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# Master Working Paper

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**Nikolaos Papadopoulos**

**Austerity-based Labour Law Reforms in Greece**

**vs**

**Fundamental Rights during the European Debt Crisis**

An evaluation through the lens of supranational and national  
bodies' jurisprudence

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## Abbreviations

AG	Advocate General
CFA	Committee on Freedom of Association
CJEU	Court of Justice of the European Union
ECB	European Central Bank
ECHR	European Convention of Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
GC	General Court
ILO	International Labour Organization
IMF	International Monetary Fund
MoU	Memorandum of Understanding
TEU	Treaty of the European Union
TFEU	Treaty of Functioning of the European Union
UN	United Nations

# 1. Introduction

## 1.1. Background to this study

In 2007 the world witnessed one of the most severe crises since WWII: the global financial crisis. In a globalized world, markets interrelate in such a way that the crisis that burst in the United States quickly spread into Europe, putting intense pressure on Europe-based banks and as a consequence of the so-called “doom loop”<sup>1</sup> on European states and institutions to confront the emergency that was threatening the viability of the Euro. The first EU country to harshly face the crisis implications was Greece, followed by Ireland, Portugal, Italy, Spain and Cyprus. This “spill-over effect” established the Sovereign Debt Crisis in Europe, starting in 2009. At that time Greece was already struggling with a high public debt and was unable to handle such a situation itself, resorting to assistance from the outside. For that purpose, and due to the lack of an EU legal financial support mechanism<sup>2</sup>, the lack of sufficient EU firepower to deal with a massive sovereign debt crisis<sup>3</sup> and the difficulties of increasing the EU budget<sup>4</sup>, various European loan facilities were created either by bilateral<sup>5</sup> or international agreements<sup>6</sup> or within EU law<sup>7</sup> between 2010 and 2015. This assistance, however, was not given unconditionally but under the strict conditionality requirement of implementing austerity-based<sup>8</sup> policies under the agreement of Memoranda of Understanding<sup>9</sup>, negotiated and monitored by the so-called “Troika”, which consists of the European Commission, the European Central Bank and

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<sup>1</sup> “Doom loop” refers to the vicious/toxic link between banks and sovereigns that may appear when a primarily private debt crisis transforms into a public debt crisis because states have to recapitalize private banks to tackle the crisis.

<sup>2</sup> The “no-bailout clause” of article 125 TFEU ensures that M. States follow a sound budgetary policy by prohibiting the Union and the M. States from granting financial assistance to other M. States (Also see interpretation of the principle by the CJEU in *Thomas Pringle v Government of Ireland and Others*, C-370/12, specifically paras. 135-137).

<sup>3</sup> De Witte 2013, p. 4.

<sup>4</sup> Kilpatrick 2015, p. 334.

<sup>5</sup> Greek Loan Facility (“GLF”) and decision of 8 May 2010 for a loan of 80 billion euros by Eurozone States and 30 billion from the International Monetary Fund (“IMF”) to Greece.

<sup>6</sup> European Financial Stability Facility (“EFSF”) established by Council document 9614/10; European Stability Mechanism (“ESM”) established by Council Decision 2011/199/EU amending article 136 TFEU, and ESM Treaty.

<sup>7</sup> European Financial Stability Mechanism (“EFSM”) established by Council Regulation 407/2010, legally based on article 122 (2) TFEU with a restricted by the EU budget capacity of 60 billion euros (article 2(2) of the Regulation).

<sup>8</sup> Austerity is also referred to in the literature as fiscal consolidation, i.e. economic, policy or legal measures to reduce public debt and deficit such as cuts in public spending, wages, pensions and social benefits, as well as tax increases.

<sup>9</sup> The programmes that lay under the MoUs are known as Economic Adjustment Programmes.

the International Monetary Fund. “The age of austerity”<sup>10</sup>, an ideological political choice deemed a necessity, had just begun.

The EU’s and M. States’ loyal dedication to saving failing financial institutions and market interests and agents, in conjunction with the application of such austerity policies either within the context of the financial mechanisms or the context of EU Economic Governance has been heavily criticized<sup>11</sup>. The criticism focuses *inter alia* on the fact that these policies shift the burden of the crisis onto States and their citizens,<sup>12</sup> they neglect to consider the social impact of these policies especially on the vulnerable<sup>13</sup> and largely affect individuals’ ability to enjoy fundamental (social) human rights<sup>14</sup> to the detriment of national sovereignty and the European social model<sup>15</sup>. More specifically, a blow-out has been struck on labour rights and relations; Greece and other countries under bail-outs have witnessed structural reforms under the “neoliberal dogma of liberalization and deregulation”<sup>16</sup> of individual labour relations and break down of the collective bargaining system towards flexible and insecure paths. Nevertheless, despite these reforms, no significant signs of progress towards the intended economic goals of “fighting unemployment and restoring competitiveness”<sup>17</sup> have been noted so far in Greece<sup>18</sup> as unemployment stands at 21,2%<sup>19</sup>, GDP growth remains subdued and fragile<sup>20</sup> and the public debt still stands at the outstanding 176,6% of GDP<sup>21</sup>. It is important to note in that regard, that the third Greek MoU formally reached its end on the 20<sup>th</sup> of August 2018<sup>22</sup>, however, according to the Eurogroup<sup>23</sup> and the European Commission<sup>24</sup>, Greece will shortly enter a post-Memorandum Enhanced Surveillance Procedure<sup>25</sup>, that will be even

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<sup>10</sup> O’ Connell 2012, p. 60.

<sup>11</sup> Brown 2015, p.

<sup>12</sup> International Monetary Fund 2013, p. 2.

<sup>13</sup> O’ Gorman 2017, p. 267.

<sup>14</sup> UN Special Rapporteur on extreme poverty and human rights 2011, p. 22.

<sup>15</sup> Tuori and Tuori 2014.

<sup>16</sup> Yannakourou and Tsimpoukis 2014, p. 333.

<sup>17</sup> Hellenic Parliament 2012, p. 25.

<sup>18</sup> Krugman, 2013; Katrougkalos, Figueiredo and Pararas, 2014; Cf. OECD 2018.

<sup>19</sup> ELSTAT 2018a.

<sup>20</sup> Argitis and Koratzanis 2018.

<sup>21</sup> ELSTAT 2018b.

<sup>22</sup> European Stability Mechanism 2018.

<sup>23</sup> Council of the EU 2018, p. 2.

<sup>24</sup> European Commission 2018a; European Commission 2018b.

<sup>25</sup> See Regulation (EU) 472/2013.

stricter than that of other countries that have exited similar programs<sup>26</sup>. In that context, there will be a government commitment to continue structural reforms in certain areas including the labour market and to keep untouched and not reverse the reforms that have been implemented with the previous memoranda at least until 2022 (principle of irreversibility)<sup>27</sup>. It should be noted, however, that according to Salomon<sup>28</sup>, these policy responses to the crisis have foregrounded legal gaps when it comes to securing socio-economic rights protections across the various levels of external influence, therefore fundamental rights are a matter that is and should still be on the agenda.

In Greece, austerity policies implemented during the crisis have been targeting fundamental rights and especially work rights with the forced imposition<sup>29</sup> of measures such as reduction of salaries and minimum wage, weakening of labour protection, decentralization of the collective bargaining system and reduction of trade unions' power, leading to a decline of fundamental labour law principles<sup>30</sup> and deterioration of working and living conditions<sup>31</sup>. A considerable number of legal challenges against such measures for violating fundamental (social) rights arose rapidly before supranational and national competent bodies. However, the jurisprudence that has developed in that regard seems incoherent<sup>32</sup> and shows real differences in approach<sup>33</sup>. Specifically, the competent Greek Supreme Court, the Council of State, after an initial period (2010-2014) of judicial self-restraint<sup>34</sup> due to the immense pressure of the falling Greek economy, has developed a more active, but not coherent<sup>35</sup> jurisprudence, ruling on the constitutionality of the imposed austerity measures that mainly contain cuts in wages and pensions with reference to the Greek Constitution, the ECHR and other treaties, denying, however, applicability of the EU Charter of Fundamental Rights<sup>36</sup>. Nevertheless, recent jurisprudence of the Greek Council of State (2014-2018) is slowly moving towards the direction of declaring the

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<sup>26</sup> E.g. review missions every three months instead of six.

<sup>27</sup> EFSYN 2018a; EFSYN 2018b.

<sup>28</sup> Salomon 2015, p. 29.

<sup>29</sup> I.e. without initially engaging in social dialogue despite the agreed relevant provision of the ESM Treaty explicitly provided in article 13 (3) but also articles 7 (1) and 8 of Regulation 472/2013.

<sup>30</sup> Kazakos 2013, p. 6.

<sup>31</sup> Koukiadaki and Kretsos 2012, p. 276.

<sup>32</sup> Mola 2015, p. 176.

<sup>33</sup> Kilpatrick and De Witte 2014, p. 7.

<sup>34</sup> See e.g. Greek Council of State Decision 668/2012.

<sup>35</sup> See e.g. Greek Council of State Decisions 2192-96/2014; Cf. Council of State Decision 2307/2014 and 2705/2014.

<sup>36</sup> Poulou 2014, p. 1173.



incompatibility of some labour law austerity measures with the Constitution and the ECHR<sup>37</sup>. As regards the European Court of Human Rights, although it interprets the European Convention of Human Rights in a broad way so as to “partially constitutionalize”<sup>38</sup> social rights in Europe<sup>39</sup>, in the context of the economic crisis it has followed a questionable interpretation that enlarges the application of the margin of appreciation doctrine with respect to public interest<sup>40</sup>, and it has found no violation of the ECHR<sup>41</sup>. Furthermore, the European Court of Justice keeps an ideologically influenced<sup>42</sup> hegemonic stance towards labour and other fundamental (social) rights<sup>43</sup> and affects their role especially in the Eurozone crisis framework<sup>44</sup>. Thus, it has so far found no violation of fundamental rights and EU law in the above context<sup>45</sup> despite the allegations for a “fraude aux Traités” as regards those rights and the management of the Greek crisis<sup>46</sup>. By contrast, the quasi-judicial European Committee of Social Rights, that generally follows to some extent the reasoning of the ECtHR<sup>47</sup>, has examined States’ compliance with the European Social Charter in its decisions on the basis of the collective complaints procedure in a much more dynamic and critical way during the crisis, finding plenty of violations<sup>48</sup> of labour (and social security) rights, claiming that the economic crisis should not have as a consequence the reduction of the protection of the rights recognized in the Charter<sup>49</sup>. In the same spirit, the Committee on Freedom of Association of the International Labour Organization has also expressed its concerns about (potential) violations of ILO Conventions 87, 98, 151 and 154 by Greece<sup>50</sup>.

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<sup>37</sup> See e.g. Greek Council of State Decision 431/2018.

<sup>38</sup> Rodean 2015, p. 43.

<sup>39</sup> See e.g. cases *Demir and Baykara v. Turkey*, App. No 34503/97 (2008); *Enerji Yapi-Yol Sen v. Turkey*, App. No 68959/01 (2009).

<sup>40</sup> Pervou 2016, p. 113.

<sup>41</sup> See *Koufaki and ADEDY v. Greece*, App. No. 57665/12 and 57657/12; *Giavi v. Greece*, App. No. 25816/09.

<sup>42</sup> Kaupa 2017, p. 35.

<sup>43</sup> See e.g. *Laval/Viking/Rüffert/Luxembourg/AGET Iraklis* cases.

<sup>44</sup> Pye 2017, p. 18.

<sup>45</sup> See e.g. cases: T-541/10 and T-215/11; T-531/14; C-434/11; C-134/12; C-462/11; C-127/12; C-128/12; C-264/12 and C-46/16.

<sup>46</sup> Chrysogonos, Zolotas and Pavlopoulos 2015, p. 613.

<sup>47</sup> Cullen 2009, p. 114.

<sup>48</sup> See *GENOP-DEI and ADEDY v. Greece*, No. 65 and 66/2011; *GSEE v. Greece*, No 111/2014.

<sup>49</sup> European Committee of Social Rights 2009, para 15.

<sup>50</sup> See *GSEE, ADEDY, GENOP-DEI-KIE, OIYE and ITUC v. Greece*, case 2820/2010.

## 1.2. The main research question of this study

These different approaches that have developed among the different bodies' interpretation of fundamental rights standards and the law imposing austerity measures during the crisis, as well as the significant changes that labour market reforms precipitated in Greece consequently lead to the question: Do austerity-based labour law reforms implemented in Greece during the European Debt Crisis infringe supranational and national fundamental rights' protection standards in light of supranational and Greek bodies' jurisprudence on fundamental rights challenges, and if so, in what ways?

### 1.2.1. Operationalization of research question

#### *Austerity-based labour law reforms implemented in Greece*

The analysis focuses on the main labour market reforms adopted in the form of statutes implementing the three MoUs that Greece has signed with its creditors to bring the economy back on track, that have been challenged by litigants before competent fundamental rights bodies. The choice of Greece as a case study of the implications of austerity during the crisis on fundamental rights is explained by the fact that it reached the highest amounts of public debt/deficit among EU countries, was at the edge of bankruptcy if reforms and assistance were not taken, and the tools used to improve the Greek economy had never been so intrusive in terms of societal consequences. In addition, many legal challenges against those reforms have been brought before Greek/supranational bodies by claimants complaining about violations of their rights by austerity measures, which are still in force and are likely to continue to be for years as conditions for receiving assistance. What is more, the choice of analyzing labour law reforms is justified, as will be shown subsequently, by the fact that the measures taken have totally transformed the labour system and industrial relations in Greece and have provoked considerable academic debate. Finally, a limitation of this study should be made explicit here, as it concerns the fact that no reforms of the Greek social security system are analyzed, although there were also legal challenges before bodies focusing on the latter, which will only analogically be discussed.

## *European Debt Crisis*

The time-frame of this study is 2010 to 2018, which reflects the crisis period between the signing of the first Greek MoU and the end of the third MoU under which the analyzed labour law reforms were adopted.

### *Supranational and national fundamental rights' protection standards*

The fundamental rights' protection standards to which I am referring consist of most of the rights that have been invoked by litigants before the bodies that monitor compliance with the following treaties and their interpretation in jurisprudence: Articles 2, 4, 17, 22, and 25 of the Greek Constitution, article 11 of the ECHR and 1 of the 1<sup>st</sup> Additional Protocol to the ECHR, articles 1, 17, 20, 21 and 31 of the EUCFR, articles 1, 2, 4, 7, 10 of the 1961 ESC and article 3 of the 1988 Additional Protocol to the ESC and finally ILO Conventions No. 87 and 98.

### *Supranational and Greek bodies' jurisprudence on fundamental rights challenges*

Cases brought by litigants before the Greek Council of State<sup>51</sup>, the ECtHR, the CJEU, the ECSR and the CFA of the ILO during the crisis that concern fundamental rights challenges against austerity-based labour law reforms in Greece (and other countries) will be analyzed in an overall and multi-leveled way (European, national, and to a minor degree International level). Specifically, the most recent and/or representative cases are scrutinized. These are the following: cases 668/2012 and 2307/2014 before the Greek Council of State, case *Koufaki and ADEDY v. Greece* before the ECtHR, cases C-434/11, C-134/12, C-462/11, C-128/12, C-264/12, C-46/16 and case *Sotiropoulou v. Council* (T-531/14) before the CJEU, *GENOP-DEI v. Greece* and *GSEE v. Greece* before the ECSR and case No. 2820 (365<sup>th</sup> Report) before the CFA of the ILO.

