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# THE FINANCIAL CRISIS AND SOCIAL RIGHTS IN THE PUBLIC POLICIES OF THE GENERALITAT*

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**Abstract**

An examination of the Generalitat's social policies is dependent on two variables: the effects of the financial crisis and the structural problems as regards the distribution of competences established by the Spanish Constitution and the Catalan Statute of Autonomy. The effective guarantee of social rights in the light of the effects of the crisis, has been determined by financial constraints and, particularly, by the centralising process of the State absorbing executive powers, especially in the areas of social services, vocational training and education.

Key words: social rights; social policies; competences; Constitutional Court; social services; employment; housing; education; public health.

## *LA CRISI I ELS DRETS SOCIALS EN LES POLÍTIQUES PÚBLIQUES DE LA GENERALITAT*

*Resum*

*L'examen de les polítiques socials de la Generalitat depèn de dues variables: els efectes de la crisi financera i els problemes estructurals del sistema de distribució de competències establert per la Constitució i l'Estatut. La garantia efectiva dels drets socials davant dels efectes de la crisi ha estat condicionada per les limitacions financeres i, especialment, pel procés centralitzador d'absorció de competències executives per part de l'Estat, sobretot en serveis socials, formació professional o educació.*

*Paraules clau: drets socials; polítiques socials; competències; Tribunal Constitucional; serveis socials; treball; habitatge; educació; sanitat.*

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## 1 The premise: the effects of the financial crisis and competence-related shortcomings

### 1.1 The impact of the crisis

The effects stemming from the financial crisis that affected Catalonia and Spain particularly intensely, have had a very significant impact on the social policies that are the responsibility of the Generalitat of Catalonia, the region's autonomous government, within the framework of its competences. This impact has affected rights in the social sphere that are recognised by both the Spanish Constitution as well as Catalonia's Statute of Autonomy, and it has not only had an effect on fundamental rights, such as the right to education (Article 27 of the Spanish Constitution (CE); Article 21 of the Statute of Autonomy of Catalonia (EAC) or the right to collective bargaining (Article 37 CE), but also on the so-called guiding principles of social and economic life (Chapter III, Title I CE and Chapter V, Title I EAC).

There is no doubt that the global financial crisis—which hit the euro zone nations particularly hard—prompted a range of political responses with significant constitutional and legal consequences, which have affected the effective guarantee of social, cultural and economic rights. The social sphere is an area in which the delivery of services by public administrations to guarantee such rights, is expressed more explicitly.

The constitutional and legal reforms carried out in countries such as Germany, Spain, France and Italy to incorporate the principle of stability in public finances—known as the "golden rule" in budgetary terms (Article 135 CE)—into the supreme law or legislation, revealed the effect the crisis had and continues to have on the bases of the rule of law. The division of powers has been particularly affected, especially through the misuse of emergency legislation to the detriment of the Catalan Parliament,[1] as well as the guarantee of rights as basic pillars of the social state.[2] Thus, in some cases of composite states such as Spain, in addition to the effects on these pillars, the situation also affected the territorial distribution of political power in a re-centralising sense, by reducing, or even distorting, the effective guarantee of competences and the scope of self-government of the decentralised political entities.

In that regard, to gauge the effects of the crisis and its translation into constitutional reforms, one confirmed fact must be borne in mind: in the case regarding the Generalitat and the other autonomous communities (AC), it has been these AC that have been responsible for specifying the essential bases of the social state in Spain.[3] Consequently, the funding and resultant capacity for public spending of the AC forms a fundamental element for delimiting the potential scope of the social policies its has the competence to implement. Thus, of particular was the absolute priority rule developed in the constitutional reform of 2011, implemented by Organic Law 2/2012 of 27 April on budgetary stability and financial sustainability[4] (which was followed, almost simultaneously, by Law 6/2012 of the Parliament of Catalonia of 17 May on budgetary stability). This rule applies to loans to pay for the capital and interest of debt (Article 135(3) CE, second paragraph), which represents a significant limitation on the Catalan Parliament's ability to decide, in the budget law, on the order of the expenses the Generalitat must meet each year.

The second paragraph of Article 135(3) states:

> Loans to meet payment on the interest and capital of the State's Public Debt shall always be deemed to be included in budget expenditure and their payment shall have absolute priority [...].

This is a constitutional provision of great importance, particularly taking into account Spain's high level of public indebtedness,[5] which has an impact on the funding of the AC. Nonetheless, this rule, which derives

1 See Aragón Reyes, M. *Uso y abuso del decreto-ley. Una propuesta de reforma constitucional.* Madrid: Iustel (2016).

2 See De la Quadra-Salcedo Fernández del Castillo, T. "Derecho Público tras la crisis económica en el Estado social y democrático: Estado de bienestar y servicios de interés general". *Crisis y Constitución.* [Madrid: CEPC] (2015), p. 75-155.

3 Regarding the participation of the AC in the protection of social rights, see: Barceló Serramalera, M. "La contribución de las Comunidades autónomas al reconocimiento y regulación de los derechos sociales". *Lex Social. Revista jurídica de los Derechos Sociales*, Vol. 1, Issue 1 (2011), p. 7-41.

4 The Constitutional Court upheld the constitutionality of this law in its Judgement 215/2014 of 18 December.

5 According to the figures published in October 2017, the public debt of the entire State totalled 98.7% of the GDP, two points below the second quarter of the same year (see: *Expansión,* October 2017).

from provisions established previously by European Union law,[6] was seen as a way to reassure the markets at the height of the crisis, since funding from the debt becomes impossible without a solid guarantee of payment, due to the decrease in the credibility offered by the State, which is unable to present sound finances that might allow for meeting the obligations taken on earlier. Yet its incorporation into the Constitution is not exempt from problems, such as, *inter alia*, those affecting the ability to decide on and implement social policies by the State and the AC.

In effect, by establishing the absolute priority rule, a ranking of payments has been introduced separate from legally established operations, and therefore the question may arise as to whether obligations *ex lege* of a contractual nature or any other obligations arising from judicial decisions could thus be sidelined or even passed over. The conclusion is that this situation could lead to subjective discrimination of creditors[7] due to fulfilling the ultimate goal, which is none other than maintaining a balanced budget. In any case, with such a strict rule there cannot be too many doubts that establishing absolute priority in the payment of public debt significantly limits the ability of the State[8] to take action, as well as the other public administrations, of course.

In objective terms, incorporating the "golden rule" into the Constitution represents a limitation of the political autonomy of the Catalan Parliament to decide on essential aspects of the social state, such as spending on public health, education, housing, social services, etc. Proof of this has been provided in the years since the 2011 reform, thanks to the content of the numerous laws approved before and especially after this reform, particularly by means of the regulatory instrument of the decree-law. This new legislation has been a direct or indirect result of the new rule on the payment of debt, and its effects have highlighted the formal and material limitations introduced concerning the guarantee of rights from the social sphere related to public health, employment, education, housing, vocational training, the pension system, etc.[9] The results of this diverse legislation have certainly been varied. However, one clearly identifiable common element has been that the rule of priority in the payment of loans to meet the interest and capital of the public administrations" public debt has affected social benefits in a clearly negative sense. On the other hand, the changes in public service management methods—especially by moving towards private management—have generated a weakening or even the disappearance of legal controls, to the detriment of protecting the rights affected. In this sense, another contributing factor has been the legal increase of the costs of accessing judicial protection,

6 The Treaty Establishing the European Stability Mechanism, done at Brussels on 2 February 2012, and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed in Brussels on 2 March 2012.

7 De la Hucha Celador, F. "La reforma del artículo 135 de la Constitución: Estabilidad presupuestaria y deuda pública". *Revista Española de Derecho Financiero.* [Madrid], Issue 153 (2012), p. 21-48.

8 Albertí Rovira, E. "El impacto de la crisis financiera en el Estado autonómico español". *Revista Española de Derecho Constitucional.* [Madrid], Issue 98 (2013), p. 63-89.

9 - Royal Decree-Law 13/2010 of 3 December on measures in the areas of taxation, employment and liberalisation to promote investment and job creation.

- Royal Decree-Law 3/2012 of 10 February on urgent measures to reform the labour market.

- Royal Decree-Law 16/2012 of 20 April on urgent measures to guarantee the sustainability of the national health system and to improve the quality and safety of its services.

