizenship and solidarity in the European Union – from the Charter of Fundamental Rights to the crisis, the state of the art*, 205-217; Mariana Canotilho, “Comentário ao artigo 53.º da CDFUE”, in *Carta dos Direitos Fundamentais na União Europeia Comentada*, ed. Alessandra Silveira and Mariana Canotilho (Coimbra: Almedina, 2013), 606-624.

⁶⁵ On the subject, cf. Alessandra Silveira, “Citizenship of rights and the principle of the highest standard of fundamental rights’ protection: notes on the Melloni case”, in *The reconceptualization of European Union citizenship*, ed. E. Guild et al. (Leiden-Boston: Brill Nijhoff, 2014), 285-299; Alessandra Silveira et. al., “Portugal”, *Reports of the XXV FIDE Congress Tallinn 2012 – vol. 1: The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and National Constitutions*, ed. Julia Laffranque (Tallinn:Tartu University Press, 2012), 715-717.

⁶⁶ Cf. Judgment *Zambrano*, 8 March 2011, Case C-34/09.

⁶⁷ In this sense, cf. Armin von Bogdandy et. al., “Reverse Solange – protecting the essence of fundamental rights against Member States”, *Common Market Law Review* 49, no. 2 (2012); Jože Štrus/Nina Peršak, “The Charter of Fundamental Rights and EU citizenship: the link with EU Law re-examined”, *The reconceptualization of European Union citizenship*, ed. E. Guild et al. (Leiden-Boston: Brill Nijhoff, 2014), 323-341.

⁶⁸ The so-called Solange doctrine derives from the German Constitutional Court case law [cf. BVerfGE 73, 339, 376 (1986), Solange II] under which the court of Karlsruhe “declines” to control secondary Union law provided that the protection of fundamental rights in the EU is essentially similar to the protection required by German Fundamental Law.

⁶⁹ Cf. Opinion *Zambrano*, 30 September 2010, Case C-34/09, recital 167.

a public consultation on the justice sector in the Union by which it intends to know, with regard to fundamental rights, if citizens understand that the rights enshrined in the CFREU should be directly applicable in Member States *in all cases*, abolishing the limitations of Article 51(1) CFREU.⁷¹

8. Final remarks

The European Union is a story of crises turned into opportunities for a deepening of the integration process. What we see today is just another page in that story. It seems more painful because we are the ones who live through it, we do not recall it through the accounts of others. This leads us to remember, with Ulrich Beck, the definition of crisis by Antonio Gramsci: «the crisis, says Gramsci, is the moment when the old world order dies and when it is necessary to fight for a new world, against resistance and contradictions. Yet, it is precisely this transition phase that is marked by many misconceptions and disorders. It is precisely this that we are currently watching: a caesura, an interregnum, the simultaneity of collapse and emergency – with results to be determined».⁷²

Crisis management while experiencing the crisis is difficult – bewilderment, fear, frustration, and restlessness, «all this is typical of these confusing situations» – mainly because «people's expectations are no longer compatible with the institutional arrangements that should satisfy them», as Ulrich Beck explains. But the «discrepancy between expectations and reality is always a motor for social mobilization»,⁷³ concludes the author.

To this extent, the reporting of past crisis illustrates that, although there are no miraculous solutions, the crisis fosters consensus and commitments in which the machinery of the Union has always been based – and the path always leads to «more Europe» or «a better Europe». And the context of crisis provides another opportunity for the ECJ, in dialogue

⁷⁰ Cf. http://europa.eu/rapid/press-release_SPEECH-12-403_en.htm?locale=en

⁷¹ Cf. http://ec.europa.eu/justice/events/assises-justice-2013/files/fundamental_rights_en.pdf

⁷² Cf. Beck, *A Europa alemã. De Maquiavel a “Merkievel”*: estratégias de poder na crise do euro, 26-27.

⁷³ Cf. Beck, *A Europa alemã. De Maquiavel a “Merkievel”*: estratégias de poder na crise do euro.

with national courts – in turn driven by citizens zealous of their rights – to demonstrate the active and decisive role that European courts have always played in building a Union of law. Because European integration is made possible by legal rules – and the judicial decisions which apply them.