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<sup>51</sup> For purposes of limitation and for the reasons discussed in Chapter 4.5., no jurisprudence of the lower Greek courts or the other two Supreme courts will be analyzed in this study.

### 1.3. Methods and designs used

It has been accepted that legal research and especially human rights research suffers from a methodological deficit and lack of reflection on choices and approaches. According to some scholars, this is because in many cases human rights researchers are also activists and delve into wishful thinking which might undermine the credibility and validity of their findings<sup>52</sup>. Against this background, this study aims to address these failings and explicitly identify and justify the methods and designs used.

To answer my research question, I am using the legal system as a theoretical framework (internal framing)<sup>53</sup>. I am employing a traditional doctrinal (hermeneutic) method in the narrow sense: I describe (*de lege lata*) the main statutes that implement austerity measures agreed on the basis of the MoUs in Greece between 2010-2018 and lay down labour law changes against the hierarchical standard of fundamental rights protection norms enshrined in the Greek Constitution, the ECHR, the EUCFR, the ESC and ILO Conventions. Those norms are analyzed by using a description of the treaties and their interpretation based on the case-law of the bodies that monitor their compliance, articles 32-33 of the Vienna Convention on the Law of Treaties and legal scholarship. That is done under a legal positivist evaluative approach and from a perspective grounded in legal certainty and doctrinal consistency and coherence, as diverse and potentially conflicting decisions on the austerity reforms by different supranational/national bodies may lead to incoherence and uncertainty. Therefore, the point of reference/tool to make explicit and evaluate this standard is the relevant to fundamental rights challenges decisions of the competent supranational and national bodies as well as the legal academic debate on that issue. In that context, I examine whether the legal argumentation and interpretative methods and criteria such as admissibility, the margin of appreciation doctrine, the proportionality test, the understanding of public interest, and the derogations and justifications of the competent bodies are legally coherent and sound in light of the norms they monitor compliance with or whether there are any contradictions. Thus, I

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<sup>52</sup> Coomans, Kamminga and Grünfeld 2009, p. 183.

<sup>53</sup> Taekema, 2008, p. 6.

attempt to construct a coherent legal doctrine, i.e. if those labour law reforms breach fundamental rights protection standards and if so in what way. This last concluding part as well as the Recommendations part in Chapter 5 also rely to some degree on legal and extra-legal (or external<sup>54</sup>) normativity with the aim of promoting the application of fundamental rights treaties<sup>55</sup> and the protective function of labour law<sup>56</sup>, which is important in assessing the outcome of the legal analysis *de lege lata* but also in including to a degree the author's evaluative view.

This law in the books or black letter approach seems the most suitable to answer my research question and other empirical approaches/methods are not called for or conducted in this study. To explain further, initially, the above-mentioned reforms are complicated laws which bring many novel changes to labour relations in Greece, and only by a doctrinal descriptive analysis of the literal meaning of the statutes, with the support of the rich academic contributions in that field will it be possible to briefly lay down the state of the art and give a general image of the measures that are also challenged before the chosen bodies. In addition, including a descriptive part on the thesis will be crucial for identifying the meaning of the rather vague standards of fundamental rights protection as enshrined in the different treaties and interpreted in jurisprudence of cases concerning fundamental (social) rights, especially in times of economic crisis, in order to have an overall image of the norms and the protection they offer. From that point on a doctrinal evaluative part is used to analyze and interpret<sup>57</sup>, based on the case-law of the competent bodies in conjunction with academic literature, the chosen-most relevant and representative decisions of the different bodies on fundamental rights challenges concerning Greek austerity-based labour law measures against the standard of fundamental rights protection. In that context, an internally-framed comparison is made to

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<sup>54</sup> Smits 2009, p. 50.

<sup>55</sup> The research attempts to identify and make explicit the "core normative assumptions" of this study that are inherent in human rights research. See Andreassen, Sano and McInerney-Lankford 2017, p. 5.

<sup>56</sup> This study is normatively based on the premise that (certain) labour rights are human rights and that "labour law is governed by various human rights principles that by definition are immune from arguments of economic efficiency... Thus, if the law falls short of their protection, the response should be that the law ought to change". Mantouvalou 2012, p. 170-172.

<sup>57</sup> The interpretative methods used in this study are inspired by Scheinin's doctrinal constructions No. 2 and 4. See Scheinin 2017, p. 29-30.

identify the interpretative methods of the bodies used during the crisis and assess their effectiveness in promoting fundamental rights.

Furthermore, the research is (doctrinally) evaluative since I am evaluating austerity-based reforms implemented in Greece during the crisis against the higher norm of supranational-Greek fundamental rights protection as enshrined in the above-mentioned legal texts and interpreted in case-law, with the goal to check whether those reforms breach those rights' standards. So, in a nutshell, it is reforms (laws) against the norm of fundamental rights. As a result, I am using an internal evaluation that lies within the boundaries of the legal system and derives its standard of evaluation from norms of the legal system and the law itself. However, the research does not focus on the main objective of the reforms which is as stated to put the Greek economy back on track. Therefore, it does not engage in questioning the effectiveness of that legal arrangement or if it is desirable. By contrast, it focuses on a specific dimension of the reforms, that is their relationship/implications to fundamental rights which one could say is a side effect or an intended/unintended consequence of the austerity reforms since there are no explicit references to fundamental rights in the laws and the explanatory texts accompanying them, or if there are they are vague and unconvincing<sup>58</sup>. That is why the evaluation method that I am using is to be considered *pro tanto* and mono-disciplinary, as it only examines one dimension of the reforms and ignores the other and is not all things-considered<sup>59</sup>.

#### 1.4. Outline of this study

This study is, thus, structured as follows: Chapter 2 introduces the background of the European Sovereign Debt Crisis as it has been witnessed in Greece with the implementation of the agreed MoUs under strict conditionality and analyzes the structural labour law reforms and how the pre-crisis labour law regime of Greece was transformed to adapt to the most significant latest changes. Chapter 3 lays down the relevant supranational and national standards of fundamental rights protection that have been invoked in challenges concerning mainly Greece before competent bodies on the basis of

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<sup>58</sup> See e.g. Hellenic Parliament 2010.

<sup>59</sup> Burg van der 2018, p. 9.

their interpretation in earlier case-law and in legal scholarship. Chapter 4 scrutinizes the decisions of the supranational and Greek bodies during the crisis and provides critical comments. Finally, Chapter 5 examines the different bodies' approaches and interpretative methods in that context in an overall and updated way and assesses whether the labour law reforms implemented in Greece infringe those protection standards, and if so in what ways, to reach the appropriate conclusions and recommendations.

## 2. Austerity-based labour law reforms in Greece during the crisis

### 2.1. The political and legal background of the crisis in Greece<sup>60</sup>

For the reasons mentioned in the introductory chapter, Greece was the first Eurozone country to formally request financial assistance from the Eurozone Member states on April 23, 2010. The European Council had already on February 2010 expressed the EU's readiness to provide such assistance to a M. State through an international bilateral *ad hoc* mechanism<sup>61</sup> in cooperation with the IMF<sup>62</sup>. After the confirmation of the May 2010 Eurogroup<sup>63</sup>, which activated the First Greek Bailout Programme<sup>64</sup>, €110 billion was loaned to Greece after the signing of a loan agreement<sup>65</sup> under strict conditionality terms of implementing structural adjustment policies in plenty of areas until 2014. The austerity reforms that had to be undertaken by the Greek government were incorporated in a Council Decision<sup>66</sup> and were laid down in a Memorandum of Understanding<sup>67</sup>.

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<sup>60</sup> For purposes of limitation of the study there is no analysis of the economic and social background of the sovereign debt crisis in Greece.

<sup>61</sup> Known as Greek Loan Facility (GLF).

<sup>62</sup> The agreement signed with the IMF is called Stand-By Agreement (SBA). It should be noted, that for the sake of Greece, the IMF Executive Board, which so far was finding "that the outlook for Greece was compatible with a high probability of debt sustainability" had to amend in 2009 its criteria for "exceptional access" decisions in order to permit such even when it is "difficult to state categorically that there is a high probability that the debt is sustainable, as long as there is a high risk of systemic spillovers" Schadler 2016, p. 5.

<sup>63</sup> Eurogroup 2010.

<sup>64</sup> Also known as Economic Adjustment Programme.

<sup>65</sup> The loan agreement is termed as Financial Assistance Facility Agreement (FAFA) and includes the financial part of the Programme setting the details of the loans (maturities, disbursements etc.)

<sup>66</sup> See Council Decision 2010/320/EU; Council of the EU 2010.

<sup>67</sup> The MoU includes the structural adjustment part of the Programme setting the detailed policy reforms that Greece has to implement to receive assistance. The MoU is a term used to include both the IMF Memorandum of Economic and Financial Policies and the EU Memorandum of Understanding on Specific Economic Policy Conditionality.

However, after five updates to the Programme monitored by the Troika<sup>68</sup>, it was proved that a second Programme was also necessary to confront the market pressure and the deterioration of public finances. For that purpose, the Eurozone Member States agreed in the July 2011 Eurozone Summit to provide Greece with €109 billion under the EFSF, a Public Liability Limited Company established under Luxembourgish law. In addition, on March 2012 a second Loan Agreement and Memorandum of Understanding until 31 December 2014 (Second Greek Bailout Programme) were signed in conjunction with a MoU for the so-called PSI (Private Sector Involvement), the famous “haircut” (debt restructuring) of private investors-Greek governmental bondholders (€34,6 billion), which took place in March 2012 to reduce Greece’s public debt stock. Nevertheless, after two extensions to the second Programme and 6 months of negotiations between the creditors and Greece’s new anti-MoU coalition government led by A. Tsipras, the Greek government requested a third Bailout Programme under the European Stability Mechanism<sup>69</sup>. A new MoU and loan agreement were signed on August 2015 after plenty of Eurogroup meetings and the July 2015 Eurozone Summit, providing for €86 billion to Greece until August 2018 (Third Greek Bailout Programme). Both the second and the third Programme contained conditionality terms similar to the first Programme, implementing structural reforms in various areas based on fiscal consolidation, which since 2010 and until the end of the third Programme have resulted into more than 700 implementing statutes<sup>70</sup>.

A sizeable portion of those abovementioned reforms that had to be undertaken target Greece’s industrial relations and labour market, based on the Troika’s three assumptions, that labour market regulation and alleged high employment protection in Greece constituted a significant barrier to growth, that labour law deregulation is a means of promoting financial stability<sup>71</sup>, and that the Greek public sector is very large<sup>72</sup>. In that context, labour law legislation in both the public and the private sectors had to be radically

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<sup>68</sup> See Regulation 472/2013 and article 13 of the ESM Treaty.

<sup>69</sup> A bridge interim loan of 7.15 billion Euro from the EFSM was also given to Greece on July 17, 2015 in order to repay pressing commitments to the ECB and the IMF.

<sup>70</sup> EFSYN 2018b.

<sup>71</sup> Koukiadaki and Kretsos 2012, p. 276.

<sup>72</sup> It should be noted here that those Troika’s assumptions have been highly contested in the literature. See e.g. Dedoussopoulos 2014, p. 63-64; Deakin and Koukiadaki 2013, p. 185-188.



adjusted to financial policies although no social consensus was built around the reforms<sup>73</sup>. Therefore, changes in the institutional framework aimed at weakening collective bargaining and the introduction of wage and working time flexibility without security safeguards on the basis of the need, supported by the Troika, to reduce labour cost in order to boost employment<sup>74</sup>.

## **2.2. The pre-crisis labour market and labour law regime in Greece**

In order to understand the content and the significance of the labour law reforms that were implemented during the crisis in Greece, analyzed in the next sub-chapter, it is important to show initially a general image of Greece's pre-crisis labour market and labour law regime. Greece's labour market and institutional arrangements before the crisis (since 1990) were similar to other south-European countries such as Italy, Spain and Portugal showing high self-employment and informal work rates, low part-time/flexible work and unemployment rates among prime-age and older workers and pronounced labour market segmentation along various lines<sup>75</sup>. The national system of industrial relations was centralized and highly characterized by a conflict between industrial relations and social movements<sup>76</sup> (which, nevertheless, declined due to the EU integration), lack of social dialogue, and by state intervention in wage and labour standards setting as well as high employment protection (constitutional and legislative), but weak enforcement of legal mechanisms<sup>77</sup>.

An important piece of labour legislation before the crisis was Law 1876/1990, which set the general framework for collective bargaining and industrial relations, rendering them stable but increasingly decentralized and involving a complex interaction between different sources of labour rights<sup>78</sup>. Its aim was to limit the state's intervention by promoting the constitutionally protected collective autonomy of social partners<sup>79</sup> through a multi-level

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<sup>73</sup> Yannakourou and Tsimpoukis 2014, p. 331; Deakin kai Koukiadaki 2013, p. 176-177.

<sup>74</sup> Voskeritsian and Kornelakis 2011, p. 3.

<sup>75</sup> Karamessini 2015, p. 231.

<sup>76</sup> Ioannou 2012, p. 204.

<sup>77</sup> Karamessini 2015, p. 231-232.

<sup>78</sup> Achtsioglou and Doherty 2013, p. 221.

<sup>79</sup> Collective autonomy is the right of workers' and employers' representative bodies to negotiate collectively, and to define jointly, the terms and conditions of employment, as well as to resort to arbitration in the event that negotiations

system of collective agreements between them, each with different applicability<sup>80</sup>. As a result, the social partners and not the state were responsible for setting the working conditions and the minimum wage laid down in the national general collective agreement and applied throughout Greece to all persons (in the private sector) whether they were trade union members or not. In addition, employers and employees could improve those standards with agreements at occupational or sectoral level, which could be also made compulsorily applicable to all workers by the Minister of Labour under certain conditions. Crucial in that context was also the principle of favorability (*Günstigkeitsprinzip* or *principe de faveur*), according to which any provision more favorable to the worker included in a collective agreement prevails over conflicting legislative provisions and any more favorable provision set in an individual contract prevails over one set in a collective agreement. What is more, a lower level collective agreement could prevail over a higher one if it entails more favorable provisions. Finally, there was a possibility under specific conditions of extending the application of collective agreements also to non-signatories companies by the Minister of Labour even after their expiration and it was also possible to have unilateral recourse to mediation-arbitration resulting in a private law act fully equivalent to a collective agreement in case of an industrial conflict concerning any issue that could be regulated in a collective agreement.

### **2.3. Labour law reforms during the crisis**

The main statutes that implemented the three MoUs in the Greek legal order and bring changes to the existing labour law regime are the following: As regards the first MoU, acts 3845/2010, 3846/2010, 3863/2010, 3899/2010, 3985/2011, 3986/2011 and 4024/2011 were adopted by the Greek Parliament. As regards the second MoU, acts 4046/2012 and Cabinet Decision 6/28.2.2012, 4093/2012 and 4111/2013 were adopted, and finally as regards the third MoU, acts 4334/2015, 4335/2015, 4336/2015 and 4472/2017 were adopted. It is important to note in that regard, that the labour market reform provisions laid down in the three Greek MoUs are so significantly detailed that those statutes seem to

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fail. See article 22(2) of Greek Constitution which prohibits State intervention in the bargaining procedure and in the content of collective agreements and arbitration awards.