- Royal Decree-Law 4/2012 of 20 April on urgent measures to rationalise public spending in the area of education.

- Law 23/2013 of 23 December regulating the sustainability factor and the index for revaluation of the Social Security pension system.

- Law 27/2013 of 27 December on rationalisation and sustainability of local government.

- Law 20/2013 of 9 December guaranteeing market unity.

- Organic Law 8/2013 of 9 December to improve educational quality.

- Decree-Law 1/2015 of 24 March on extraordinary and urgent measures to mobilise housing coming from mortgage foreclosure processes.

- Law 18/2014 of 15 October approving urgent measures for growth, competitiveness and efficiency.

- Royal Decree-Law 4/2015 of 22 March to urgently reform the vocational training system for employment in the workplace.

particularly as regards the administrative courts, meaning the right in Article 24 CE has been materially limited. This is evident from the decrease in appeals to these types of courts.[10]

### 1.2 Competence-related shortcomings

Besides the consequences arising from the crisis over political autonomy, it should be added that the self-governance of the AC, in general, and of the Generalitat of Catalonia, in particular, has been interfered with by a system of distribution of competences that, after the nearly 40 years since the Spanish Constitution entered into force, can be affirmed to present legal shortcomings of a structural nature, which, apart from other circumstantial or cyclical issues in the area of economics, in themselves have limited or limit the decision-making capacity of the AC institutions.

In the case of Catalonia, these shortcomings were exposed over a decade ago in *Informe sobre la reforma de l'Estatut de 2003*[11] [Report on the 2003 reform of the Statute of Autonomy], which would subsequently inspire the drafting of the new 2006 Statute of Autonomy.[12] In the stock-taking and assessment being done at that time as regards the application of the Statute, the main problems detected were the following, among others: lack of capacity to establish own policies in consistent and complete material areas; fragmented and restricted executive functions; lack of full self-organisational capacity; inability to adapt to the State and Justice Administrations' self-governing model; insufficient participation in State institutions and policies, as well as in the area of the European Union and in the external projection of Catalonia; and a lack of sufficient, stable and guaranteed funding. To close, the report warned of the risks of denaturing the legislative powers of the Generalitat.

Likewise, the framework of criteria identified for the future reform of the Statute and as an alternative to the set-up of the 1979 Statute, included, among other proposals, establishing broader and more detailed attributions of competences, in addition to criteria aimed at reducing the expansive use of horizontal powers (former Articles 149(1)(1) and (13) CE). This all comes against the backdrop of a legal conception of the Statute defined as a supplement to the Constitution and expression of an agreement for self-governance. However, the deactivating effect of Constitutional Court Judgement 31/2010 of 28 June in relation to this reform situated the scope of the Generalitat's competences at the starting point, and the same structural problems identified continued to be in effect.

Two factors were therefore at play: the constitutional impact of the economic and financial crisis, on the one hand, and the structural problems of the system of distribution of competences designed by the 1978 Constitution, on the other. This will have to be taken into account to develop the object of this work on the impact of the economic and financial crisis, starting in the last decade, on the public policies the Generalitat is responsible for implementing to protect the rights from the social sphere.

In accordance with the premise, firstly, the position of the public authorities will be examined with regard to guaranteeing social rights, particularly the legislator and the constitutional jurisdiction and their respective scope for decisions as regards this issue. Starting from there, some relevant cases will be analysed—without seeking to be exhaustive—that have been the object of decisions by the Constitutional Court during the crisis period.

10 See Villares Naveira, L. "Control jurisdiccional de la actividad administrativa". In: Nogueira, A.; Lois, M.; Diz, I. (ed.). *Crisis, derechos sociales e igualdad*. Valencia: Tirant lo Blanch, 2015, p. 437-478.

11 See *Informe sobre la reforma de l'Estatut*. Barcelona: Institut d'Estudis Autonòmics (IEA), Generalitat de Catalunya (2003), p. 15-87.

12 On the 2006 reform of the Statute of Autonomy: Viver Pi-Sunyer, C. "La distribució de competències en el nou Estatut". *Seminari IEA*. [Barcelona], Issue 52 (2006).

## 2. Rights in the social sphere: between the legislator and the court

### 2.1 Controversial issues regarding social rights

The examination of the social policies implemented by the public authorities of the Generalitat—whether the Parliament or the Government—must in all cases consider the position occupied by the social rights recognised by the Spanish Constitution and the Statute of Autonomy of Catalonia, between the legislator, the ordinary courts and the Constitutional Court. The efficacy of the rights included in this sphere and the constitutional limits on exercising them are the controversial topics that have occupied the doctrine of the general theory on rights.[13]

The legal value of social principles and rights, the delimitation of the sphere defined as fundamental rights, the existence of a constitutionally preserved minimum of social rights not available to the legislator, as well as the idea of a possible irreversibility in the face of actions by the State or AC legislator, etc. are topics that not only form part of the theoretical reflection in the doctrine on public law or of the experiences that can be drawn from the comparative law, they also form an essential part of the courts' jurisdictional function. Economic crisis or not, this is an unavoidable premise. Thus, for example, in the framework of the current block of constitutionality in force in Catalonia, it is not the same to address in this sense the guarantees of the right to education as it is the right to decent housing, or of healthcare rights and those relating to social care.

### 2.2 The legal value of social rights

When the category of social rights is invoked in the framework of constitutional rights, it is defined as those that are so called due to the function of benefit attributed to the State in order to attain effective assurance. The term *social right*, however, is more descriptive of content than a conceptual expression of a legal reality. In actuality, the social nature is generally obvious for all rights, even those that form part of a person's rights of freedom, insofar as they all, to a greater or lesser extent, require active intermediation by the public authorities through specific provisions and guarantee institutions to attain effective protection.[14]

From the legal perspective, the constitutional configuration of the guiding principles of social and economic policy makes it necessary to address the legal nature of the values and principles. The fact they all are regulatory in nature cannot be disregarded, and they are always susceptible to being claimed by the parties in judicial proceedings before any court. This regulatory nature, however, is not synonymous with direct efficacy, if they end up being invoked autonomously. On the contrary, they only acquire direct efficacy when they are claimed before the judge as a supplement to a substantive rule (Constitutional Court Judgement 18/1984 of 7 February and Constitutional Court Judgement 32/1985 of 6 March). Except, of course, in the cases envisaged in Article 14 CE—where the principle of equality and the right to non-discrimination is directly stipulated—the generic and simple appeal to the constitutional values and principles in a legal case would generate such a degree of abstraction in the proceedings that the result would have to be opening an undesirable judicial activism.

Unquestionably, the principles in Chapter III of Title I of the Spanish Constitution have the status of legal standard that is clear from the 1978 Constitution, as an example of a supreme law that forms part of the rational-normative constitution model. However, this quality makes it necessary to immediately introduce an important nuance: the nature of standard or regulation is not clear from all its content with the same degree of intensity.[15] The values and principles gain special meaning in the current constitutionalism, insofar as they

13 As general reference, see, *inter alia*, the now-classic works by Alexy, R. *Teoría de los derechos fundamentales.* Madrid: CEC, 1993; Dworkin, R. *Los derechos en serio.* Barcelona: Ariel, 1995; Fioravanti, M. *Los derechos fundamentales. Apuntes de historia de las Constituciones.* Madrid: Trotta, 1996; Laporta, F. J. "Los derechos sociales y su protección jurídica: introducción al problema". In: Betagón, J.; Laporta, F. J.; De Páramo, J. R.; Prieto Sanchís, L. (coord.). *Constitución y derechos fundamentales*. Madrid: CEPC, 2004, p. 297-325; Cascajo Castro, J. L. "Els drets socials, avui". *Revista Catalana de Dret Públic.* [Barcelona], Issue 38 (June 2009), p. 21-42; Martín-Retortillo Baquer, L.; De Otto Pardo, I. *Derechos fundamentales y Constitución.* Madrid: Civitas, 1988.

14 See Baño León, J. M. "La distinción entre derechos fundamentales y garantía institucional en la Constitución española". *Revista Española de Derecho Constitucional.* [Madrid], Issue 24 (1988), p. 155-179.

15 On the legislation and efficacy binomial, see: García de Enterría, E. *La Constitución como norma y el Tribunal Constitucional.* 4th ed. Cizur Menor: Thomson Aranzadi, 2006, p. 2-19; and Nieto, A. "Peculiaridades jurídicas de la norma constitucional". *Revista*

can be used to inform and interpret the legal standards equipped with more substantive content, in such a way so as to make it possible to judge the work of the State or AC legislator in terms of a constitution that is regulatory, but at the same time equipped with strong axiological content.

In the topic at hand—and excluding the cases in which the constitutional provision recognising a guiding principle also incorporates the express existence of a right, and therefore the constitutional constraint for the legislator and judge is more significant (e.g. the right to protection of health, Article 43(1); the right of access to culture, Article 44(1); the right to the environment, Article 45(1); the right to decent housing, Article 47(1)—the principles of social and economic policy recognised by the Constitution are, certainly, standards. But until the intermediation by the legislator takes place, these principles only appear as an expectation of enforceable rights, without, on the other hand and *prima facie*, having the status of subjective rights.

In any case, regardless of whether the guiding principle incorporates a right or its formulation is more generic, in accordance with the provisions of Article 53(3) CE, by virtue of the constitutional value of political pluralism (Article 1(1) CE), the law and its implementing rules will have to specify the political option chosen by the parliamentary majority. Therefore, the law is the instrument that—admittedly with a materially limited power of provision—must allow for the content of the guiding principles of social and economic policy to materialise into subjective rights that can be invoked before the courts.

At the same time, its regulatory nature is limited to establishing general mandates for action for the legislator, setting up institutional guarantees to ensure the future delivery of benefits or to anticipate programming standards the public authorities must abide by, etc. Consequently, the mediated nature of its legal efficacy is clear in the fact that in no case can it fail to be recognised by the public authorities, either when parliament is in the process of approving a law that is connected to a guiding principle or, likewise, when the judicial bodies are settling a materially similar question.[16]

## 2.3 The public authorities and social rights

The Constitution recognised rights in the social sphere as well as some guiding principles of social and economic policy (Title I, Chapter III). With regard to the latter, it established that these principles may only be claimed before ordinary courts in accordance with the legal provisions implementing them (Article 53(3) CE). Logically, it did not go any further and it did not have to. It would not have been prudent for the Constitution to rigidly fix the guaranteed content of all rights from the social sphere once and for all. If it had done so, the Constitution would be impeding the legislator's ability to take different options to establish this content and articulate the protection of the rights. On the other hand, as these are rights that depend more than others on the public authorities' ability to deliver, full constitutional or statutory recognition would have been of little use—except making the Constitution and the Statute purely semantic texts—without also taking into account the variables of a financial nature regarding which the legislator must always have decision-making capacity.

Therefore, in principle, it is the legislator that shapes their content,[17] but their availability is not absolute, because the constitutional precept relating to their guarantees establishes that their recognition, respect and protection "shall guide legislation, judicial practice and actions by the public authorities". But does this mandate to the public authorities, despite its generic nature, mean the guiding principles hold an intangible core that the legislator and the other public authorities must respect? Or to what extent can the constitutional jurisdiction annul the legislative work of the Catalan Parliament, which has regulated a guiding principle in a certain sense? There is no question that the tension between democratic legislator and constitutional justice is always present and forms one of the central problems in applying the Constitution.[18]

Thus, these questions about the role of the legislator and the constitutional jurisdiction versus the law and its application are also projected onto the rights from the social sphere, even though some of these rights

*de Administración Pública.* [Madrid], Issues 100-102, vol. I (1983), p. 371-416.

16 See Cascajo Castro, J. L., *op. cit*.

17 See Sastre Ariza, S. "Hacia una teoria exigente de los derechos sociales". *Revista de Estudios Políticos,* Issue 112 (April-June 2001), p. 268.

18 On this topic, see: Ferreres Comella, V. *Justícia constitucional y democràcia.* 2nd ed. Madrid: CEPC, 2007.

have a different constitutional “status” and not all of them correspond to a single profile. In addition to the constitutionalisation of labour-related fundamental rights, such as the right to organise, the right to collective bargaining and the right to strike, as well as of more classic social rights that have the status of fundamental rights (education), and the benefits of certain social services, there was also the recognition of other, new types of social rights, both in the Constitution as well as in the 2006 Statute of Autonomy of Catalonia in particular, based on which the Generalitat has the ability to develop its social policies.

This is the case, among others, for the right to health, to care and to social benefits, to decent housing, to the environment, the rights between consumers and users, the rights regarding rational urban planning and land-use planning, the rights of social and ethnic minorities and the right to good administration, etc.

Considering the diverse profile of the constitutional recognition of the rights from the social sphere outlined above, the questions presented, and depending on the right in question, have a different scope with regard to the public authorities’ decision-making capacity. Thus, for example, when the Constitution establishes that “The public authorities shall maintain a public Social Security system for all citizens guaranteeing adequate social assistance and benefits in situations of hardship, especially in case of unemployment” (Article 41 CE), it is stipulating that the legislator cannot establish a private scheme of Social Security benefits. Certainly, what the legislator can do is modify the forms of the benefits, but it will always be prevented from doing away with the public healthcare system funded from the national budget.

On the other hand, the legislator has more room to manoeuvre when the Constitution, after recognising “the right to health protection”, adds that “It is incumbent upon the public authorities to organize and watch over public health by means of preventive measures and the necessary benefits and services. The law shall establish the rights and duties of all in this respect” (Article 43(1) CE). In this case, therefore, apart from stipulating that the measures must be preventive, it is left up to the legislator to decide what they must be.

Conversely, its decision-making capacity is more restricted in relation to the right to housing. Although the reference to “the right to enjoy decent and adequate housing” (first paragraph, Article 47 CE) is still a vague statement, the legislator must take into account the obligation stipulated in the Constitution whereby “The community shall have a share in the benefits accruing from the town-planning policies of public bodies” (second paragraph, Article 47 CE). The specification of how to make this participation effective must be determined by the legislator, and here there can certainly be various options, but in none of them may reasons of a budgetary nature act as a legitimate impediment.

In any case, the challenge for constitutional justice is significant and not always easy, if not risky. The double respect for the rights at play and for the attribution of the territorial competence for delivering these rights is the function that, as supreme interpreter of the Constitution, the Constitutional Court must deal with, as will be seen in the third section of this work. It will have to try out its jurisdictional possibilities—with the necessary self-restraint—while avoiding the always latent temptation to supplant the legislator where the content of the supreme law is less prescriptive, because whereas Parliament is the repository of direct political legitimacy, the Constitutional Court only has this legitimacy in a mediated way.

### 2.4 The unavailable core of social rights and providing for the subsistence minimum

With regard to the social rights recognised by the Constitution and those deriving from the guiding principles of social and economic policy, it is customary to introduce two limits considered unsurpassable: the will of the legislator and the financial availability reflected in the budgets, either of the State or the Generalitat. As has been highlighted before, referring to the law does not entail the full availability of the legislature to decide on its content, nor can situations of economic crisis and circumstances linked to economic availabilities serve as legitimate grounds for suppressing the law due to lack of funding. In order to clarify this approach, the doctrine and comparative case-law have supported the existence of a kind of resistant core of the content of social rights that should be invulnerable to the effects of the limits described.

At the same time, the moral assumption that usually justifies the guarantee of social rights is the principle of equality,[19] and the legal basis of the unavailable core of social rights has been established by the constitutional case-law in the value of dignity, as an interpretative supplement of all constitutional rights.

The 1978 Constitution did not expressly envisage legal requirements on the existence of a resistant core—as a kind of essential content—of social rights. Various new-generation statutes of autonomy have done so, however, in different forms, which have recognised the right to a guaranteed income, a basic guaranteed minimum or a basic income, in favour of citizens.[20] For its part, the Statute of Autonomy of Catalonia also recognises that "persons or families who find themselves in a situation of poverty have the right to access a guaranteed income ["renda garantida de ciutadania"] that will ensure they have the minimum to live in dignity, in accordance with the legally established conditions" (Article 24(3) EAC).