<sup>80</sup> Koukiadaki and Kokkinou 2016, p. 208.

translate them automatically into domestic statutory provisions<sup>81</sup>. What is more, MoU clauses concerning labour market reforms constitute directly applicable rules<sup>82</sup>. In the pages that follow, the main and most important for the purposes of this study Greek labour law reforms will be briefly presented.

### 2.3.1. Individual labour law

These abovementioned statutes outline the direction of the reforms regarding individual labour law with changes made to a wide variety of areas. Primarily, dismissals were facilitated by drastically reducing the notification period and consequently severance pay up to 50%<sup>83</sup> and collective redundancies were also facilitated by increasing the necessary thresholds. Subsequently, flexible forms of employment were fostered e.g. by increasing the maximum duration of fixed-term contracts from 12 to 36 months including renewals<sup>84</sup>, or by the vast use of the unilaterally imposed work rotation<sup>85</sup> and of a 12-month fixed-term employment contract, that was a result of the increase from 2 to 12 months of the probationary period of a contract, under which dismissal is allowed without previous notice or severance pay<sup>86</sup>. In addition, new possibilities for determining working time arrangements were created and decreases in overtime work remuneration were established<sup>87</sup>. It should be also noted, that considerable emphasis was given to changes regarding lower remuneration and minimum monthly and daily wage levels of young people between 15-24 years of age<sup>88</sup> by e.g. excluding them from the scope of the national collective agreement and generally binding provisions concerning minimum wage and working conditions<sup>89</sup>. Finally, the national minimum wage, as well as the monthly salaries

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<sup>81</sup> Achtsioglou and Doherty 2013, p. 226.

<sup>82</sup> Act 4046/2012, article 1(6).

<sup>83</sup> Article 75(3) of Act 3863/2010.

<sup>84</sup> See Act 3899/2010.

<sup>85</sup> Unilaterally imposed work rotation was established before the crisis by Act 2639/1998 but was not commonly used by employers.

<sup>86</sup> Acts 3863/2010 and 3899/2010.

<sup>87</sup> Act 3863/2010.

<sup>88</sup> Act 4093/2012.

<sup>89</sup> For a detailed analysis of the labour law reforms' implications on young people see Yannakourou and Tsatiris 2015, p. 1245-1265.

of all public-sector employees were reduced, including premiums and bonuses<sup>90</sup>, while job positions in the public sector were abolished or suppressed<sup>91</sup>.

### 2.3.2. Collective labour law

As regards collective labour law, all the provisions of act 1876/1990 discussed above were found to be deficient for fulfilling the economic purposes of the MoUs. The aim of the first MoU's measures was to create a more flexible (but still strong) collective bargaining system and to transfer the wage setting closer to company-level. However, that changed significantly after the adoption of the second MoU, which totally altered the policy direction by imposing an immediate realignment of the (significantly reduced<sup>92</sup>) minimum wage level through statutory law<sup>93</sup> (and later through Decision of the Ministry of Labour with the consent of the Cabinet Council<sup>94</sup>) resulting in strong debate in academia and among the social partners considering the constitutional protection of collective autonomy<sup>95</sup> (discussed in the previous sub-chapter). More specifically, the conclusion of company-level collective agreements was stipulated by being given priority over sectoral ones even if they contain clauses less favorable to the employees and by suspending the possibility of extending sectoral and occupational agreements. Thus, the principle of favorability in case of conflicting provisions of sectoral and company-level collective agreements was abandoned<sup>96</sup>. In addition, company level agreements were also facilitated when the number of employees is less than ten. Another important development was the establishment of "associations of persons", an *ad hoc* collective representation body alternative to the trade union. It was given the right to bargain working conditions and conclude company-level collective agreements with the employer containing clauses that may deviate from the applicable sectoral agreement, even in a less favorable way<sup>97</sup>, as long as the body represents three fifths of the company staff and there is no trade union

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<sup>90</sup> Acts 3833/2010, 3845/2010 and 4024/2011.

<sup>91</sup> E.g. by the transfer of employees to other public-sector services or by the establishment of "labour reserves". See Papadimitriou 2013, p. 12-13.

<sup>92</sup> Act 4046/2012 and Board of Ministers' Act 6/2012.

<sup>93</sup> Act 4093/2012. See Yannakourou and Tsimpoukis 2014, p. 353.

<sup>94</sup> Act 4172/2013.

<sup>95</sup> See Kazakos 2013, p. 567. Cf. Yannakourou and Tsimpoukis 2014, p. 356.

<sup>96</sup> Act 4024/2011. In accordance with Act 4472/2017 this measure is still today applicable despite the criticism and the government's reassurances about its temporality.

<sup>97</sup> Yannakourou and Tsimpoukis 2014, p. 356.

legally capable to bargain such an agreement<sup>98</sup>. As regards the previously discussed existing possibility of administratively extending sectoral and occupational collective agreements to non-signatory companies, that was suspended, resulting in employers leaving the organization in which they were affiliated with and thus opting out from the binding effect of the sectoral agreement since only the members of the signatory organizations are bound by it unless extended<sup>99</sup>. Additionally, unilateral recourse to mediation-arbitration was eliminated and was replaced by the need for the consent of both parties, while drastic restrictions were set at the scope of the procedure<sup>100</sup>, (only as regards basic monthly or daily wage) including economic and financial considerations. Finally, with the adoption of the third Memorandum, any return to the previous system of act 1976/1990 was legislatively excluded and any new legislative initiative of the government must abide by the “best EU practices”<sup>101</sup> and the creditors’ agreement<sup>102</sup>.

## 2.4. Conclusions

These significant developments in labour law and industrial relations in Greece have been described to be “unique and exceptional”<sup>103</sup> among Europe although at the same time they have been also deemed an aspect of Europeanization of labour markets and wage setting institutions and procedures<sup>104</sup> through the implementation of Economic Adjustment Programs (included in Council Decisions on the basis of article 126 TFEU) that promote the transfer of decision-making on labour law from the national to the supranational level<sup>105</sup>. However, the EU lacks the exclusive competence to have an impact on Member states’ labour law systems<sup>106</sup> and specifically on areas of wage and pay levels and setting, trade union rights, collective bargaining and the right to strike<sup>107</sup>. In addition, serious doubts have been raised in academia also about the feasibility of such a policy direction considering the different labour traditions and systems of EU countries

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<sup>98</sup> Act 4024/2011.

<sup>99</sup> Act 4024/2011.

<sup>100</sup> Acts 3863/2010 and 3899/2010.

<sup>101</sup> Council of the EU 2017, p. 1.

<sup>102</sup> Kazakos 2017, p. 209.

<sup>103</sup> Council of the EU 2011, p. 2-3; Matsaganis 2011, p. 502.

<sup>104</sup> Ioannou 2012, p. 221.

<sup>105</sup> Deakin and Koukiadaki 2013, p. 176.

<sup>106</sup> See article 153(5) TFEU.

<sup>107</sup> See Ioannou 2012, p. 214-215; Tzannatos 2014, p. 172; Pagones 2013, p. 1548; Chrysogonos and Pavlopoulos 2014, p. 381.

and the constant internal devaluation (wage reductions and high wage flexibility). The latter has been used as an alternative to currency devaluation (reduction of value of exchange rate)<sup>108</sup> which is not a choice for Eurozone countries due to their participation in the EU's Economic and Monetary Union. Against that background, austerity-based labour law reforms in Greece seem to be driven more by ideology than pragmatism with emphasis being given more to flexibility than security<sup>109</sup> which is unlikely to restore the competitiveness of the Greek economy since it disregards the specificities and path-dependencies of the Greek model resulting in a dysfunctional liberal market economy<sup>110</sup>.

To sum up, the steps taken initially before the full onset of the crisis seemed to be consistent with the protective function of labour law<sup>111</sup>, however the situation changed dramatically, leading to a transformation of Greek individual and collective labour law as the crisis was expanding and to a new labour law paradigm in line with the new EU economic governance<sup>112</sup>. Specifically, the main principles and foundations of Greek labour law and its protective function were abandoned resulting in a neo-liberal<sup>113</sup> shift towards civil law-the law on contracts and in commodification of labour<sup>114</sup> without collective constraints and in the employer's favor, raising serious questions about the reforms' conformity with supranational and national fundamental rights protection.

### **3. Supranational and national fundamental rights protection standards**

A significant number of provisions of fundamental rights treaties<sup>115</sup>, that are used as the evaluative standard in this study, have been invoked by litigants before supranational and

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<sup>108</sup> See Mundells 1961, p. 657-665.

<sup>109</sup> Zartaloudis and Kornelakis 2017, p. 1-2; Matsaganis 2013, p. 30. This is considered problematic since flexicurity is the central element of the EU Employment Strategy. See Commission of the European Communities 2007. For a critique of flexicurity during the crisis see Sanders 2013, p. 314-332.

<sup>110</sup> Kornelakis and Voskeritsian 2014, p. 359.

<sup>111</sup> Papadimitriou 2013, p. 4.

<sup>112</sup> Yannakourou and Tsimpoukis 2014, p. 369.

<sup>113</sup> Crouch 2013, p. 44.

<sup>114</sup> Yannakourou and Tsimpoukis 2014, p. 368.

<sup>115</sup> Note that Greece is a party to all the treaties analyzed in this study.

national bodies to challenge austerity-based labour law reforms in Greece. However, the protection standards enshrined therein are considered vague and need to be interpreted on the basis of different sources of law, as explained in the methodology section of this study. In this chapter, selected<sup>116</sup> fundamental rights are interpreted and briefly discussed in order to be able to understand the protection that they could offer or have offered so far against austerity measures, how they have been interpreted by fundamental rights bodies in times of crisis, but also in order to answer whether they are infringed by austerity-based labour law reforms in Greece.

### 3.1. Greek Constitution

#### Article 2 para 1: Human dignity

Human dignity is enshrined in the first part of the constitution that concerns the form of Government (basic provisions), therefore it is obvious that it has been given fundamental value for the constitutional order of Greece<sup>117</sup>. It is a fully binding provision that due to its general wording applies complementary to other fundamental rights and lays down the state's primary obligation to respect and protect through legislative or administrative measures human dignity against serious insults by state organs but also individuals. Finally, it is not subject to any restrictions.

#### Article 4 paras 1 and 5: Equality and equality before public charges

The principle of equality obliges the legislator to treat equal situations equally and unequal situations unequally. It has more of a negative than a positive role, which means that it prohibits arbitrariness of the legislator and mainly of the administration when the latter acts discretionally. Restrictions are allowed only for reasons of public interest or social justice. Equality before public charges resembles equality of para 1 but actually

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<sup>116</sup> The selection is based on whether fundamental rights bodies have elaborated or put emphasis on them in the decisions analyzed in this study and on their importance for the majority of the decisions.

<sup>117</sup> Dagtoglou 2012, p. 896.

refers to citizens' monetary or tax burdens. The criterion for the difference in treatment is given by the article itself and is the contribution in proportion to their means. For example, for poor people that the State has the duty to take care of, there should be a tax relief of a minimum subsistence level<sup>118</sup>. Finally, para 5 of article 4 is considered a provision of general nature of the State's liability<sup>119</sup>.

#### Article 17 para 1: Right to property

The right to property under the Greek Constitution follows to a large degree, as will be shown in the Supreme Court's case-law in the next chapter, article 1 of Additional Protocol 1 ECHR and protects both *in rem* and *in personam* property rights of natural and legal persons against state intervention. In particular, it is under the protection of the State, thus having an institutional dimension<sup>120</sup>. Restrictions are permitted under article 17 para 1 only for reasons of public interest (for the protection of other rights), albeit under circumstances and with the provision of compensation.

#### Article 22 paras 1 and 2: Right to work and collective autonomy

The right to work under article 22 para 1 covers both the individual right as well as the social right to paid work of any kind and protects from any state intervention. It is thus considered the general foundation of the welfare state in Greece. The state has a general obligation to create conditions of full employment for everyone. Restrictions may be provided on the basis of the main rule of article 25 of the Constitution also in light of the principle of proportionality (see below). Para 2 of article 22 protects the previously discussed collective autonomy<sup>121</sup>, which belongs to the core of trade union freedom (article 23 para 1), however, it is considered so crucial for social peace that the legislator has laid it down in a separate provision in the Constitution<sup>122</sup>. The aim of the provision is to limit the omnipotence of the legislator, however subject to public interest<sup>123</sup>. Collective

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<sup>118</sup> Chrysogonos 2006, p. 150.

<sup>119</sup> *Ibid*, p. 156.

<sup>120</sup> *Ibid*, p. 362.

<sup>121</sup> For a definition of collective autonomy see *supra* footnote No. 74.

<sup>122</sup> Dagtoglou 2012, p. 671.

<sup>123</sup> See Council of State case 632/1978.



autonomy pays considerable attention to binding collective agreements concluded and amended only by trade unions, equating them with a rule of law and giving them the power to lay down working conditions complementing the law and arbitration. Collective bargaining is essential in that regard and must be free from any intervention by the legislator.

### Article 25 para 1: Proportionality

Paragraph 1 of article 25 plays a major role, in conjunction with the rest of the paragraphs of the article, in determining the restrictions imposed by the Constitution in the rights enshrined therein. Thus, it is not a self-standing constitutional rule but a guideline standard to determine the limits of restrictions of other constitutional rights<sup>124</sup>. The test of proportionality includes the elements of appropriateness of means for the attainment of a goal and necessity, which means that a restriction is necessary when there is no alternative and equally effective measure that would not restrict or would restrict less sensibly the guaranteed by the Constitution rights<sup>125</sup>. In addition, the test includes a *stricto sensu* proportionality test which means that a statute or an administrative act need to be put in a balancing exercise of costs and benefits between public interest and a person's right at stake.

## **3.2. European Convention of Human Rights**

### Article 1 Additional Protocol 1: Right to Property

The lack of agreement to include the right to property in the ECHR resulted in its subsequent inclusion in the 1<sup>st</sup> Additional Protocol, which has resulted in a broad framing and broad scope of restrictions. The ECtHR has identified three distinct rules in the article<sup>126</sup>: Firstly, that everyone is entitled to peaceful enjoyment of existing

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<sup>124</sup> Chrysogonos 2006, p. 95.

<sup>125</sup> See Council of State case 1149/1988.

<sup>126</sup> See e.g. *Ališić and others v. Bosnia and Herzegovina et al*, app. No. 60642/08 (2014).

possessions<sup>127</sup>, secondly, that deprivation (extinction of the legal rights of the owner) is subject to certain conditions, and thirdly, contracting parties are entitled to control the use of property where it is in the general interest. If there has been no deprivation of possessions or control of their use, then the ECtHR examines if there has been interference with the peaceful enjoyment of possessions and if it is in the general interest. The Court has recognized a positive obligation of states to take practical steps to avoid loss of property<sup>128</sup>, however, it has also established that there is a wide margin of appreciation in that regard<sup>129</sup> and especially when economic relations are involved<sup>130</sup>. When it comes to the definition of “possessions”, the Court has adopted a wide range of rights and interests which may be classified as assets<sup>131</sup> taking into consideration also national law, including social security pensions and other benefits<sup>132</sup> (and legitimate expectations<sup>133</sup>) where national law provides for those and the applicant satisfies the legal conditions set down for them<sup>134</sup>. Furthermore, the conditions for permitted deprivations are the following: accordance of the measure with national law (including EU law<sup>135</sup>), respect of the general principles of international law and existence of public interest which comes after a balancing of the latter against individual rights, where the Court places great emphasis and awards states a wide margin of appreciation. Finally, for a control on the use of property to be permissible under article 1, the measure must have the character of law, be in the general interest<sup>136</sup> and be deemed necessary for the state<sup>137</sup>.