In other words, these statutory provisions seek to determine whether the constitutional rights from the social sphere (those in the second section of Chapter II and Chapter III CE and the rights and guiding principles in Title I EAC) have a core that will withstand the regulatory interventions of the public authorities, especially Catalan Parliament. Therefore, despite the legislator having a political discretion to shape its content and scope, this discretion is limited by the Constitution and Statute of Autonomy.[21]

Based on an initial interpretation by the Constitutional Court, and with regard to the Social Security system, in its Judgement 37/1994 of 10 February, the Court affirmed that Article 41 CE "confirms, in the form of an institutional guarantee, a public scheme whose preservation is deemed essential to ensure constitutional principles, establishing [...] a core or stronghold that is essential for the legislator". However, although it is clear that this constitutional precept referring to the public nature of Social Security has a more prescriptive profile than other precepts, certain sectors of the doctrine have argued that all the rights in the socio-economic sphere have an unavailable core resistant to legislative activity that must be preserved, and that in its protective role, constitutional justice must play an important part in ensuring the justiciability and efficacy of social rights.[22]

In a similar sense, the constitutional jurisdiction has provided a fairly significant interpretation of Article 41: "the protection of citizens facing situations of need is regarded as "a function of the State" and the precept cited confirms, in the form of an institutional guarantee, a public scheme whose preservation is deemed essential to ensure constitutional principles, establishing a core or stronghold unavailable to the legislator".[23] In accordance with the same logic, this function of the State designed to address situations of need must also cover the realisation of non-contributory benefits.[24]

For its part, the Supreme Court has interpreted the existence of a connecting relationship between the value of a person's dignity and the right to housing, arguing that the current regulation of the public asset of land fulfils the requirements of Article 47 CE and it is aimed at "responding to the current serious crisis in housing, which forms the necessary space to be able to develop fundamental rights such as personal and family privacy and personal dignity".[25]

19 See Laporta, *op. cit.* p. 307.

20 This is the case, for example, of Castile and Leon, Valencia, the Balearic Islands, Andalusia and Aragon.

21 Ponce Solé, J. "Las líneas rojas constitucionales a los recortes y la sostenibilidad social. ¿Derechos vs. eficiencia y economía?". In: Nogueira, A.; Lois, M.; Diz, I. (ed.). *Crisis, derechos sociales e igualdad.* Valencia: Tirant lo Blanch, 2015, p. 316.

22 See Carro Fernández-Valmayor, J. L. "Derechos fundamentales socio-económicos y prestaciones esenciales". In: Agirreazkuenaga Zigorraga, I. (col.). *Derechos fundamentales y otros estudios en homenaje al Prof. Dr. Lorenzo Martín-Retortillo*. Vol. I. [Zaragoza: El Justicia de Aragón] (2008), p. 377; Carmona Cuenca, E. "¿Los derechos sociales de prestación son derechos fundamentales?". *Estudios sobre la Constitución española: Homenaje al professor Jordi Solé Tura.* [Madrid: CEPC] (2008), p. 1115.

23 Constitutional Court Judgement 128/2009 of 1 June.

24 Constitutional Court Judgement 239/2002 of 11 December.

25 Supreme Court Judgement of 27 June 2006. This reference is taken from Ponce Solé, *op. cit.* p. 320. Also the Supreme Court Judgement of 7 May 1992 (Chamber for Social and Labour Matters) on the non-freezing of the amount indicated as minimum guaranteed interprofessional wage in the case of freezing of benefits due to Social Security debts, and the Supreme Court Judgement of 4 December 1992 (Chamber for Contentious Administrative Proceedings) concerning support for elderly persons.

From another perspective, the idea of the solid core of social rights as a limit the legislator cannot go beyond also fulfils the theoretical challenge of confronting the fairly common approach according to which the economic situation under certain circumstances and the lack of financial availability forms grounds that should allow the public authorities to stop taking action to ensure certain benefits. Thus, one of the sceptical reflections on the relationship between social rights and a poor economic situation is based—as Laporta has criticised—on the fact that social rights would only be rights when it was possible to satisfy them. Consequently, even though a right may be recognised constitutionally, it would have to remain deactivated due to the financial inability of covering it.[26]

This situation has meant the reflection on the existential guarantee of a subsistence minimum based on human dignity, for the protection of social rights, has taken root in Europe in the comparative constitutional case-law. This is the case, for example, of the Constitutional Court of Italy's ruling on the constitutionality of the State law creating the so-called social charter (Constitutional Court Judgement 10/2010 of 11 January), or the Swiss Federal Court on the fundamental right to subsistence (Judgement of 27 October 1995) or of the French Constitutional Council on the right to housing (decisions of 19 January 1995 and 29 July 1998), as well as the very important judgement of the German Federal Constitutional Court regarding the fundamental right to a subsistence minimum (judgement of 9 February 2010).[27] The provision for the right to guaranteed income set out in Article 24(3) EAC, within the chapter on rights from the social sphere, is therefore framed within the legal logic of these jurisdictional decisions.

### 2.5 The question of the irreversibility of social rights

Linked to the existence of a resistant core of social rights that must be unavailable to the legislator, once the law has specified their scope, the question of their irreversibility also arises. In other words, are the so-called "social gains" achieved in the past immune to the economic situation?

A good part of the above-mentioned legislation has been the result of applying the amended Article 135 CE; the importance of this reform in terms of the material scope of the provisions for the social state are undeniable. The recurring question is to what extent do these gains bind the current legislator, whether State or AC? Evidently, the degree of availability arising from the social rights of a fundamental nature may in no case affect their essential content (Article 53(1) CE). On the other hand, if the rights and principles in question are not fundamental, as is more common, the predominant criterion supports a greater decision-making capacity of the ordinary legislator to determine the content. This is especially the case regarding those rights that, due to their nature, are more dependent on the acting legislator's social and economic policy and, therefore, more dependent on the budgetary support that may go along with them to make them materially effective. It is clear that in this case, they may be more vulnerable when it comes to the democratic legislator's different options.

The more recent experience offered by the jurisdictional activity of the constitutional courts of two EU Member States particularly affected by the economic and financial crisis, such as e.g. Portugal and Spain, highlights different perceptions of the limits of the legislator as regards social rights.[28] In the case of Portugal—a state subject to general intervention in its economy by decision of the so-called *troika*—the bailout decided on in 2011 established the Economic Adjustment Programme for Portugal. In Spain, the intervention was limited to the banking system. In both cases, however, the consequences of the legislation approved by the respective parliaments have reduced the State's social protection system. Moreover, the Portuguese jurisdiction has

26 See Laporta, *op. cit.* p. 305.

27 These case-law references are taken from: Carro Fernández-Valmayor, J. L. "Mínimo existencial y jurisprudencia. Hacia la construcción jurisprudencial de un derecho fundamental". In: García de Enterría, E.; Alonso García, R. (coord.) *Administración y justicia. Un análisis jurisprudencial:* liber amicorum *Tomás-Ramón Fernández*. Vol. II. Cizur Menor: Civitas Thomson Reuters, 2012, p. 3832-3843.

28 Aymerich Cano, C. "El control constitucional de las políticas de austeridad. Examen de la jurisprudencia portuguesa y española". In: Nogueira, A.; Lois, M.; Diz, I. (ed.). *Crisis, derechos sociales e igualdad.* Valencia: Tirant lo Blanch (2015), p. 437-478.

shown less deference for the measures taken by the legislator on the crisis, to the extent of declaring some laws unconstitutional,[29] compared to the respect shown by the Spanish Constitutional Court in this area.[30]

## 3 The social policies of the Generalitat: between the State legislator and the Constitutional Court's interpretation

Having reached this point and considering, on the one hand, the restrictions represented by the effects of the financial crisis and the structural shortcomings of the system of distribution of competences established by the block of constitutionality, on the other, the position of social rights in relation to the functions attributed to the legislator and the judge, it is necessary to examine the impact on the social policies to be developed by the Generalitat's administration. Without seeking to be exhaustive, this work will focus its attention on some of the more significant sectors and those regarding which both the effects of the crisis as well as the State legislation and constitutional case-law make it possible to take stock of the scope and limitations of the social policies.

### 3.1 Social services

The "social services" delivered in the framework of their respective powers by the various public administrations constitute, together with Social Security, the essential pillars on which the social state is founded. Like the other areas that form the structure of the welfare state, both are dealing with the challenges represented by the processes of liberalising the economy and the effects of the last decade's economic crisis, which have produced a notable growth in precarious employment and the decrease in the budgetary resources available to cover the benefits arising from social services.

The solutions devised were formulated both in the successive budget laws as well as in the extensive catalogue of legal provisions approved by the national government and national parliament, described in the first section of this work. To achieve the necessary budgetary stability by reducing the public deficit, the effects have been as follows: on the one hand, the existence of significant reductions in the financial support for social services and, on the other, the adoption of organisational measures aimed at reassigning powers and responsibilities concerning efficient social services.[31]

However, beyond the objectives of this law—the examination of which is not the purpose of this work—what is now worth highlighting is that the solutions adopted by the State legislator to deal with the crisis have not only had implications for financial availability—which have reduced the possibilities of guaranteeing the resistant core of social rights—but the capacity for managing social rights has also been reduced in the order of competences, especially in terms of the Generalitat's executive powers.

The problem has a lot to do with the competence-related shortcomings that have distant origins and have been accentuated by the crisis. To examine its practical translation into this sphere of competences, the Constitutional Court case-law and, in the framework of the advisory role, the doctrine of the Council for Statutory Guarantees of Catalonia as well, both form a good point of reference.

Therefore, in relation to the area of "social assistance" or "social services", according to the expression used by the Statute of Autonomy (Article 166), the Court has established, in accordance with the guidelines established by some international instruments, such as the European Social Charter, that social assistance in an abstract sense includes a form of protection that lies outside the Social Security system. In other words, a

29 For example, Judgement 474/2013 of 29 August, regarding legislation on retraining and objective dismissal of public employees or Judgement 863/2013 of 19 December, on the cuts that have affected civil servant pensions.

30 This is the case, *inter alia*, with Constitutional Court Judgement 119/2014 of 16 July and the Constitutional Court Judgement 8/2015 of 22 January, both related to labour reform, or Constitutional Court Judgement 93/2015 of 14 May, declaring the unconstitutionality of some measures concerning housing set out in the Autonomous Government of Andalusia's Decree-Law 6/2013 of 9 April on measures to ensure compliance with the social function of the property. This latter decision, based more on criteria of an economic nature than criteria related to legal competence, was the subject of an action filed by the Andalusian government (Constitutional Court Judgement 93/2015 of 14 May).

31 See Moreno Molina, A. M. "Organización administrativa, servicios sociales y crisis: el cambio de modelo arbitrado por la reforma local". In: De la Quadra-Salcedo Fernández del Castillo, T. (dir.). *Los servicios públicos tras la crisis econòmica.* [Valencia: Tirant lo Blanch], 2017, p. 172-225.

form with its own characteristics that separate it from other areas that are similar or close. In this sense, social assistance forms a public or private protection mechanism for specific situations of need, aimed at groups of the population not covered by the Social Security system, that operates with different or complementary methods to those typical of that system.

Regarding the framework of competences for social assistance, the constitutional case-law has provided the following interpretation: "the Constitution refers to social assistance [...] as a subject regarding which the Autonomous Communities may assume competence. Catalonia has done this in Article 166 of its Statute of Autonomy".[32] In effect, Article 166(1) EAC sets out that the Generalitat has the exclusive jurisdiction over social services, which is specified into a series of sub-areas.

However, despite the nature of exclusive jurisdiction that Article 166 EAC attributes to the Generalitat concerning social services, as well as the provisions of Article 110 EAC regarding the functional scope of this exclusivity, the interpretation of the constitutional case-law regarding this sphere reduced the AC competence, even though the social service area does not appear as a State competence in the Constitution. This argument goes into the logic of minimising or even diluting the exclusive nature of the competence in the sense that this functional qualification "does not impede the exercise of the State's competences pursuant to Article 149(1) CE, whether these competences are simultaneously present with the regional competences regarding the same physical space or regarding the same legal object".[33] In a different sense, the Council for Statutory Guarantees provided the following interpretation: "the exclusive nature of this statutory competence [...] arises from the double fact of not being mentioned, even indirectly, in the list in Article 149(1) CE and of its consideration as a competence expressly reserved for assumption by the regional statutes of autonomy by Article 148(1)(20) CE", and, therefore, the Generalitat "exercises both full legislative power as well as regulatory power and the executive function, including promotional activity and the actions of an organisational, inspecting and sanctioning nature that go along with it".[34]

Moreover, as we will later see, the reality of the State's regulatory output in the area of social services and the promotional activity linked to these services through subsidies have repeatedly gone down different routes, despite the ample constitutional case-law condemning the action of the State bodies in this regard. One example is one of the most recent, exemplified in Constitutional Court Judgement 9/2017 of 19 January, and one of the many that has occurred in recent years, where the State, through its spending power, encroaches into the spheres of competence that are the responsibility of the Generalitat, especially in the area of executive functions, shifting this responsibility from the AC bodies to State bodies. In this case, there is a positive conflict of jurisdiction lodged by the Government of the Generalitat against the Secretariat of State for Social Services and Equality Decision of 18 May 2016 announcing State subsidies aimed at developing programmes of general interest funded by the tax allocation from personal income tax. The Generalitat considered this decision breached its competences concerning social assistance.

The Court partially upheld the Generalitat's claims, in a declaratory way, providing the interpretation that, in effect, certain sections of the decision breached its executive powers concerning this subject by attributing to a State body the formulation of the draft decision announcing subsidies and by specifying the requirements and, in some cases, the documentation to be submitted for each of the programmes. In its grounds, the Court again recalls the criteria for distribution of competences established in the leading case, which continues to be Constitutional Court Judgement 13/1992 of 6 February, and regarding the interpretative rules to be applied to the activity of promotion through subsidies, it underlines that spending power does not constitute an attribution of competence to the AC, and that its projection onto a specific area must respect the system of distribution of competences established by the block of constitutionality applicable to the case. Moreover, this respect for competences makes it necessary to prevent the State from invoking the centralised management of subsidies, except for exceptional reasons justifying this (Constitutional Court Judgement 13/1992, legal basis 8(d)).

32 Constitutional Court Judgement 70/2013, legal basis 3, repeating the opinion maintained in Constitutional Court Judgement 21/2013.

33 Constitutional Court Judgement 31/2010 of 28 June, legal basis 104.

34 Council for Statutory Guarantees Opinion 13/2012, legal basis 2(2).

From here, the Court considers that neither the reorganisation nor the new systematisation of programmes, nor the differences in regulation in terms of establishing the priorities or requirements set out in the Secretariat of State's decision, can in any way alter the framing of the controversy in the constitutional and statutory system of distribution of competences. More specifically, and in accordance with the interpretative logic established by Constitutional Court Judgement 13/1992, it underlines that "the attribution of competence to the State set out in Article 149(1)(14) CE does not apply, even though the source of the funds that finance these subsidies may be related to the tax allocation from the personal income tax for purposes of general interest". Nor do the exceptional circumstances apply that might necessitate the centralised management of these subsidies, since in this case where the social services are the exclusive competence of the Generalitat, "the aid has been positioned by our case-law within the case envisaged in the same Constitutional Court Judgement 13/1992, legal basis 8(a), which precludes the possibility of centralised management" (legal basis 1).

As has been noted above, this is just another case among the many[35] in which the State has ignored the constitutional case-law regarding the relationship between its spending power and the corresponding projection onto the various areas of competence. This institutional behaviour based on repeated disregard by some State bodies has led the Court to invoke the principle of constitutional loyalty, to affirm in this case—and this was not the first time it was in this situation—the following: "As regards this same controversy, in Constitutional Court Judgement 21/2013 we had to "recall what we said in Constitutional Court Judgement 208/1999 of 11 November (legal basis 7), on the need to avoid the persistence of abnormal situations where the State continues to exercise competences for which it is not responsible, so that the order of competences that follows from the Constitution and the Statutes of Autonomy may be fully realised". As we affirmed then, "constitutional loyalty is binding on everyone (Constitutional Court Judgement 209/1990, fourth legal basis) and unquestionably includes respect for the decisions of this High Court" (eighth legal basis). The full and timely compliance therewith, to which all public authorities are bound (Article 87[1] of the Organic Law on the Constitutional Court), requires that the State address without delay the amendment of the regulatory framework for these subsidies, in order to adapt it for future announcements to the results of the clear and firmly settled constitutional case-law, in its both regulatory and executive dimension" (legal basis 3).