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<sup>127</sup> See e.g. *Marckx v Belgium*, app. No. 6833/74 (1979).

<sup>128</sup> See *Öneryildiz v Turkey*, app. No. 48939/99 (2004).

<sup>129</sup> See *Budayeva and others v Russia*, app. No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (2008).

<sup>130</sup> See *Kotov v Russia*, app. No. 54522/00 (2012).

<sup>131</sup> See *Gasus Dossier und Fördertechnik GmbH v The Netherlands*, App. No. 15375/89 (1995), para 53.

<sup>132</sup> See e.g. *Klein v Austria*, app. No. 57028/00 (2011), where the Court found that the “fair balance” requirement was not met contrary to what happened in *Koufaki and ADEDY v Greece* (analyzed below). It should be noted here that the ECtHR does not in principle connect the protection of pensions under article 1 Additional Protocol 1 ECHR with the risk of jeopardy of a decent living; Minimum limits of social benefits and reductions or abolitions in pensions fall within the scope of articles 2 and 3 of the ECHR. See *Larioshina v Russia*, App. No. 56869/00 (2002); *Banfield v UK*, App. No. 6223/04 (2005) and *Üner v Netherlands* App. No. 46410/99 (2006).

<sup>133</sup> See *Bélané Nagy v Hungary*, App. No. 53080/13 (2016).

<sup>134</sup> See e.g. *Richardson v UK*, App. No. 26252/08 (2010).

<sup>135</sup> See *Bosphorus Airways v Ireland*, App. No. 45036/98 (2005).

<sup>136</sup> As regards the notion of general interest especially concerning pensions See *Kjartan Ásmundsson v Iceland*, App. No. 60669/00 (2004); *Munoz Diaz v Spain*, App. No. 49151/07 (2009); *Maggio and others v. Italy*, appl. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, (2011) and *Andrejeva v Latvia*, App. No 55707/00 (2009).

<sup>137</sup> Rainey, Wicks and Ovey 2017, p. 575.

## Article 11: Freedom of Assembly and Association

Article 11 protects the peaceful assembly and association including the right to form and join trade unions. For the purposes of this study, emphasis will be given to the latter. Specifically, states have the positive obligation to protect through legislation the union rights of workers in the private and the public sector<sup>138</sup>. The union and its members must be free to seek to persuade the employer to take notice of their arguments<sup>139</sup> and bargain collectively<sup>140</sup> and one way to succeed in that is the right to strike (subject to justified restrictions<sup>141</sup>), however, the Court has adopted a cautious approach as to the extent to which the union rights should be protected under national law<sup>142</sup> and the right to strike, giving a wide margin of appreciation to states in that context.

### **3.3. Charter of Fundamental Rights of the European Union**

Before looking at the substantive provisions of the Charter that were invoked by litigants in the cases analyzed below, it is important to make a preliminary remark about the scope of application of the EUCFR under article 51(1), with regards to the framework of financial assistance to Eurozone states<sup>143</sup>, since the labour law reforms, analyzed in the previous chapter, were adopted by Greece to implement the Macroeconomic Adjustment Programs laid down in MoUs and Decisions of the Council of the EU under strict conditionality, an area which is considered rather grey<sup>144</sup>. The applicability of the Charter with regards to the Council and its decisions is clear and not contested, despite the procedural hurdles that are raised in that regard by the CJEU in actions for annulment<sup>145</sup>. In the landmark case *Ledra Advertising*, the CJEU filled the gap left in *Pringle* by clearly establishing also the Commission's and the ECB's obligation to respect the Charter of Fundamental Rights

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<sup>138</sup> See *Gustafsson v Sweden*, App. No. 15573/89 (1995).

<sup>139</sup> See *Wilson and others v UK*, App. No. 30668/96, 30671/96 and 30678/96 (2002).

<sup>140</sup> See *Demir and Baykara v Turkey*, App. No. 34503/97 (2008), para 154.

<sup>141</sup> See *Enerji Yapi-Yol Sen v Turkey*, App. No. 68959/01 (2009), para 32.

<sup>142</sup> *Schmidt and Dahlström v Sweden*, App. No 5589/72 (1976).

<sup>143</sup> This framework is comprised of the GLF, the EFSM, the EFSF and the ESM. For more information see Introductory Chapter.

<sup>144</sup> Poulou 2017, p. 992.

<sup>145</sup> See case T-541/10 *ADEDY and others v. Council*.

in all circumstances, so also when acting<sup>146</sup> in the above context, even though they act outside the EU legal framework<sup>147</sup>. Finally, as regards the Eurogroup, it is not listed as an institution, agency or a formal decision-making body<sup>148</sup>, thus it does not fall under the scope of article 51(1) of the Charter.

Coming now to the issue of applicability of the Charter to national measures (statutory and administrative acts) adopted by the national parliaments and applied by the national public authorities of member states under financial assistance to implement the MoUs, the CJEU has so far<sup>149</sup>, as we shall see in the next Chapter, denied that member states implement Union Law when adopting the impugned measures. As a result, the EUCFR was not applicable. However, that has recently changed with the unprecedented *Florescu* ruling<sup>150</sup>, where the CJEU clearly established that Romania is implementing EU law in accordance with article 51(1) of the Charter when carrying out MoU-inspired reforms. This development definitely puts judicial scrutiny of the responses to the crisis, which so far was left to national and international fora only, in the hands of the CJEU and confirms clearly the Member States' duties under the Charter in the financial assistance framework. Nevertheless, the question whether the *Florescu* reasoning on the applicability of the Charter is also analogically relevant to other financial assistance contexts (ESM, EFSF) except the balance-of-payments programme in which Romania (a non-Eurozone m. state) was put is still unanswered by the CJEU, since it did not take the opportunity in the recent C-64/16 case (analyzed below), a preliminary reference by a Portuguese Court, to judge on austerity measures on the basis of the Charter but did so on the basis of provisions of the TEU<sup>151</sup>.

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<sup>146</sup> All general or concrete acts including legislative, executive and judicial, informal or atypical ones are covered, as long as they produce legal effects. Thus, regardless of the MoU's classification, the Charter is applicable on acts adopted in that context. *Ibid*, 1010.

<sup>147</sup> Joined cases C-8-10/15, para 67.

<sup>148</sup> Joined cases C-105-108/15 *Mallis*, para. 61.

<sup>149</sup> See Romanian and Portuguese preliminary references analyzed below.

<sup>150</sup> C-258/14.

<sup>151</sup> Markakis and Dermine argue that *de lege ferenda* the *Florescu's* ratio decidendi and thus the applicability of the Charter could extend to all financial assistance frameworks. Markakis and Dermine 2018, p. 16.

## Article 1: Human Dignity

Human dignity is a right that gives priority to the person as a whole and not just specific types of rights. It is considered significant for having a dual nature under the EUCFR as it is both a right and “the real basis of fundamental rights”<sup>152</sup>, therefore also including the rights of the EUCFR under the Solidarity title, and social/welfare rights, which may be relevant in times of financial crisis. This means that none of the rights established in the EUCFR may be used to harm the dignity of a person and that alleged victims of such breaches should always be able to rely on dignity regardless which right is at stake<sup>153</sup>. More specifically, dignity refers to the notions of respect, autonomy, integrity and self-determination of a person and is recognized as a general principle of EU law<sup>154</sup> and the first foundational value of the EU under article 2 TEU. The reference of Art 1 wording to inviolability seems to be placing human beings at the top of the EU’s normative pyramid so that none of the EU’s activities may breach their dignity<sup>155</sup>. However, this has led to academic ambiguity about the absolute or relative nature of the right i.e. if it is subject to limitations and derogations under article 52 EUCFR<sup>156</sup>, while the CJEU in practice seems to be adopting a very cautious approach. In addition, the article’s reference to the “duty to respect and protect” reflects the negative duty not to interfere with dignity and the positive duty to take active steps to ensure that dignity is not breached. Finally, it should be noted that as the CJEU’s case law has shown, the argument of human dignity has proved to be more effective as a hermeneutic tool for courts to construe the meaning of provisions and other rights<sup>157</sup>.

## Article 17(1): Right to Property

The right to property is a well-established in the CJEU’s case law right that has an autonomous meaning under the Charter. It has a negative and a positive (obligations)

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<sup>152</sup> Explanations relating to the Charter of Fundamental Rights Note on Article 1.

<sup>153</sup> Dupré 2014, p. 16.

<sup>154</sup> See C-36/02.

<sup>155</sup> Dupré 2014, p. 20.

<sup>156</sup> Ibid, p. 21-22.

<sup>157</sup> See C-13/94, C-117/01, C-36/02, Joined cases C-411/10 and C-493/10.

dimension<sup>158</sup> and may be claimed by natural and legal persons<sup>159</sup> extending to all pecuniary rights assigned to the individual in her/his private interest and as an exclusive entitlement<sup>160</sup>. Moveable and immovable property and immaterial positions like claims of economic value are covered, both with the precondition that they are lawfully acquired possessions, as well as a wider notion of possessions as under article 1 of the Additional Protocol to the ECHR. Two categories of limitations and derogations are mentioned in article 17(1), “deprivation of possessions” and “regulations of the use of property”: The former refers to a formal expropriation which may be based on legislative acts or measures implementing them and requires not only deprivation of property but also transfer to another person<sup>161</sup>. Three requirements are necessary to justify a deprivation of possessions: first, a sufficiently precise and accessible legal basis regulating the conditions, second, the deprivation must be in the public interest (except if the underlying objectives are disproportionate considering the right to property<sup>162</sup>) and third, a fair compensation for the loss must be paid in good time. “Regulations of the use of property” covers all measures limiting the exercise of property rights, also indirectly, which is assessed in view of the contribution of the state action to the interference, the intensity of the infringement and/or the intention of public authorities<sup>163</sup>. In addition, they must be provided by law and be necessary for the general interest (proportionality test) having a sufficiently precise legal basis, and they must respect the essence of the right. Finally, the requirement of necessity needs to be interpreted in light of the jurisprudence<sup>164</sup> and the general rule of limitations of article 52(1) EUCFR.

As regards the proportionality test that the CJEU employs in cases evolving the right to property, it is based on four steps, which the CJEU does not though distinguish clearly: The measure at stake must have a legitimate objective (serving the public good or the protection of the rights of others<sup>165</sup>) be appropriate (factually suitable measure to meet the pursued objectives), necessary (when there is a choice between several measures, the

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<sup>158</sup> See e.g. Joined cases C-402/05 and C-415/05.

<sup>159</sup> See e.g. joined cases 154/78, 205/78 et al.

<sup>160</sup> See e.g. C-283/11.

<sup>161</sup> See e.g. Joined cases C-402/05 and C-415/05.

<sup>162</sup> Wollenschläger 2014, p. 480.

<sup>163</sup> Ibid, p. 477.

<sup>164</sup> See e.g. C-200/96.

<sup>165</sup> See article 52(1) EUCFR.

least onerous must be used<sup>166</sup>) and *stricto sensu* proportionate (the conflicting interests must be balanced fairly with regard to all circumstances of the case<sup>167</sup>). It is important to note in that regard, that the greater the weight of the public interest at stake, the wider the scope for limitations<sup>168</sup>. Consideration must be given to factors such as the ability of the person to avoid the limitation, compensation by other advantages, temporary nature or urgency of the measure<sup>169</sup> and transitional rules mitigating the interference<sup>170</sup>. Finally, the CJEU awards a broad margin of discretion to EU institutions and Member States when implementing EU law especially in areas such as economic policy<sup>171</sup>.

### Article 20: Equality before the Law

Equality before the Law is a basic general principle of EU law<sup>172</sup> that gives everyone the right to mount a challenge to any difference in treatment arising within EU law or national law implementing it and specifically requires that comparable situations must not be treated differently, and different situations must not be treated in the same way unless objectively justified<sup>173</sup>. The objective justification test is read in the light of article 52(1) EUCFR (necessary and recognized general interest objective) and gives a generous margin of discretion to public bodies especially when it comes to economic policy choices<sup>174</sup>, while stricter scrutiny is given to employment law. It should be noted that article 20 is commonly cited in relation to other differences of treatment than the ones listed in article 21, which is analyzed below.

### Article 21: Non-Discrimination

Article 21 protects all persons within the EU against status discrimination (para 1) that lists a wide range of prohibited grounds and nationality discrimination (para 2) in the field

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<sup>166</sup> See e.g. C-265/87.

<sup>167</sup> See e.g. C-112/00.

<sup>168</sup> See e.g. C-317/00.

<sup>169</sup> See e.g. T-13/99 and joined cases C-20/00 and C-64/00.

<sup>170</sup> See e.g. C-68/95.

<sup>171</sup> See C-265/87.

<sup>172</sup> See e.g. C-292/97.

<sup>173</sup> See C-303/05.

<sup>174</sup> Kilpatrick 2014, p. 573.

of EU law and is considered a significant bridge between the civil and social components of the EUCFR. It includes the concepts of direct (no possibility of justification) and indirect discrimination (possibility of objective justification) that are core EU values and objectives (articles 2 and 3(3) TEU) and are placed at the heart of the EU also as general principles of EU law. This is reflected also by the expansive development of the right in the CJEU's case law especially when it comes to the validity of the EU legislation<sup>175</sup>, although in many cases emphasis has been given by the Court on non-discrimination as general principle<sup>176</sup> and article 21 is used as supplementary support due to the fact that general principles also apply horizontally in private party disputes whereas the Charter does not.

### Article 31: Fair and Just Working Conditions

According to the Explanatory Note on article 31, the rights enshrined therein draw on articles 2 and 3 of the European Social Charter (see subsequent analysis) and article 26 of the Revised Social Charter as well as Directive 89/331/EEC. Article 31 has played a prominent role as an interpretative guide to provisions of EU Directives such as the Working Time Directive<sup>177</sup> and is considered as an especially weighty normatively fundamental right and the *Grundnorm* of other labour rights included in the Solidarity section<sup>178</sup> considering its textual relationship with article 1 of the Charter and dignity. Member States are obliged to provide effective regulation of the whole of working conditions insofar as they concern workers' safety, health, and dignity in their national legal systems. The significant characteristic of this article is that it is a genuinely autonomous and non-derogable fundamental right, in the sense that it is a standard against which Union and national laws/practices are measured rather than a standard that may be weakened by the latter<sup>179</sup>. It should be noted, at this point, that socio-economic rights are considered *ipso facto* principles on the basis of article 52(5); However, as regards specifically article 31, leading scholars such as Barnard and Craig<sup>180</sup> support the view that it is to be regarded as a right in its entirety (at least 31 para 2) and not a principle

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<sup>175</sup> See C-239/09 where the CJEU used article 21(1) to strike down a provision in an EU Directive.

<sup>176</sup> See e.g. C-144/04 and C-555/07.

<sup>177</sup> See e.g. C-173/99.

<sup>178</sup> Bogg 2014, p. 836.

<sup>179</sup> *Ibid*, p. 846.

<sup>180</sup> Barnard 2012, p. 29; Craig 2012, p. 78-108.



as does AG Trstenjak in *Maribel Dominguez*<sup>181</sup>. The phrase “every worker” also signals towards a wider personal scope of article 31 compared to other social rights of the Charter and the same applies to “safety”, “health” and “dignity” which are broad principles interpreted in light of EU legislation. As regards especially the notion of dignity, which will also come up when analyzing the CJEU’s case law during the debt crisis, it should be noted that it is the idea of treating workers that do not disrespect their personhood, and this obviously widens the scope of the notion even more so that the problem of over-expansion might appear<sup>182</sup> in cases before the CJEU<sup>183</sup>. Finally, limitations of article 31 arise in the context of article 52(1) EUCFR, however, it should be emphasized that in light of the Preambles of Directives 89/391/EC and 93/104/EC, the objective of article 31 should not be subordinated to purely economic considerations, and the proportionality test is to be applied strictly with a very narrow margin of discretion<sup>184</sup>.

### 3.4. European Social Charter<sup>185</sup>

#### Article 1: right to work

The right to work obliges contracting states to accept and maintain the highest and most stable level of employment possible, with a view to attaining full employment (para 1). Article 1 is a core dynamic provision since states are obliged to present information regarding the level of employment/economic situation and follow economic policies that create and preserve jobs and assist unemployed finding a job. Paragraph 1 is an obligation of means rather than results, however, the ECSR, based on economic indicators, may find national situations being in breach of the ESC e.g. where unemployment is extremely high, or the measures taken are insufficient<sup>186</sup>. Paragraph 2 ensures effective protection of workers’ rights to earn a living in an occupation freely entered upon and to not be discriminated (directly or indirectly) on various grounds in

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<sup>181</sup> C-282/10.

<sup>182</sup> Bogg 2014, p. 855.

<sup>183</sup> See e.g. C-264/12, analyzed below.

<sup>184</sup> Bogg 2014, p. 864.

<sup>185</sup> The present analysis focuses on the 1961 European Social Charter since Greece had not ratified the Revised European Social Charter at the time the fundamental rights challenges arose before the competent bodies, as analyzed below.

<sup>186</sup> European Committee of Social Rights 2004, p. 21.

employment. Discrimination is a difference in treatment between persons in comparable situations that does not pursue a legitimate aim and is not based on objective and reasonable grounds or is not proportionate to the aim pursued<sup>187</sup>. Specifically, national legislation must e.g. provide for the power to set aside or amend discriminatory provisions entailed in collective agreements or employment contracts<sup>188</sup>, adequate remedies to victims and alleviation of the burden of proof<sup>189</sup>.

## Article 2: Right to just conditions of work

Article 2 is another dynamic provision that protects the right to just conditions of work, which is a vague term that encompasses many elements. Among those elements are reasonable daily and weekly working hours including overtime (para 1) and rest periods (para 5), which are up to the member states to establish in their national legislation<sup>190</sup> by taking into account many (economic-related) factors. Reasonable working hours are not expressly defined; therefore, the Committee assesses that standard on a case by case basis. For example, the Committee prohibits exceeding maximum working hour standards set at the level of 16 hours per day<sup>191</sup> or 60 hours per week<sup>192</sup>. Overtime work and its duration must be subject to regulation<sup>193</sup>. As regards paragraph 5, the Committee strictly obliges member states to ensure one day of rest from work per week and that obligation is fulfilled if at least 80% of the workers take advantage of this one day free<sup>194</sup>. The working week is comprised of five working days and the sixth day of the weekly calendar is regarded as a day free from work, allocated for rest and must coincide with the day traditionally or customarily regarded as a day free from work, i.e. Sunday. Working on Sunday is permitted as long as a compensatory rest period of at least equal duration is provided<sup>195</sup>. Finally, weekly rest must not be replaced by compensation<sup>196</sup>.

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<sup>187</sup> *Syndicat national des professions du tourisme v France*, Complaint No. 6/1999, (2000), paras. 24-25.

<sup>188</sup> European Committee of Social Rights 2002, p. 313.

<sup>189</sup> *Syndicat Sud Travail et Affaires Sociales v. France*, Complaint No. 24/2004, (2005), para. 33.

<sup>190</sup> Council of Europe 2008, p. 27.

<sup>191</sup> European Committee of Social Rights 1999a, p. 578.

<sup>192</sup> European Committee of Social Rights 1999b p. 535-536.

<sup>193</sup> European Committee of Social Rights 1999c, p. 32.

<sup>194</sup> Swiatkowski 2007, p. 81.

<sup>195</sup> European Committee of Social Rights 1999d, p. 34-35.

<sup>196</sup> Council of Europe 2008, p. 30.

#### Article 4: right to fair remuneration

Article 4 guarantees the right to fair remuneration to ensure a decent standard of living. To be considered fair in light of paragraph 1, wages must be above the poverty line in the member state concerned, i.e. 50% of the national average wage<sup>197</sup>, and a wage must not fall too far short (the threshold is 60%<sup>198</sup>) of the national average wage. The net national average wage is calculated with reference to the labour market as a whole and when a national minimum wage exists (as e.g. in Greece) its net value is used as the basis of comparison with the net average wage. If the wage is between 50% and 60%, a state has to demonstrate that it is sufficient for a decent standard of living<sup>199</sup>. Paragraph 4 of article 4 recognizes the right of all categories of employees<sup>200</sup> to a reasonable (on a case by case basis) period of notice for any termination of employment (also during the probationary period). The major criterion for the assessment of reasonableness is the length of service (e.g. one week's notice for less than six months of service is not in conformity with the Charter<sup>201</sup>).

#### Article 7: right of children and young persons to protection

Article 7 gives special protection to children and young persons against physical and moral hazards. Specifically, paragraph 2 obliges member states to provide in domestic law that 18 is the minimum age of admission to prescribed dangerous or unhealthy occupations except if it is absolutely necessary for their vocational training. Paragraph 5 awards young workers and apprentices the right to a fair (compared to the minimum wage paid to adults<sup>202</sup>) wage or other appropriate allowances deriving from statute, collective agreements or other means<sup>203</sup>. Young workers' wage may be less than the adult starting wage, but any difference must be reasonable, and the gap must close quickly. For example, for sixteen/eighteen-year-olds the difference may not exceed 20%<sup>204</sup>. Finally,

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<sup>197</sup> Council of Europe 2008, p. 42.

<sup>198</sup> European Committee of Social Rights 1999e, p. 50-52.

<sup>199</sup> Council of Europe 2008, p. 42.

<sup>200</sup> European Committee of Social Rights 1996, p. 352.

<sup>201</sup> European Committee of Social Rights 1998, p. 267.

<sup>202</sup> European Committee of Social Rights 1989, p. 96.

<sup>203</sup> Council of Europe 2008, p. 61.

<sup>204</sup> European Committee of Social Rights 2006.

paragraph 7 obliges states to provide to employed persons under 18 at least four weeks' annual holiday with pay which cannot be given up.

#### Article 10: right to vocational training

Article 10 protects the right to vocational training. Specifically, according to paragraph 2, young people have the right to access to apprenticeship and other training arrangements combining theoretical and practical training based on a contract or school-based<sup>205</sup> and close to the working world<sup>206</sup>. The main elements that must be observed are e.g. length, remuneration and termination of the apprenticeship.

#### Article 3 of the 1988 Additional Protocol: right to take part in the determination and improvement of the working conditions and working environment

This article ensures effective participation of workers in the determination and improvement of working conditions. Member states are obliged to undertake or support measures towards those goals which can be covered in collective agreements or other legal means, however, workers and their representatives do not enjoy a right of joint decision-making or veto over decisions of the head of the undertaking<sup>207</sup>. Nevertheless, this provision does not apply to collective bargaining.

#### Articles 30, 31: Derogations and Restrictions

In cases of war or other public emergencies that threaten the life of the nation, the authorities of member states can take measures required by the exceptional situation and can be temporarily exempt from obligations undertaken by the ratification of the Charter. For that to have effect, the conditions set in article 30 must be observed. In addition, according to article 31, the efficient enforcement of the rights of the Charter cannot be subject to any limitations except if it is prescribed by statutory law that is precise and

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<sup>205</sup> European Committee of Social Rights 1999d p. 60-61 and European Committee of Social Rights 2003, p. 589.

<sup>206</sup> European Committee of Social Rights 1999 p. 60-61.

<sup>207</sup> Explanatory report to the 1988 Additional Protocol, p. 135.

foreseeable, pursues a legitimate purpose i.e. the protection of the rights of others, of public interest, national security, public health or morals, and is necessary in a democratic society i.e. the restriction has to be proportionate to the legitimate aim pursued<sup>208</sup>. Restrictions should be well-founded and legitimate aims must not be flagrantly disproportionate to the social rights guaranteed by the Charter<sup>209</sup>.

### **3.5. International Labour Organization's Conventions**

#### Conventions 87 and 98<sup>210</sup>

Conventions 87 (Freedom of Association and Protection of the Right to Organize) and 98 (Right to Organize and Collective Bargaining) are legally binding international treaties that contain provisions that have inspired the EUCFR, the ESC, and the ECHR. They are considered fundamental since they guarantee core labour standards that are a necessary condition for other rights<sup>211</sup>. It is important to note also that on the basis of those two, organizations of employees and employers can bring complaints before the quasi-judicial CFA of the ILO. The above-mentioned Conventions impose positive and negative obligations on states to respect the rights of workers and employers to freely and voluntarily establish and join organizations, and to collective bargaining. To give some relevant examples, according to the case law of the CFA, employers and workers should be able to determine in full freedom wages and working conditions by collective agreements independently from the public authorities<sup>212</sup>. As regards non-unionized workers, the conclusion of collective accords that provide for better terms than collective agreements with such workers is not permitted except when no organization exists<sup>213</sup>. In addition, limitations on collective bargaining (such as suspension or derogation by decree of collective agreements<sup>214</sup>) by the authorities should be preceded by consultation, and statutory restrictions, when repeated, may lead to deprivations of workers' fundamental

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<sup>208</sup> Council of Europe 2008, p. 177.

<sup>209</sup> Swiatkowski 2007, p. 371.

<sup>210</sup> For the purposes of the present analysis only provides a brief introduction to the Conventions. For an extensive view of the Conventions' interpretation by the CFA see International Labour Office 2018.

<sup>211</sup> International Labour Office 2002, p. 11; Koukouli-Spiliotopoulou 2014, p. 212.

<sup>212</sup> International Labour Office 2018, p. 231-232.

<sup>213</sup> See also ILO Conventions 135 and 154.

<sup>214</sup> International Labour Office 2018, p. 268.

rights. Thus, legislation should not be an obstacle to collective bargaining at the industry level and when it contains less favourable provisions than at higher level, this violates Conventions 87 and 98. Finally, the Committee has also stated that under exceptional economic situations restrictive measures must be temporary<sup>215</sup> to the extent necessary and assess the potential impact on workers.

#### **4. Supranational and Greek bodies' jurisprudence during the debt crisis**

The labour law developments analyzed in Chapter 2 in conjunction with the harsh social consequences<sup>216</sup> that they necessitated in Greece have given rise to legal mobilization strategies<sup>217</sup> that put austerity reforms under the test of legality against the standards analyzed in Chapter 3 before supranational and Greek competent bodies with a clear focus on policy reform<sup>218</sup>. Some of the reasons that have mobilized mainly trade unions and workers or pensioners' associations to challenge either the decisions of the Council of the European Union that encapsulate conditionality on the basis of the Excessive Deficit Procedure before the CJEU or the statutory acts implementing the MoUs in the Greek legal order before the Greek Council of State, the ECtHR, the CJEU, the ECSR and the CFA of the ILO are the following: The failure of the Greek government to build consensus on the labour market reforms, the absence or negligence of dialogue with the social partners and the lack of ratification of the first loan agreement by the Greek Parliament<sup>219</sup> in combination with political and ideological tensions. The jurisprudence that has developed in that context is, as stated in the introductory chapter, incoherent and shows many different approaches in the reasoning that bodies adopt under the pressure of the crisis. In the pages that follow this jurisprudence is analyzed in an overall and multi-level way.

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<sup>215</sup> The Committee has in many cases set 3 years as a threshold in that regard. See *Ibid*, p. 270.

<sup>216</sup> See European Parliament 2015.

<sup>217</sup> Colling 2006, p. 140; Vestena 2017, p. 1.

<sup>218</sup> Psychogiopoulou 2014, p. 17.

<sup>219</sup> Deakin and Koukiadaki 2013, p. 177.

## 4.1. Greek Council of State

In Greece there is no Constitutional Court, therefore constitutional review is incidentally and *in concreto* diffused to all courts, which have the power to adjudicate a legal provision on the basis of the Greek Constitution<sup>220</sup>. However, the Council of State, which is the highest court in the administrative jurisdiction produces the most important case-law, also in the context of the crisis, in particular because applicants have the right to demand directly from the Court the annulment of general administrative acts that execute legal provisions found e.g. in legislation implementing the MoUs. The Council of State may in that context declare an administrative decision as unconstitutional which results in the decision not producing any legal effect *inter partes*, although that conclusion would also be important for the general application of the statute at stake as it creates a (non-binding) precedent that is likely to influence subsequent case-law<sup>221</sup>. In the pages that follow, two of the most representative cases of the way the Council of State has judged on the conformity of austerity-based labour law reforms adopted during the crisis to implement the MoUs<sup>222</sup> with the Greek Constitution and other international treaties are analyzed<sup>223</sup>.

### 4.1.1. Case 668/2012

On July 26, 2010 the Athens Bar Association, ADEDY and 30 other organizations and individuals brought a case before the plenary of the Greek Council of State against the Minister of Finance and the Minister of Labour and Social Security asking for the annulment of various administrative acts providing for cuts in wages, allowances-bonuses and pensions in the public sector that they adopted to implement austerity legislation of the First MoU<sup>224</sup>. They argued that the acts at stake are contrary to their rights as protected

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<sup>220</sup> For an analysis of the lower Greek courts' jurisprudence on austerity measures breaching social rights see Pavlidou 2018, p. 305, where she argues that lower courts followed a different path of reasoning than the Council of State by safeguarding the direct interests of individuals and social rights protection and "reconstitutionalizing" labour rights.

<sup>221</sup> Marketou 2014, p. 132.

<sup>222</sup> The cases analyzed in this Chapter concern the implementation only of the first two MoUs since so far, no substantial relevant case-law on the third MoU has been developed and the reforms undertaken in the latter are either based on the two previous MoUs or do not entail significant changes to the labour law system in Greece.

<sup>223</sup> The analysis focuses solely on the issue of alleged violations of fundamental rights by labour law reforms.

<sup>224</sup> Specifically Act 3845/2010.

by the Constitution<sup>225</sup> and international treaties<sup>226</sup>. At the admissibility stage, many requests such as the allegations for violations of collective bargaining and collective labour rights were found to be inadmissible for various reasons e.g. for not being enforceable or directly affecting the applicants or the members of the organizations. Several requests though were considered admissible. The plaintiffs based their arguments on the general and automatic character of the measures as well as their retroactive and permanent nature and disputed whether they serve the general interest or respect a decent standard of living.