In short, we have highlighted above that the case-law doctrine on the spending power/competence binomial is dependent on the interpretative rules set out in the eighth legal basis of Constitutional Court Judgement 13/1992 mentioned numerous times above. However, the truth is that this doctrine has sometimes been adapted by the Court itself, as indicated in recent years in several dissenting opinions issued with regard to similar cases. Thus, for example, in Constitutional Court Judgement 226/2012 of 29 November, regarding a positive conflict of jurisdiction also raised by the Generalitat, against the Ministry of Labour and Social Affairs Order TAS/1948/2005 of 8 June establishing the regulatory bases and announcing for 2005 the granting of subsidies to develop innovation projects in social services, despite the partial upholding of its claims, the dissenting opinion signed by two judges underlined some changes in the case-law from Constitutional Court Judgement 13/1992 that until then had been considered unchallengeable. The reason for the dissenting opinion was based on the fact that in this Constitutional Court Judgement 226/2012, and also in the earlier Judgement 178/2011 of 8 November, the fundamental difference represented by having a competence in a specific area attributed or not was played down. Thus, a *vis expansiva* has been attributed to the State's intervention in the case of exclusive competence of the AC, in considering that the sphere of State competence includes, as stated in Constitutional Court Judgement 178/2011, "the regulation of aid, technical form of the aid, beneficiaries and essential requirements for access".

### 3.2 The labour sphere

Undoubtedly, another of the areas that was the subject of State legislation aimed at tackling the effects of the crisis was, and still is, the sphere of labour relations. Decree-Law 3/2012 on urgent measures to reform the labour market[36] and the subsequent Law 3/2012 of 6 July on urgent measures to reform the labour market, started a process of labour market deregulation that had a noticeable impact on the constitutional

35 For all, the Constitutional Court Judgements 21/2013, 26/2013, 52/2013, 70/2013 and 154/2013.

36 In its Opinion 5/2012 of 3 April, the Council for Statutory Guarantees of Catalonia considered that this decree-law breached the right to collective bargaining and also the Generalitat's executive competences in labour matters.

integrity of two labour rights: the right to work (Article 35 CE) and the right to collective bargaining (Article 37(1) CE). However, the majority of the Court did not see any grounds for unconstitutionality in the allegations in the constitutional challenge presented by the Socialist and Esquerra Plural [Plural Left] parliamentary groups. In any case, the new regulation of labour relations set out in the reform and, especially, its consequences—particularly restrictive regarding the right to collective bargaining, as well as the intense relaxation of employment contracts (which became increasingly temporary and precarious)—have affected the preservation of the essential content of the labour rights of workers in Catalonia as well as the rest of the working population throughout Spain. This has had the resultant affect on the Generalitat's social policies as well, with particular impact on the executive competences concerning employment.

As regards labour and active employment policies, both the case-law of the Constitutional Court as well as the advisory doctrine of the Council for Statutory Guarantees[37] have interpreted the full regulatory capacity in the labour law sphere as belonging to the State, while the executive functions correspond to the area of AC competences, including "the issuing of internal regulations to organise the necessary services (Constitutional Court Judgements 249/1988 of 20 December, legal basis 2, and 158/2004 of 21 September, legal basis 5) and to regulate the functional competence of implementation itself (Constitutional Court Judgement 51/2006 of 16 February, legal basis 4)" and, in general, "the development of the set of actions needed to implement the regulations regulating the overall labour relations system" (Constitutional Court Judgement 194/1994 of 23 June, legal basis 3), as well as "the power to impose penalties in this area (Constitutional Court Judgements 87/1985 of 16 June, legal basis 1 and 2; 195/1996 of 28 November, legal basis 8 and 9; and 81/2005 of 6 April, legal basis 11)".[38]

Moreover, as regards the scope of the concept of labour law, set out in Article 149(1)(7) CE, although the initial case-law and a good part of the case-law developed in the 1990s and 2000s by the Constitutional Court has shaped a concept limited to regulating the elements that make up the relationship between employees and employers, it has also validated in certain cases the extension of its scope to spaces linked to policies to invigorate the job market and to the implementation of certain active employment policies, specifically in the area of training programmes. In this sense, regarding the catalogue of cases included within the State's competence, the Council considered the list set out in the third legal basis of Constitutional Court Judgement 228/2012 of 29 November fairly illustrative. This list not only outlines the unquestionably specific aspects of labour relation legislation, such as the different types of contracts or the legal regime for collective bargaining, but also elements such as "placement, in its various phases or stages; employment; aid to promote employment and occupational vocational training, as well as stimulus actions for job recruitment in its different forms [...]; continuing professional development [...]". Therefore, as the Council stressed, "the delimitation of the scope of Article 149(1)(7) CE has, in certain areas that border but do not exactly coincide with labour law, gone beyond the restrictive idea established since the first stages of the constitutional case-law".[39]

Despite this case-law guarantee for a certain broad idea of the concept of labour law as a competence attributed to the State, this has not been an obstacle for the Court to declare the unconstitutionality and invalidity of certain precepts of national provisions that constituted a breach of the Generalitat's executive powers in labour matters. This has been the case still recently, for example, with Law 30/2015 of 9 September regulating the vocational training system for employment in workplace.

In the opinion of the Generalitat, the contested precepts of Law 30/2015 did not respect the order of distribution of competences established by the block of constitutionality (Articles 149(1)(7) CE, 115(2) EAC and 170(1)(b) EAC) in relation to active employment policies. The justifying reason is based on the fact that in this case, the State applied the criterion of supraterritoriality as the means of attributing competences, thus disregarding the Generalitat's competence in the execution of labour matters, by attributing to a State body, the State Public Employment Service (SPEE), various functions that are not within its remit. In effect,

37 See, for all, Council for Statutory Guarantees Opinion 9/2015 of 4 June (legal basis 2) and Council for Statutory Guarantees Opinion 3/2013 of 26 February (legal basis 3).

38 See Council for Statutory Guarantees Opinion 3/2013, legal basis 3(3).

39 Council for Statutory Guarantees Opinion 9/2015, legal basis 2.

the competence issue under dispute in this case—and in other previous cases of the same nature—is the scope of the principle of territoriality. As is generally known, and beyond the cases expressly provided for by the block of constitutionality, the principle of territoriality of AC competences is not, in itself, a means of attributing competences. Thus, the supraterritorial effect of an AC competence does not entail the automatic shift of this competence in favour of the State. In the case of Law 30/2015, the conflict of competences was focused on determining whether the accreditation and registration of entities engaged in remote training was the responsibility of the State (SPEE) or the relevant body of the Generalitat, since these entities have centres located in several AC.

The Court settled the case by recalling that, although the use of supraterritoriality as a criterion for determining the attribution of competences to the State in spheres of competence reserved to the AC is not prohibited, it must always be considered an exceptional criterion. When does this exceptional case occur? This happens "when, in addition to the phenomenon in question being supra-regional, it is not possible to divide the public activity performed regarding this phenomenon, wherever this activity cannot be performed by means of cooperation or coordination mechanisms either, and, therefore, it may require a degree of standardisation that can only be guaranteed through attribution to one body, which is necessarily the State" (Constitutional Court Judgement 22/2014 of 13 February, legal basis 2, and Constitutional Court Judgement 81/2017 of 22 June, legal basis 3).

Therefore, in the case of the disputed executive competences, the Court underlines that the general rule must be the attribution of competence to the AC according to the matter in question. In the case in question, the executive competence in labour matters should have been attributed to the Generalitat.[40] This was recognised, although partially, without sufficiently understanding the reason why it was not decided to attribute this competence to the Generalitat in full. On the one hand, the Court recognises that the Generalitat, and not SPEE, must be responsible for the executive competences related to obtaining professional qualification certificates via three different methods (remote training, mobile centres and through entities that have permanent facilities and resources in more than one AC); however, on the other, it maintains that the SPEE must be responsible for the functions of programming, managing and monitoring vocational training, where this relates to training initiatives funded through subsidies for Social Security contributions for companies that have workplaces in more than one AC, or to programmes or training actions requiring intervention from the SPEE to ensure a coordinated and standardised action. In that regard, the criterion used by the Court in this case is not sufficiently understood, as the functions of programming, management and monitoring are also executive. The fact that the doctrine of the supraterritoriality of the effects of the competence is applied in the first case and denied in the second is inconsistent, since the function in question is the same.

This case has been preceded by other very similar cases in which the Court fully or partially recognises the Generalitat's executive competences in labour matters, in order to develop a certain scope for decisions in this sphere in the application of State legislation.[41]

### 3.3 Housing

The progressive indebtedness of natural persons and companies caused by the economic and financial crisis in Catalonia and the rest of Spain has had a particular impact on the availability of housing acquired through mortgages granted by various financial institutions. The inability of many citizens to cope with their loan obligations, as a result of the devastating effects of the employment crisis, led to the enforcement of mortgages and evictions of many flats due to lack of payment. Loss of housing has become a large-scale

40 Constitutional Court Judgement 194/2011, legal basis 6, and Constitutional Court Judgement 95/2013, legal basis 7, both mentioned in Constitutional Court Judgement 81/2017, legal basis 3.

41 See, *inter alia*, Constitutional Court Judgement 150/2012 of 5 July, in relation to Decree-Law 13/2009 of 26 October creating the State fund for employment and local sustainability; Constitutional Court Judgement 27/2014 of 13 February, regarding Royal Decree 1529/2012 of 8 November developing the contract for training and education and establishing the bases for dual vocational training; or Constitutional Court Judgement 61/2015 of 18 March, regarding Royal Decree 34/2008 of 18 January regulating professional qualification certificates, as amended by Article 1 of Royal Decree 189/2013 of 15 March.

social problem[42] in such a way that the crisis has affected the resistant core of this right from the social sphere, depriving citizens of access to a place to live.

The significance of this impact has made it necessary to look at new approaches to housing policies. From the institutional and legal perspective, the various public administrations have taken measures that have broadly consisted in:[43] redirecting housing plans from promoting ownership to rental, or even reducing new construction in favour of building refurbishment; passing new legislation on housing to contribute to making the right to housing effective (in Catalonia, an example in this regard was Law 8/2007 of 28 December on the right to housing) and the adoption of extraordinary measures to tackle the problems that have reached considerable dimensions, such as the eviction of vulnerable persons and families from their main residences.

The framework of competences on the right to housing is recognised in Article 137 EAC as an exclusive competence. However, significantly, both Article 47 CE and Article 47 EAC refer to the right to housing as a principle of social and economic policy, and they immediately mention land-use policies, as these form part of town-planning policy. Moreover, as interpreted by the Council for Statutory Guarantees[44], and along the same interpretive lines as the Constitutional Court, it can be considered that "urban planning law focuses on the organisation of the population centres, the territorial organisation of cities, while legislation on housing mainly addresses the conditions of buildings as a living space for people". These are therefore different, but closely linked, policies, so urban planning and programming must be consistent with housing planning and programming, because this largely depends on the availability of land.

As regards housing, the Generalitat's competence takes shape in a set of powers that facilitate the recognition of its outlines. The doctrine and the rules themselves have made it possible to also identify a set of powers that, without seeking to be exhaustive, include the activities of advocacy, promotion, programming and execution, specifically for protected housing, the regulation and conditions of habitability and first occupation, control of the quality or sustainability of construction, as well as verification of the compliance with rules on conservation and maintenance of homes, etc.

In the framework of these competences, the Generalitat's response to the crisis began with Law 18/2007, cited above, and more recently with Law 14/2015 of 21 July on the tax on empty homes and amending tax rules and Law 3/2012, as well as Law 24/2015 of 29 July on urgent measures to address the emergency in the area of housing and energy poverty. Both have been the subject of various constitutional challenges lodged by the Prime Minister of Spain and are pending before the court. However, with respect to the first law, the Court, within the mandatory time-limit of five months pursuant to Article 162(1) CE, has decided to fully lift the precautionary suspension that had been imposed on the contested provisions.[45] By contrast, the majority of the judges decided to maintain the suspension of all the contested provisions of the second law.[46]

With respect to Law 14/2015 regarding the tax on empty flats, the Court, in its task of weighing up individual and general interests and in order to decide on the precautionary suspension measure, considered that the harm to the general interest claimed by the State attorney was not based on accurate information. Considering

42 The terms under which these loans were taken out were often unfair, something that has been appreciated by the Court of Justice of the European Union in its significant Judgement of 14 March 2013 handed down in relation to a request for a preliminary ruling from Commercial Court no. 3 of Barcelona, related to certain provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. In the operative part of the judgement, the CJEU considered that: "Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not allow the court before which declaratory proceedings have been brought, which does have jurisdiction to assess whether such a term is unfair, to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision". This decision has been followed by many others in the same sense, including the recent CJEU Judgement (Fifth Chamber) of 7 December 2017.

43 See: Vaquer Caballeria, M. "Retos y oportunidades para una política cabal de vivienda tras la crisis económica". In: De la Quadra-Salcedo Fernández del Castillo, T. (dir.). *Los servicios públicos tras la crisis económica.* Valencia: Tirant lo Blanch, 2017, p. 229-230.

44 Council for Statutory Guarantees Opinion 8/2011 of 27 September, legal basis 3.

45 Constitutional Court Interim Judgement 157/2016 of 20 September.

46 Constitutional Court Interim Judgement 160/2016 of 20 September.

this circumstance, and despite the fact that the decision on the substance of the challenge is pending, the Court considered the alleged harm to the general interest cannot prevail over the presumption of legitimacy of the Generalitat's tax law. The specific justification that served as the grounds for lifting the suspension of all the provisions was based on the following terms: "From the regulation of the disputed tax, it follows that the legal persons possibly affected by a refund will be sufficiently identifiable. The possible refund to these entities of the amounts already paid, arising from the possible admission of the constitutional challenge, will not produce damages that cannot be or will be difficult to compensate. Even if a significant number of people were affected, this would not mean that the charges and cost of the operations to refund the amounts paid would be excessively onerous in nature, which the Autonomous Community of Catalonia has estimated at €14,326,562.01 for the financial year 2016; in any case, it would not have to be higher than the other cases, mentioned above,[47] in which the Court has proceeded to lift the precautionary suspension of the tax". (Constitutional Court Interim Judgement 157/2016, legal basis 4).

Finally, in terms of Law 24/2015, regarding energy poverty, the majority opinion of the Court to maintain the suspension of the contested provisions is mainly based on reasons of an economic and financial nature set out in a Bank of Spain report, cited by the State attorney, referring to this law of the Catalan Parliament, which repeats the concern expressed by the competent European authorities, who highlighted the potential negative impact of the AC's initiatives to protect mortgage debtors for the activities of the Bank Restructuring Asset Management Company (SAREB). The arguments of the majority of the Court, which were not shared by three dissident judges, were the following: although the contested provisions do so slightly in quantitative terms, in any case "they impact the financial system as a whole and generate, in a situation such as this of exceptional distrust in the credit system considered globally, an impediment to the public interest represented by the stability of this system and, insofar as it may jeopardise carrying out the banking restructuring supported with public funds by virtue of a special State aid scheme under the authorised terms, it gives rise to an equally certain effect for compliance by Spain of its international commitments, interests prevalent in the matter under consideration and clearly distinct from the compensable damage the credit institutions might suffer, considered singularly". (Constitutional Court Interim Judgement 160/2016, legal basis 4).

### 3.4 Education

Recently, the Generalitat's ability to develop its competences in education and implement public policies in this sphere have been affected by a new change in State legislation in this area: Organic Law 8/2013 of 9 December to improve educational quality (LOMCE). This is the umpteenth basic general regulation on the right to education, projected onto a shared area of competence and against which the Generalitat has appealed to the Court.[48] The educational model in this law alternates with the part that has remained in force from the former Organic Law 2/2006 of 3 May on Education (LOE). With the aim of improving quality and competitiveness, Law 8/2013 now allows, in a clearer way, private operators in the sector to provide public educational service with the only limit being the wishes of their users, which—it is affirmed—may mean that in the medium term, private State-funded schools become the main model[49] and public schools move to a more subsidiary position than they now occupy.

47 The interim judgement refers, *inter alia*, to an environmental tax in the Balearic Islands (Constitutional Court Interim Judgement 253/1992); another on credit institution deposits in Extremadura (Constitutional Court Interim Judgement 174/2002) and also the same in Catalonia (Constitutional Court Interim Judgements 123/2013 and 154/2013); the Catalan tax on provision of content by electronic communication service providers and promotion of the sector and the dissemination of digital culture (Constitutional Court Interim Judgement 196/2015), as well as the Catalan tax on the production of electricity generated by nuclear power (Constitutional Court Interim Judgement 202/2015).

48 Regarding this issue, see the opinions issued by the Council for Guarantees: Council for Statutory Guarantees Opinion 3/2014 of 28 January and 4/2014 of 12 February.