The Court's stance was to reject all the claims of the plaintiffs<sup>227</sup> and deem the contested measures constitutional. Initially, it laid down the relevant provisions of the EU and international Treaties as well as the background of Greece's integration in the EU until the crisis. When examining the allegations concerning violations of fundamental rights, the Court started its analysis by referring to the ECtHR's case law on article 1 of Additional Protocol 1 ECHR (right to property). It stated that although the latter protects the right to an income (and a pension), it does not guarantee a right to a certain income (or pension) except where the decent standard of living of the citizens is at risk. As a result, the legislator can impose (appropriate, necessary and not disproportionate) restrictions to the right to property such as adjusting the amount of income of public servants when that is justified by a "general public interest" such as a particularly serious financial situation. What is more, when defining that general public interest, the legislator has a wide margin of discretion with a marginal possibility of judicial review. The Court subsequently went through a proportionality test to conclude that cuts in salary, allowances-bonuses and pensions of public servants were justified by the "compelling public interest of consolidation of public finances" or "financial public interest" and were not manifestly inappropriate or unnecessary as they are part of a general economic programme (First Memorandum) planned to tackle the emergency of the crisis. The Court

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<sup>225</sup> Article 1 of Additional Protocol 1 to the ECHR, articles 2 para 1 (human dignity), 4 para 1 (principle of equality) and 5 (equality before public charges), 5 para 1 (economic liberty, 17 para 1 (right to property), 22 para 2 and 23 (collective bargaining and collective labour rights) and 25 para 1 (proportionality) of the Constitution.

<sup>226</sup> ECHR, ILO Conventions and the International Covenant for Economic, Social and Cultural Rights.

<sup>227</sup> The Court also implicitly rejected their claim for a preliminary ruling to the CJEU without any justification for doing so. It is also noteworthy that the ECtHR in *Koufaki and ADEDY v Greece*, analyzed below, did not assess this lack of action of the Council of State in light of article 6 para 1 ECHR.



in that regard rejected the plaintiffs' claims that there was no study of alternative less onerous measures that could have been taken. It should be noted here that six judges dissented in that regard, claiming that it is the duty of the legislator under article 25(1) of the Constitution to consider alternative measures. In conclusion, the Court found no violation of article 1 Additional Protocol to the ECHR (four judges, however, dissented in that regard) and briefly rejected the claim for violation of the principle of proportionality of article 25(1) as well as the right to property under article 17 of the Constitution<sup>228</sup>. The Court subsequently referred to article 2 para 1 of the Constitution (human dignity), finding no violation either (again with the dissenting opinion of six judges) since the applicants did not invoke or prove any risk to their decent standard of living caused by the measures at stake. The same conclusion was reached concerning the principle of equality and equality before public charges enshrined in article 4 paras 1 and 5 of the Constitution with the justification that reductions in the wages of public servants whose income is under 3000 euros did not result in an equal treatment of different situations. It should be noted, however, that 8 judges dissented at this point, claiming that only one category of the population is targeted by the measures and no counterweight measures were provided for their protection.

### Comments

In an attempt to provide some comments to the judicial reasoning of the Council of State in this case, it should be noted that the use of the state of emergency doctrine is prevalent throughout the whole judgment in the Court's justifications on the basis of the general public interest although the constitutional provisions of the state of emergency were not triggered<sup>229</sup>. Thus, the Court seems to accept that in times of emergency constitutional (social) rights are subordinated to the protection of the public interest, and the legislator's policy choices in that context are justified. It is striking, however, that the Court here is enlarging the concept of public interest to include not only economic policies but the country's immediate cash needs, thus introducing a new legal concept of financial

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<sup>228</sup> Case 668/2012, para 36.

<sup>229</sup> Article 48 of the Constitution.

public interest<sup>230</sup>. The limits to this concept seem to be respect to human dignity, equality before public charges and proportionality as protected by the Constitution, however, in this case, they did not alter the Court's conclusions. As regards specifically the Court's proportionality test, although the Court stated that for the reasons explained above judicial review of the measures at stake would be marginal, it paradoxically did the exact opposite, as it exercised a rigorous version of it in order to verify that the measures are proportionate<sup>231</sup>. When examining necessity, however, the Court did not engage in the juxtaposition of a particular measure with other alternative measures and what it actually did was to reverse the burden of proof so that the plaintiffs have to show evidence that the legislator took into consideration the wrong elements and facts when drafting the measures at stake<sup>232</sup>. This results in proportionality<sup>233</sup> backing up austerity policies relieving the legislator from the obligation to justify measures breaching fundamental rights during the crisis. As a result, through this questionable interpretation, the Council found no breach of fundamental rights by labour law measures reducing wages of public sector employees.

It should be noted, however, that the Court's reasoning was altered in subsequent cases concerning specific reductions in wages of armed, security and police forces' personnel<sup>234</sup> and doctors of the National Healthcare Service (E.S.Y.)<sup>235</sup>, thus inaugurating an era of strong form of judicial review of socio-economic legislative measures<sup>236</sup>. In those cases, it found that the financial public interest is not enough to justify under the Constitution the reductions in wages of the specific categories of employees, since it has been weakened and is not as absolute as it was when the measures condemned in case 668/2012 were taken<sup>237</sup>, but also because of the special importance of the specific employees for the functioning of the State. Thus, it found those wage reductions as contrary to articles 4 para 5 (equality before public charges), 25 para 4 (social and national

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<sup>230</sup> Yannakourou 2014, p. 39.

<sup>231</sup> Contiades and Tassopoulos 2013, p. 207.

<sup>232</sup> By contrast, in subsequent cases before it (See e.g. cases 2287/2015, 2288/2015 and 2289/2015) the Council of State put the burden of proof this time to the State to prove that the (social security) measures at stake do not put in risk the decent standard of living of employees and pensioners.

<sup>233</sup> For a criticism of proportionality during the crisis See Contiades and Fotiadou 2014.

<sup>234</sup> Council of State cases 2192/2014, 2193/2014, 2194/2014 and 2195/2014.

<sup>235</sup> Council of State case 431/2018.

<sup>236</sup> Vlachogiannis 2016, p. 9.

<sup>237</sup> Yannakourou 2015, p. 48.

solidarity) and 21 para 3 (protection of healthcare) respectfully<sup>238</sup>. To conclude, as seen, the gradual decline of the pressure precipitated by the debt crisis in Greece seems to reflect a shift in the Council's stance towards austerity measures imposing wage reductions and its reasoning to justify fundamental rights violations. Nevertheless, it is still to be seen if this case-law will remain fragmented or will turn into a coherent and resistant to the continuing impact of the crisis<sup>239</sup> dialogue of the judiciary with the legislator concerning reductions of salaries of public sector employees.

#### 4.1.2. Case 2307/2014

In case 2307/2014 the plenum of the Council of State was called on March 13, 2012, by nine trade unions (including GSEE, the Confederation of workers) and one individual to annul on various grounds<sup>240</sup> Cabinet Decision No 6/28.2.2012, that specifies Act 4046/2012<sup>241</sup>. The latter, as explained in Chapter 2, contains plenty of collective labour law measures<sup>242</sup> that implement the Second MoU targeting employees in the private sector. The Court, primarily, citing case 668/2012, introduced the background of financial assistance given to Greece as well as the reforms that are put forward by the contested act. As regards the allegation concerning violation of collective autonomy under article 22 of the Constitution, the Court following its case law stated that the exclusive regulation by the legislator of working conditions and their removal from the scope of collective autonomy is permitted when there are reasons of "public and general social interest" connected with the functioning of the national economy<sup>243</sup>. It then admitted that the measures at stake limit the social partners' power to regulate working conditions and constitute a serious decline in workers' rights, however, they are integrated into a broader set of measures aimed to reduce public debt and deficit that extends to many areas of

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<sup>238</sup> It is, however, noteworthy that the Council of State decided to annul the contested measures in this case not retroactively-from the time of their adoption, but from the time of the publication of the judgment (except as regards the four plaintiffs) for reasons of public interest and the well-known cash difficulties of the Greek State. This decision of the Court seems to be mimicking decision 413/2014 of the Portuguese Constitutional Court.

<sup>239</sup> Vlachogiannis 2016, p. 19.

<sup>240</sup> Articles 4 para 1 and 5, 22 para 1 and 2, 23 para 1 and 2, 25 para 1, 43 para 2, of the Constitution, articles 126 and 136 TFEU, article 11 ECHR and 1 Additional Protocol 1 ECHR, ILO Conventions 87, 98, 154 and the European Social Charter.

<sup>241</sup> See article 1 para 6 of Act 4046/2012.

<sup>242</sup> E.g. realignment of the level of the minimum wage, reduction of wages by 22% in general and by 32% for young persons, suspension of all automatic wage increases based on maturity clauses, introduction of maximum duration of collective agreements and elimination of unilateral recourse to arbitration.

<sup>243</sup> Case 2307/2014, para 22.

public policy. Thus, the measures at stake which were adopted under “exceptional circumstances” (as stated also in case 668/2012) are not inappropriate or unnecessary for the attainment of their constitutional goals nor do they affect the core of the rights enshrined in articles 22 and 23 of the Constitution as they still enable employees to bargain to improve their working conditions. As a result, the Court found no violation in that context, while it should be noted that 10 judges dissented at this point claiming that there is a violation of the core of the rights of articles 22 and 25 of the Constitution and that the public interest justification is not enough since a feasibility study<sup>244</sup> should have taken place to assess the necessity of the measures<sup>245</sup>. The Court used the similar justification of “overriding social interest” to reject also the claims that the reductions of private sector employees’ wages are contrary to articles 2 para 1 and 5 para 1<sup>246</sup> and that by-law amendments to collective agreements are contrary to article 22 para 1 of the Constitution. As regards the allegation of violation of article 4 para 1 and 5 of the Constitution because the measures target only one category of the population, the private sector employees, the Court rejected that claim stating that also other categories of the population and even entrepreneurs have been hurt by the measures.

The same conclusion was reached by the Court as regards the allegation of violation of article 22 and 23 of the Constitution by the provisions introducing maximum duration and partial abolition of the after-effect<sup>247</sup> of collective agreements with the following justification: The aim of the legislator was to adjust working conditions to the fiscal crisis and the general framework adopted to tackle it. Thus, social partners can still bargain autonomously, and as regards the after-effect of collective agreements and consequently the deterioration of the workers’ position, it is constitutionally tolerable under the current situation<sup>248</sup>. By contrast, the Court surprisingly found the provision abolishing unilateral resort of trade unions to arbitration after the failure of negotiations to conclude a collective

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<sup>244</sup> Cf. subsequent Council of State 2288/2015 para 7, where the Court obliged the legislator to justify choices made on the basis of a “special in-depth and scientifically documented study”.

<sup>245</sup> Dissenting opinions are strong also in other points of the judgment.

<sup>246</sup> Ibid para 36.

<sup>247</sup> After-effect is called the collective agreements’ effect for a period even after their expiration.

<sup>248</sup> Council of State 2307/2014, para 30.

agreement<sup>249</sup> as well as the provision restricting the scope of arbitration to determining only minimum wage as breaching article 22 of the Constitution. Concretely, it stated that the constitutional reference to arbitration would be superfluous if resort to the latter was only by consensus and only to determine a part of the dispute. The Court then went on to examine the measures at stake under article 11 ECHR but merely repeated that the measures at stake do not affect the core of the rights enshrined therein, therefore it found no violation. In line with its reasoning in case 668/2012 the Court also found no violation of article 1 of 1<sup>st</sup> Additional Protocol ECHR, as the latter does not guarantee a right to a wage of a specific amount and the fiscal problem of the country constitutes a public interest reason for restricting the right to property. As regards, finally, the allegations concerning violations of ILO Conventions 87, 98 and 154 and the European Social Charter, the Court cited its case-law to state that these treaties merely contain indications to Member States which in the case of Greece have been already incorporated in articles 22 and 23 and thus rejected the claims.

### Comments

In case 2307/2014 the Council of State follows a slightly different path of reasoning than case 668/2012 but with a similar result, despite the harsh criticism it received in the meantime by the dissenting judges and the constitutional law and labour law academia<sup>250</sup>. Although it abandons the concept of an overriding financial public interest that justifies interference with fundamental rights, it establishes the equivalent overriding general social interest to justify restrictions of collective labour law rights as long as the principle of proportionality is respected. Proportionality in that regard means that the measures need to be appropriate, necessary but also temporary, meaning that they should be applicable as long as they are necessary<sup>251</sup>. The Court, however, once again as in case 668/2012 denied considering whether the austerity measures at stake are temporary, something that is highly doubtful today after 8 years of MoUs and in light of the post-Memorandum

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<sup>249</sup> Note, by contrast, that the ILO CFA in case 2820, discussed below, did not find the abolition of unilateral resort to arbitration as violating ILO Conventions. It only raised, as will be shown, its concerns about the restriction of the scope of arbitration.

<sup>250</sup> Travlos-Tzanetatos 2015, p. 29.

<sup>251</sup> Yannakourou 2015, p. 47.

Enhanced Surveillance Procedure arrangements<sup>252</sup>. This puts the Council of State in a situation of logical inconsistency with the state of emergency doctrine that it employs<sup>253</sup>, due to its unwillingness to put obstacles in the way of enforcement of the obligations undertaken by Greece towards its creditors for the sake of fundamental rights. The only exception, however, and novelty of this judgement is the Court's stance towards arbitration as protected under article 22 para 2 of the Constitution. Even though the Council validates all the rest measures affecting collective autonomy, in the case of arbitration it adopts a (criticized<sup>254</sup>) interpretation that safeguards the existence of collective agreements and arbitration awards instead of individual employment contracts where the employer is in a dominant position<sup>255</sup>. It is noteworthy, that for the first time the Council of State declares an austerity collective labour law measure adopted during the debt crisis as infringing the Constitution after four years of the implementation of the economic adjustment programme for Greece. Nevertheless, it still refuses to examine the measures under the European Social Charter and ILO Conventions by not accepting their enforcement in the Greek legal order through their recognition as supranational binding rules under article 28 of the Constitution. In that regard, the Court puts forward the (inconsistent with its case-law) argument that those treaties merely contain indications whereas they contain obligations to Greece<sup>256</sup>, compliance with which is highly recommended, as will be seen, by the European Committee of Social Rights and the ILO Committee on Freedom of Association.

## 4.2. European Court of Human Rights

### 4.2.1. *Koufaki and ADEDY v Greece*, App No [57665/12](#), [57657/12](#)

The famous *Koufaki and ADEDY v. Greece* are two similar cases joined by the Court in one, that concerned Mrs. Koufaki, lawyer working in the public sector under a private law fixed-term contract, and ADEDY, Confederation of public-sector trade unions<sup>257</sup>, who

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<sup>252</sup> See in that regard Introductory Chapter of the study, p. 7-8.

<sup>253</sup> Ibid, p. 47.

<sup>254</sup> See e.g. Liksouriotis 2015, p. 137-152.

<sup>255</sup> Kazakos 2015, p. 113.

<sup>256</sup> Koukouli-Spiliotopoulou 2014, p. 229; Gavalas 2015, p. 704-705.

<sup>257</sup> The Court questioned whether ADEDY can claim the status of victim since it is the represented employees and pensioners, members of the trade unions, that were affected by the measures and not the organization itself.

complain before the ECtHR for reductions of pay (for all public servants irrespective of salary) by statutes implementing the first Greek MoU. They allege that the reductions lead to a drastic fall in their standard of living and thus violate article 1 of 1 Additional Protocol to the ECHR<sup>258</sup>. In particular, the applicants claimed that the right to payment of salary forms part of their possessions and is therefore protected under the Convention and that the abolition or reduction of Christmas, Easter, holiday and other allowances amount to deprivation of possessions, which should be considered a last resort measure. In that regard, the applicants claimed that the adverse economic situation and the public interest concept of para 1 of article 1 is not only relevant for the interests of the State's treasury and the elimination of deficit but, when invoked, it should contain an economic study that examines in advance all alternative solutions and measures with a less drastic impact<sup>259</sup>. In addition, as regards proportionality, in the applicants' view, the legislature should have examined *a priori* the possible (temporary or permanent) impact of the measures at stake, if their scope and duration is compatible with the aim pursued and if any compensatory measures were foreseen (which according to the first applicant were not)<sup>260</sup>.

The Court's reaction was to reject the applicants' claims deeming them manifestly ill-founded and thus inadmissible. It should be noted, that considering a claim as manifestly ill-founded<sup>261</sup> gives the extraordinary possibility to the ECtHR to evaluate the merits of the case before finding it inadmissible, thus raising a procedural and substantive barrier that is hard for applicants to break, but it also gives the opportunity to the Court to weed out difficult cases in light of its heavy case-load. As regards its reasoning, the Court primarily emphasized the wide margin of appreciation that it awards to Member states in regulating their social policy. It also pointed out its subsidiary role through its case-law when states enact laws to balance state expenditure and revenue that involve political, economic and social issues unless the judgment of the national courts (or the legislature's interpretation

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Nevertheless, the Court did not examine that issue further (if it had done so it would probably reject the rather abstract and weak claim) as the complaint was found to be anyway inadmissible. See *Koufaki and ADEDY*, para. 30.

<sup>258</sup> ADEDY also invoked articles 6 § 1, 8, 13, 14 and 17 of the Convention, however the Court reasoned only on the basis of article 1 of Additional Protocol 1 and paid no attention at all to the rest articles. It should be noted also that ADEDY paradoxically did not invoke article 11 of the Convention before the ECtHR although it had brought such a claim before the Greek Council of State in case 668/2012 that led to this case.

<sup>259</sup> *Koufaki and ADEDY*, para. 23.

<sup>260</sup> *Koufaki and ADEDY*, para. 25.

<sup>261</sup> See ECtHR 2017, p. 54-55.

of the “public interest” notion) is manifestly without reasonable foundation<sup>262</sup>. Subsequently, it went on to establish the relevance of article 1 of the 1<sup>st</sup> Additional Protocol to the ECHR when it comes to salaries or welfare benefits (although it does not give a right to a particular amount of salary or pension) and noted that under the proportionality test, there must be a fair balance between the demands of the general interest of the community and fundamental rights protection, which is not found if the person concerned has to bear an individual and excessive burden. The Court then stated that the restrictions at stake should not be regarded as deprivation of possessions but as interference with the right to peaceful enjoyment of possessions which is nevertheless provided for by law and is justified by the “existence of an exceptional crisis without precedent in recent Greek history”<sup>263</sup>. As a result, the measures and aims of the Greek Economic Adjustment Programme, as well as the legislature’s actions, were in the public interest. When it comes to proportionality and the “fair balance” criterion discussed above, the Court stated that although the measures were not temporary, that was justified by the budgetary crisis but also by the fact that the applicants did not claim that the measures worsened their situation in a way that they risked falling below the subsistence threshold<sup>264</sup>. Finally, the Court noted that there were compensatory measures put in place and that it is not for the ECtHR to decide whether alternative solutions in the discretion of the legislature would be best-suited.

### Comments

It is important to note primarily, that the plaintiffs, in this case are two of the more than thirty applicants of case 668/2012 before the Greek Council of State discussed above, who decided to bring the case to the ECtHR after exhausting the national remedies. The Court, by contrast to the ECSR that examined plenty of international materials in the cases analyzed subsequently, relied heavily on the Council of State’s decision and focused understandably its reasoning only on the first applicant to find that the reductions in her

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<sup>262</sup> *Koufaki and ADEDY*, para. 31.

<sup>263</sup> *Koufaki and ADEDY*, para. 36.

<sup>264</sup> The Court examined at this point the salary of the first applicant before and after the measures and found that the reduction is not such so as to impose on her an excessive burden or to breach article 1. See *Koufaki and ADEDY*, paras. 44-45.



(comparingly high) wages (from €2.435,83 to €1.885,79) fall within the legislator's discretion in setting economic and social policies in times of extreme crisis. The Court also went through a rather brief proportionality test to find that there was a balance between the general interest and the protection of the fundamental rights of the person concerned since the reductions were not such to put on Mrs. Koufaki an excessive burden or to place her below the "subsistence threshold". The latter is a term developed by the Court with regards to article 3 of the Convention, which was not, nevertheless, elaborated by the Court here despite the applicant's claims<sup>265</sup>. Thus, it could be argued that had there been a public sector employee or pensioner applying before the ECtHR for such reductions of his/her wages that risk his/her decent living, then maybe the conclusion of the Court would have been different<sup>266</sup>. As a result, the Court found no violation of the right to property, overlooking though the number of persons represented by ADEDY and potentially affected by the cuts as well as the humanitarian aspects of the crisis in Greece.

However, despite the fact that the Court's constructive interpretation of the right to property has resulted in significant openness of the Convention to social protection, this case also shows that the scope of the notion of possession depends on the entitlements granted within the national legal order and thus the right to property is to be considered a "weak" right in the context of challenging austerity measures<sup>267</sup>. As a result, other rights enshrined in the Convention could possibly provide more protection to vulnerable persons such as the rights of articles 3, 6, 8 or 11 which were either not invoked by litigants or invoked but not examined by the Court for purposes of speeding up the process to the detriment though of proper justification. The same conclusion is strengthened by the argument that the use of the subsistence threshold notion in the interpretation of the right to property seems problematic due to the fact that this threshold is very low covering only the most basic human needs<sup>268</sup>.

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<sup>265</sup> *Koufaki and ADEDY v Greece*, para. 26.

<sup>266</sup> Gavalas 2013, p. 762; Kagiarios 2014, p. 6.

<sup>267</sup> Mola 2015, p. 190.

<sup>268</sup> Nannery, 2015, p. 31.

Finally, the Court in line with its relevant case law for other countries<sup>269</sup> seems to be using a language of exceptionality<sup>270</sup> when referring to the financial crisis, without a single reference though to article 15 of the Convention by the Court or the Government, something that is also prevalent in the language of the Greek Council of State. This rhetoric of the law of emergency in combination with the wide margin of appreciation given to the legislator in the crisis context (and the consequent enhancement of the principle of subsidiarity) allow the ECtHR to elaborate less on possible rights' violations, thus raising serious concerns about the protection of fundamental (social) rights in times of crisis. What is more, as *Koufaki and ADEDY* but also the cases before the Greek Council of State analyzed above show, the ECtHR and the Council of State applied only a marginal judicial review being *in dubio pro lege* and not *in dubio pro libertate*, providing thus a presumption of constitutionality<sup>271</sup> to the Greek austerity labour law measures and negating the individual to the detriment of the State's financial interests. Therefore, it could be argued that it is unlikely that the ECtHR will act as a protector of socio-economic fundamental rights in times of crisis except only where national decisions are manifestly unreasonable, patently arbitrary or discriminatory and affecting the very essence of the individual's rights<sup>272</sup>.

### 4.3. Court of Justice of the European Union

For the reasons discussed below, there have not been so far any cases before the CJEU challenging Greek labour law reforms. Therefore, cases concerning labour law reforms in Portugal and Romania, which also received financial assistance under conditionality being in a similar position with Greece, are included in the analysis of the CJEU's jurisprudence, as well as a case concerning social security reforms/rights in Greece, which is analogically interpreted.

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<sup>269</sup> See e.g. cases *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*, App. No. 62235/12 and No. 57725/12 (2013), *N.K.M. v Hungary* App. No. 66529/11 (2013), *Frimu and others v Romania*, App. No. 45312/11, 45581/11, 45583/11, 45587/11 and 45588/11 (2012).

<sup>270</sup> See e.g. *Koufaki and ADEDY v Greece*, para. 37.

<sup>271</sup> Travlos-Tzanetatos 2015, p. 17-18.

<sup>272</sup> Gerards 2015, p. 278; Pervou 2016, p. 122.

#### 4.3.1. C-434/11<sup>273</sup>, C-134/12<sup>274</sup>, C-462/11<sup>275</sup>, C-128/12<sup>276</sup>, C-264/12<sup>277</sup>, C-64/16<sup>278</sup>

The first five cases are preliminary references made by Romanian and Portuguese Courts to the CJEU on the interpretation of articles 20, 21 and 31 of the EUCFR in the context of reductions of remuneration of public sector employees imposed by domestic laws implementing the Council Decisions on the basis of the Excessive Deficit Procedure and the MoUs signed by those countries with their creditors. Precisely, what the referring courts ask the CJEU is: whether the principles of equal treatment and non-discrimination also apply to public sector employees in the reduction or non-payment of remuneration, whether unilaterally imposed salary cuts are prohibited by the right to working conditions that respect dignity and whether the latter protects the right to fair remuneration that ensures a satisfactory standard of living considering also that there are alternative measures to consolidate public finances. Nevertheless, the CJEU in all five cases held in similar fashion that it lacks jurisdiction to hear those questions since the preliminary references do not contain evidence that the laws at stake are implementing EU law and the provisions of the Charter are according to article 51(1) EUCFR addressed to Member States only when implementing EU law. As a result, all references were held inadmissible.

Recent case C-64/16 is also a preliminary reference of a Portuguese court in the context of temporary reductions in the amount of remuneration of the Portuguese Court of Auditors' members imposed by EU rules, this time on the interpretation of article 47 EUCFR and article 19(1) TEU (principle of judicial independence). The referring court asks essentially whether that principle must be interpreted as precluding measures to reduce remuneration of the judiciary. The CJEU went on to hold the claim admissible, paradoxically without referring at all to its previous case law on the above-analyzed cases or the *Florescu* case<sup>279</sup>, and avoiding the question of implementation of EU law and the

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<sup>273</sup> C-434/11 *Corpul Național al Polițiștilor*.

<sup>274</sup> C-134/12 *Corpul Național al Polițiștilor*.

<sup>275</sup> C-462/11 *Cozman*.

<sup>276</sup> C-128/12 *Sindicato dos Bancários do Norte and Others*.

<sup>277</sup> C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins*.

<sup>278</sup> C-64/16 *Associação Sindical dos Juizes Portugueses*.

<sup>279</sup> C-258/14 *Florescu and others*, para. 41, where the CJEU stated that "the Memorandum of Understanding, although mandatory, contains no specific provision requiring the adoption of the national legislation at issue in the main proceedings".

EUCFR by the adoption of the domestic laws at stake probably because, as it explains on the examination of the merits of the case, it was “apparent from the information provided by the referring court that the salary-reduction measures at issue were adopted because of mandatory requirements linked to eliminating the Portuguese State’s excessive budget deficit and in the context of an EU programme of financial assistance to Portugal”<sup>280</sup>. On the substance of the case, the CJEU probably to a degree influenced by the on-going rule of law crisis in Poland focuses solely on the interpretation of article 19(1) TEU and not article 47 EUCFR, to declare itself competent (directly from the EU Treaties) to judge on the independence of national judges who apply and interpret EU law even if there is no EU element in its sources of law (e.g. a directive)<sup>281</sup>. Nevertheless, in the present case, it held that salary-reduction measures linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme do not impair the independence of the members of the Portuguese Court of Auditors<sup>282</sup>.

### Comments

In the first five cases, the question whether austerity-based labour law reforms breach the Charter was not answered<sup>283</sup>, with the Court legalistically, on the one hand, blaming the referring courts for not clearing out the link between the contested acts and EU law and/or on the other hand considering that the MoUs are not part of EU law at all. However, the Court could have displayed more proactivity by seeking to reformulate the questions or rearticulating the referrals as it has done in the past in many cases<sup>284</sup>. Nevertheless, after its important ruling in *Florescu*<sup>285</sup>, the Court has changed its stance towards the admissibility of preliminary references where litigants challenge national measures, at least as regards the balance of payments financial assistance framework and pension reforms. This precedent was to a degree followed by the Court in C-46/16 where the CJEU

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<sup>280</sup> C-46/16, para 46.

<sup>281</sup> Taborowski 2018.

<sup>282</sup> C-46/16, paras 51-52.

<sup>283</sup> It should be noted that before C-128/12 was referred to the Court of Justice, the Portuguese Constitutional Court in case 353/2.12 found the public sector pay cut to contravene the equality provision of article 13 of the Portuguese Constitution.

<sup>284</sup> Markakis and Dermine 2018, p. 14. See e.g. case C-6/64 *Costa ENEL*, p. 593.

<sup>285</sup> In *Florescu*, the national court, perhaps learning from earlier failures, sent a more precise and wide-ranging reference. Kilpatrick 2017, p. 9. Nevertheless, the CJEU found no violation of article 17(1)-right to property of the EUCFR.

declared the preliminary reference admissible without though any reference to fundamental rights under the Charter. The Court, nevertheless, rejected the claim on the substance due to the specific circumstances under which the reductions in remuneration of judges were taken (limited reduction, wide application, temporary nature) that do not violate judicial independence (article 19(1) TEU). It is apparent that the Court in the above-mentioned preliminary references is trying to avoid the politically sensitive issue of fundamental rights' breaches under the EUCFR by national labour law measures initially at the admissibility stage and recently in the merits in an inconsistent manner in light of its previous case-law<sup>286</sup>. Thus, the difficulties also for Greek courts of making a preliminary reference to the CJEU are obvious and that explains why<sup>287</sup> no cases have been noted so far challenging labour law reforms in Greece before the CJEU<sup>288</sup>. Therefore, the question of conformity of labour law reforms in Greece and other countries under financial assistance with the EUCFR is still to be answered by the CJEU, which favors case by case findings in that context.

#### **4.3.2. T-531/14 *Sotiropoulou and others v Council of the EU***

The plaintiffs, in this case, used to be employees of the Hellenic Telecommunications Organization S.A. (OTE) that have now retired and receive old-age pensions from two pension funds (IKA-ETAM and TAPOTE-TAYTEKO). On the 15<sup>th</sup> of July 2014 they filed an action for damages (of €870.504,11 plus €3.000 for each for moral damage) against the Council of the European Union and its decision 2010/320<sup>289</sup> on the basis of the Excessive Deficit Procedure (article 126(9) and 136 TFEU) that notifies Greece to take deficit reduction measures under fiscal consolidation to improve the competitiveness of the Greek economy. The legal basis of their complaints was article 1 (human dignity), article 25 (rights of the elderly) and 34 social security and assistance) of the EUCFR. The

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<sup>286</sup> Hinarejos 2015, p. 135.

<sup>287</sup> See also Stagkos 2016, p. 409 in that regard.

<sup>288</sup> Note that in Greek Council of State decision 668/2012 analyzed below the plaintiffs made a claim for a preliminary reference, however, the Council silently rejected it without any justification probably because it regards MoUs as political plans or declarations.

<sup>289</sup> As amended by Council decisions 2010/486, 2011/57, 2011/734, 2011/791, 2012/211, 2013/6. Note, that Council decision 2010/320 was also challenged by the plaintiffs complaining about reductions in wages and pensions in *ADEDY v. Greece*, T-541/10, an action for annulment case that also failed at the admissibility stage due to lack of direct concern. It should also be noted here, that the Court seems to direct litigants to bring a case against the implementing measures of the MoUs and before national courts and not the CJEU. See para 90 of the judgment.

measures, as implemented by statutory acts and circulars of the pension funds, against which the plaintiffs are complaining include among others abolition of Easter and Christmas bonuses as well as vacation allowances, reduction of pensions and their ceiling of pensions and other reforms of the Greek social security system.