The Constitutional Court Judgement of 22 February 2018 was published during the review phase for this work, partially upholding the constitutional challenge lodged by the Government of the Generalitat of Catalonia. In sum, the Court annulled some of the contested provisions due to considering they violated AC competences concerning education. Among other aspects, the judgement considers that the system designed by the law to guarantee the teaching of the Spanish language supported using public funds does not respect the distribution of competences between the State and the AC.

49 Celador Angón, O. "Una perspectiva de la situación de la educación como servicio público". In: De la Quadra-Salcedo Fernández del Castillo, T. (dir.) *Los servicios públicos tras la crisis económica.* Valencia: Tirant lo Blanch, 2017, p. 167.

From the perspective offered by the block of constitutionality and considering the nature of shared competence for competences regarding education, framed by the provisions on the fundamental right to education set out in Article 27 CE, the State is responsible for approving the basic rules and fulfilling the conditions of its dual material and formal aspect, as has been dealt with in numerous constitutional judgements.[50] As the advisory doctrine of the Council for Statutory Guarantees has highlighted, from this case-law it is necessary to underscore that the regulatory intensity of the bases varies a great deal from one subject area to another and that, in the material sphere of education, the bases can largely be limited to the general lines established by the minimum common denominator for the area, since, by its nature, this is one of the competences of Article 149(1) CE that better allows for the consideration of the bases as general criteria and characteristics. For the same reason, the law's references to future State regulations has to be exceptional.[51]

However, the reality in this area has gone down very different routes. Apart from the cases in which the State has maintained an expansive conception of its competence to establish the lowest common regulator in this material area—such as, *inter alia*, was the case with Royal Decree 830/2003 of 27 July establishing the common primary education, where the Catalan Government filed a complaint regarding competence based both on the very detailed regulation of the bases as well as on the regulation of the language regime; its claims were dismissed by the Court—[52]now attention must be paid to the management of scholarships provided by the exercise of executive competences. By way of example, it is worth maintaining the position held by the constitutional jurisdiction in relation to Royal Decree 609/2013 of 2 August establishing the thresholds for family income and assets and the amounts of the scholarships for the 2013-2014 academic year and also with respect to Royal Decree 1721/2007 of 21 December establishing the system of personalised scholarships and study grants.

Both cases raise the common issue of determining which public administration is responsible for managing scholarships, taking into account the constitutional case-law established in the leading case of Constitutional Court Judgement 13/1992. In the first case, the Court rejects the centralised execution of managing the variable amount of the grants for doing post-compulsory studies, ruling that the direct exercise of this function corresponds to the Generalitat. Moreover, it denies that the attribution of competence applies pursuant to Article 149(1)(1) CE, referring to the regulation of the basic conditions that guarantee equality between all Spaniards, all reasons that support the breach of the Generalitat's competences.[53] In the second case, the arguments used by the Court to allow it—partially, in this case—are the same, in addition to adding the absence of the exceptional nature that may justify State intervention and also refusing to apply the criterion of supraterritoriality to shift the competence in favour of the State.

However, as in the case of social services, it is worth recalling here the warning made in fairly resounding terms by the Court in view of the repeated breach by the State Administration of its decisions, by again calling on the principle of constitutional loyalty.[54]

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50 See, *inter alia*, Constitutional Court Judgements 184/2012 of 17 October and 212/2012 of 14 November.

51 Council for Statutory Guarantees Opinion 3/2014, legal basis 2(1).

52 Settled 10 years later in Constitutional Court Judgement 15/2013 of 31 January. In the same sense, Constitutional Court Judgement 2/2014 of 16 January, regarding Royal Decree 832/2003 establishing common post-compulsory secondary education, where it again maintained the same criterion on language in non-university education.

53 Constitutional Court Judgement 95/2016 of 12 May.

54 "At times, when dealing with the persistence of abnormal situations of disagreement with the Constitution, this Court has declared the duty of loyalty to the Constitution by the public authorities (Constitutional Court Judgement 247/2007 of 12 December, legal basis 4, affirmed this duty as "an essential support for the functioning of the State composed of autonomous regions", and Constitutional Court Judgement 42/2014 of 25 March, legal basis 4, highlighted it in relation to the Legislative Assemblies of the Autonomous Communities) or the principle of constitutional loyalty that binds all public authorities (in Constitutional Court Judgements 209/1990 of 20 December, legal basis 4; 158/2004 of 21 September, legal basis 7; and 245/2012 of 18 December, legal basis 26, highlighted in relation to the central State institutions). More specifically in Constitutional Court Judgement 208/1999 of 11 November (RTC 1999, 208), legal basis 8, we affirmed "the need to avoid the persistence of abnormal situations where the State continues to exercise competences for which it is not responsible, so that the order of competences that follows from the Constitution and the Statutes of Autonomy may be fully realised", due to understanding that "the State composed of autonomous regions set up by our Constitution will not achieve its finished design in this area as long as the order of competences that follows from the Constitution and the Statutes is not fully realised". These words are fully valid and sufficient for responding to the claim submitted by the Autonomous Community that lodged the challenge". (Constitutional Court Judgement 95/2016, legal basis 8).

### 3.5 Public health

A final mention must be made of the competences in the area of public health and, more specifically, those relating to the pharmaceutical management and pharmaceutical products (Article 149(1)(16) CE and Article 162 EAC). The distribution of competences in this area is determined substantially by the functional criterion, in such a way that the State is responsible for issuing the basic legislation and exercising the coordination, while the autonomous communities are responsible for legislative and regulatory implementation and the executive function.

In the area of pharmaceutical management and pharmaceutical products, and for collection purposes, in 2012 the Generalitat created a new tax, known as *the one-euro prescription*, which sought to levy a tax on the preparatory steps and accessory services for improving information inherent in the process for the prescription and dispensing of medications and healthcare products, by means of issuing medical receipts and dispensing orders. This tax was incorporated into Article 41 of Law 5/2012 of 20 March on fiscal, financial and administrative measures and creating the tax on stays in tourist establishments.

However, the Court declared it unconstitutional and invalid due to the breach of State competence pursuant to Article 149(1)(16) CE. As regards the essentials, the Court considered that this tax did not apply to a new benefit nor did it represent an added value that the tax sought to finance by means of an accessory service, as an expression of a specific policy of the Generalitat concerning public health. Its arguments were based on the existence of a case of double taxation: "the examination of the chargeable event of the tax allows for concluding that it does not apply to a new benefit, but directly on all the benefits included in the supplementary common portfolio (Article 8ter of the Law on the cohesion and quality of the National Health System),[55] the funding of which is regulated, in the terms set out above, in Articles 94 and 94bis of the Law on Medicines,[56] which limit the user's contribution to the cases envisaged therein. The establishment of a tax such as the one at issue is therefore incompatible with this basic regime, due to making the acquisition of prescription medications more costly for citizens in the Autonomous Community of Catalonia".

55 Law 16/2003 of 28 May on cohesion and quality of the National Health Service.

56 Law 29/2006 of 26 July on the guarantee and rational use of medications and healthcare products.

## 4 Final considerations

In the same way as the rest of the AC, in Catalonia the Generalitat has also been the main support that has sustained the construction of the basic pillars of the social state. However, the regulatory possibilities and, ultimately, the scope it has had to implement its own policies to guarantee rights in the social sphere, have been determined in part by the devastating impact of the financial crisis in the last decade that is still being felt, which has particularly affected the states in the euro zone. In addition, for structural reasons, this determination is also attributable to the shortcomings presented by the constitutional system of distribution of competences, which, as such and beyond economic contexts, have in practice limited not only the regulatory capacity of the Parliament and Government of Catalonia, but also the Administration's management powers in basic sectors of social policy (education, public health and social services).

The effects of the crisis had a constitutional impact through the reform of Article 135 CE, which, by introducing the rule of priority in the payment of public debt, notably reduced the political freedom both of the national Spanish parliament as well as the Catalan Parliament to decide on the purpose of public spending. Certainly, both in Catalonia as well as in Spain overall, the respective legislators were particularly diligent in developing the principle of budgetary stability. The result has produced diminishing effects on the preservation of the so-called core unavailable to the legislator of a good number of social rights. However, even so, the institutional responses to the financial crisis have exacerbated the limitation of the Generalitat's political autonomy and have generated a process of recentralisation in the exercise of competences, especially in terms of affecting the executive function, even despite the resounding warnings put forward by the Constitutional Court in view of the repeated breach of some of its decisions by the State.