At the admissibility stage, the Council argued that the contested decisions contain measures only of a general nature and it's the duty of the national legislator under "wide autonomy and discretion"<sup>290</sup> to define their content in statutory acts, therefore the Greek courts and not the General Court should be competent to examine the complaint at stake. The plaintiffs replied that the Greek legislator was obliged to enact the statutes implementing the contested Council decisions under the threat of the imposition on Greece of the sanctions of article 126(9) and 11 TFEU and that the contested decisions imposed the adoption of highly detailed specific measures that cover a wide range of public policies including social security and the pension system<sup>291</sup>. The General Court's reaction, in line with the *Ledra Advertising* case, was to declare the action for damages admissible. It stated that to have jurisdiction in such a case of contractual liability (a. 268 and 340 TFEU), the damage must be caused by action of the institutions, bodies, offices and agencies of the European Union or their servants in the exercise of their duties and not national institutions<sup>292</sup>, and that this observation is relevant also for the examination of the merits of the action since it is one of the three elements needed to establish Union's liability (action, damage, causal link). In this case the alleged damage is attributable to the Council as it is a direct consequence of the contested decisions.

At the substance of the case, the plaintiffs claimed that the cuts in pensions are excessive and disproportionate and do not respect the fair balance between the requirements of the general interest and the protection of fundamental rights enshrined in articles 1, 25 and 34 of the EUCFR. The Court rejected the claims and stated that although the Council had a wide discretion when adopting the contested decisions, justified by the fact that they are economic policy choices, it was not manifestly unjustified to provide for

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<sup>290</sup> T-531/14, para 54, translated by the author.

<sup>291</sup> T-531/14, para 55.

<sup>292</sup> T-531/14, para 56.

various cost-saving measures, including pension schemes, and the Council did not exceed the limits of its wide discretion by adopting the contested decisions. This is justified, according to the Court, by the exceptional situation under which the contested decisions were adopted, i.e. at a time when the deterioration of the public finances of the Hellenic Republic threatened the financial stability of both Greece and the eurozone in general and the measures at stake were already in-depth discussed by the Greek government and the so-called Troika and were foreseen in the First MoU<sup>293</sup>. What is more, the Court refers to the rights of the elderly and the rights to access to social security benefits and services to state that they are not absolute, which means that their exercise may be limited (a. 52 EUCFR) where justified by objectives of general interest and the restrictions are necessary and correspond to these objectives. More specifically, the measures cutting pensions at stake respond to the general interest objectives of ensuring fiscal consolidation, reducing public expenditure and supporting the pension system of Greece and as a result to the Union objective of budgetary discipline of Eurozone Member states to ensure financial stability of the euro area. Therefore, they are not unjustified restrictions, nor constitute excessive and unacceptable interference affecting the very substance of those rights and the plaintiffs failed to demonstrate a flagrant infringement by the Council of a rule of law conferring rights on individuals<sup>294</sup>.

### Comments

Case *Sotiropoulou* is a recent example of the “imputability” of the Union’s Economic Governance, where although the Council adopted a formal decision translating a Memorandum of Understanding, there is no responsibility of the EU for the pension reforms in Greece<sup>295</sup>. If we apply the reasoning of the Court to labour law reforms in Greece and try to anticipate the outcome of a case challenging through an action for damages cuts in wages and allowances of public servants, it is highly likely that the conclusion will be the same. The GC declares the action admissible which seems as in *Ledra Advertising* to open the Court’s door to more similar challenges under the financial

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<sup>293</sup> T-531/14, para 84-85.

<sup>294</sup> T-531/14, paras. 88-92.

<sup>295</sup> Adalid 2018, p. 22.

assistance framework, however, that is to be considered only a Pyrrhic victory for litigants. In reality, the Court's reasoning in the substance of the case shows that the Court raises high procedural barriers by the way it approaches<sup>296</sup> the elements needed to establish an EU action for damages and specifically the need for the EU to have committed a sufficiently serious breach by manifestly and gravely disregarding the limits of its discretion. In addition to that, the Court also raises substantive barriers going through a very brief proportionality test stating that articles 25 and 34 of the Charter are not absolute, and their exercise may be limited by reasons of general interest which in this case is fiscal consolidation and the Council has a wide margin of appreciation in that context. However, the Court makes no reference to the invoked human dignity under article 1 of the Charter and does not examine at all the possibility of the decent standard of living having been affected. As a result, the contested act containing pension reforms challenged in this case do not infringe, according to the GC, the EUCFR.

#### 4.4. European Committee of Social Rights

As a preliminary remark, it should be noted that the ECSR is a quasi-judicial<sup>297</sup> body established by the Council of Europe to monitor compliance with the ESC following to a degree the methods of the ECtHR<sup>298</sup>. Compliance is monitored through two mechanisms that work complementary: the national reporting system and the procedure of collective complaints directly submitted to the Committee by social partners and NGOs at European or national level. The decisions of the Committee must be respected by the State concerned although they are not enforceable in the domestic legal order as Courts' decisions<sup>299</sup>. In addition, the decisions are declaratory, in other words, they set the law, thus requiring national authorities to take measures to give them effect under domestic law<sup>300</sup>. In the following pages, three cases brought before the Committee under the

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<sup>296</sup> Kilpatrick 2017 p. 14.

<sup>297</sup> The literature takes a mixed view as to whether the Committee is considered a totally judicial body. See Nannery 2015, p. 65; Brillat 2005, p. 409.

<sup>298</sup> E.g. the margin of appreciation doctrine or proportionality test.

<sup>299</sup> National courts, however, should *ex post* intervene in domestic disputes to examine the measures condemned by the Committee in light of its decision. E.g. in the Greek legal order individuals may file an action for damages to the Greek courts against the Greek State due to damage caused by an illegal act, pursuant to article 105 of the Introductory Law to the Civil Code (Eis. N.A.K.). Stagkos 2013, p. 172-174.

<sup>300</sup> Council of Europe 2018.



collective complaints procedure concerning austerity-based labour law reforms in Greece and their conformity with provisions of the ESC are discussed.

#### **4.4.1. GENOP-DEI and ADEDY v Greece, Complaints 65-66/2011**

Complaints No. 65/2011 and 66/2011 were submitted to the Committee by the Federation of employees of the national electric power corporation and the Confederation of Greek civil servants' trade unions on the same day, the 21<sup>st</sup> of February 2011. In complaint 66/2011 they argued that special apprenticeship contracts between employers and individuals aged 15 to 18 excluding them from labour law protection as well as measures enabling the employment of new entrants to the labour market aged under 25 with a reduced (84%) minimum or daily wage<sup>301</sup> violate plenty of provisions of the Charter<sup>302</sup>. In complaint 65/2011 the organizations claimed that the possibility<sup>303</sup> of dismissing a person without notice or severance pay during the probation period in an open-ended contract violates article 4 para 4 of the ESC. In addition, they argued that the possibility of a company-level collective agreement to derogate from the provisions of a sectoral-level collective agreement leading to a deterioration in working conditions, as well as the capability of trade unions of different levels to conclude a company-level collective agreement, if there is no trade union in the enterprise<sup>304</sup>, violate article 3 para 1a of the 1988 Additional Protocol.

The respondent Government defended its policy choices in both complaints. In complaint 66/2011 it claimed that special apprenticeship contracts are means of integrating young people into the labour market, thus creating the preconditions for stable employment and providing incentives to employ workers under 25 to reduce unemployment. In addition, the protective provisions of labour law also cover young persons. In complaint 65/2011 the respondent Government argued that the current economic crisis and the unstable nature of Greek enterprises' business activities justify the initial instability in employment during the probation period and that the measures at

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<sup>301</sup> Introduced by Act 3863/2010, articles 74 para 9 and 74 para 8.

<sup>302</sup> Articles 1§1, 1§2, 7§2, 7§7, 7§9, 10§2 and 12§2 of the 1961 Charter.

<sup>303</sup> Introduced by Act 3899/2010, section 17§5.

<sup>304</sup> Introduced by Act 3899/2010, section 13.

stake do not violate the freedom of collective bargaining as only the legal representatives of workers at enterprise-level have the right to conclude enterprise-level collective agreements.

Before addressing the merits of the case, the Committee made in both cases similar preliminary observations that it also took into account when examining one by one the alleged violations of the Charter. Citing its XIX-2 (2009) Conclusions, the Committee emphatically stated that:

“the economic crisis should not have as a consequence the reduction of the protection of the rights recognized by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most”<sup>305</sup>.

Hence, it may be reasonable, according to the Committee, for the crisis to prompt changes in legislation, including labour law, to reduce public spending, however, they should not excessively destabilize the situation of those who enjoy the Charter’s protection otherwise employees would have to bear an excessively large share of the crisis’ consequences that might probably make the crisis even worse<sup>306</sup>.

Addressing the merits of complaint No 66/2011, the Committee found primarily no violation of article 1 para 1 of the Charter as regards the complainants’ allegations of inadequate job and social protection in special apprenticeship contracts. It found no violation either of article 7 paras 2 and 9 since the apprentices’ situation satisfies the age limit requirements as regards dangerous/unhealthy occupations and regular medical control. By contrast, it found a violation of article 7 para 7 as young persons are excluded from the scope of labour legislation and are not entitled to three weeks’ annual holiday with pay, as well as article 10 para 2 since special apprenticeship contracts do not give

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<sup>305</sup> European Committee of Social Rights 2009, para 15.

<sup>306</sup> See *GENOP-DEI and ADEDY v Greece*, Complaint No 66/2011, paras 12-16 and Complaint No 65/2011 paras 16-19.

any indication e.g. as to how time should be divided between theoretical and practical instruction or how apprentices/trainers should be selected or remunerated. Finally, the Committee examined the measure providing for (32%) lower minimum wages to all young persons up to 25 years, to find that although it considers it permissible to pay a lower minimum wage to younger persons in certain circumstances, any such reduction should not fall below the poverty level of the country concerned (i.e. 50% of the national average wage<sup>307</sup>). In the present case the minimum wage for young workers was found to be substantially below the poverty level and consequently in violation of article 4 para 1 considered also in the light of the non-discrimination clause of the 1961 Charter's Preamble, since the measure is discriminating against young workers based on age in a disproportionate manner even under the particular serious economic circumstances.

In the merits of complaint 65/2011 the Committee found a breach of article 4 para 4 by the austerity measure that provides for no notice or severance pay to an employee when his/her permanent contract is terminated during the probationary period set at one year, as the right to reasonable notice applies to all categories of employees and also during the probationary period. As regards the alleged violation of article 3 para. 1a of the 1988 Additional Protocol, the Committee found that it does not concern the right to collective bargaining and thus it does not cover the issue raised by the complainants in this case<sup>308</sup>.

#### **4.4.2. GSEE v. Greece, Complaint 111/2014**

In this case, the complainant workers' confederation challenged the anti-crisis legislation<sup>309</sup> enacted between 2010-2014 in Greece before the ECSR as breaching provisions of the ESC<sup>310</sup>. Specifically, GSEE claimed that the laws at stake, which are not, according to statistics, necessary, effective or proportionate (and definitely not temporary)<sup>311</sup>, dismantle the existent system of employment negotiations between social

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<sup>307</sup> See *GENOP-DEI and ADEDY v Greece*, Complaint No 66/2011, para 57.

<sup>308</sup> In that regard Greek Member of the Committee P. Stagkos dissented to support his argument that article 3 para 1a covers collective bargaining and that the Greek measure at stake is in breach of that Charter provision.

<sup>309</sup> Section 31 and 37 of Act No. 4024/2011, Section 1, 2 and 5 of Council of Ministers Act No. 6/2012, Section IA, para. C1, sub. 12 and para. G 10 and 14 of Act No. 4093/2012, and Section IA, sub. IA.4 of Act No. 4254/2014.

<sup>310</sup> Articles 1(1) and 1(2), 2(1) and 2(5), 4(1) and 4(4), 7(5) and 7(7), 30 and 31 of the 1961 Social Charter and article 3 of the 1988 Protocol to the Charter.

<sup>311</sup> *GSEE v. Greece*, paras 104, 111, 112.

partners and allow the employers to be discharged from their obligations arising from collective agreements and arbitration. In addition, working conditions and pay terms are downgraded in a discriminatory manner for young workers under 25. The introduction of “associations of persons” as well as the rise of company agreements shift the employment relationship from sector to company-level or to the individual worker where the employer is in a dominant position also facilitating temporary employment. What is more, GSEE complained about the reduction of rest hours from 12 to 11 hours, the reduction of severance pays and about other means that result in increased work intensity<sup>312</sup>. It also claimed that reductions of the minimum wage in conjunction with the rise in social contributions and taxes and even further reductions of young persons’ wages under 25 are contrary to article 4 of the Charter. Finally, the measures at stake concerning children and young persons/apprentices breach, according to GSEE, article 7 of the Charter.

The Greek Government’s response was not to dispute the merits of the case as it did in *GENOP-DEI and ADEDY v Greece*, but to make a political claim that it respects Greece’s international obligations (including the ESC) by putting forward policies that try to replace the austerity programmes with humanitarian measures for the most vulnerable of the society<sup>313</sup> and measures that reconstruct labour law deregulation<sup>314</sup>. The shift in the Government’s response in those two cases is explained by the fact that at the time of submitting its observations in this case the anti-austerity and anti-memorandum Cabinet of A. Tsipras of the “SYRIZA” party in a coalition with the “Independent Greeks” party was in charge, whereas in *GENOP-DEI and ADEDY v Greece* the pro-austerity Cabinet of A. Samaras of the “New Democracy” party in a coalition with the “PASOK” party were in charge. The new Greek Government probably saw this case before the ECSR as an opportunity to strengthen its position at a pan-European level and gain a negotiating advantage at a time that the negotiations of Greece with the creditors were still on-going by putting the blame on them for the disputed legislation. Thus, this case ends up being a paradoxical dispute of the respondent Government joining forces in a way with the complainant organization against the so-called “Troika” and in particular the European

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<sup>312</sup> *GSEE v. Greece*, paras 142-143.

<sup>313</sup> *GSEE v. Greece*, para 117.

<sup>314</sup> *GSEE v. Greece*, paras 115, 116 and 117.

Commission, that was invited by the Committee to submit observations in this case<sup>315</sup>. The European Commission denied responsibility for those measures claiming that they are the consequence of serious imbalances of earlier origin and they were necessary for Greece to remain in the Eurozone<sup>316</sup>. By contrast, the European Trade Union Confederation argued that the measures were neither necessary nor pursuing a legitimate aim since there were alternative measures available for the Government that it did not consider<sup>317</sup>.

The Committee started its assessment by examining articles 30 and 31 of the Charter. It considered the large number of victims of the measures at stake, the large number of provisions and the persistent nature of the alleged violations as examined in relevant complaints, to state that the legitimate aim of the measures pursued through austerity is the public interest and the legislature has a margin of appreciation in defining it. Nevertheless, the public international human rights obligations of a state oblige it even when defining public interest during a severe economic crisis to maintain an adequate level of balanced protection for basic social needs, especially for the most vulnerable, and to consider alternative and less restrictive measures, which the Government, in this case, failed to do. Subsequently, the Committee recognized that unemployment in Greece has reached dramatic levels, however, it was not convinced that the invoked measures were the only and direct cause of the (un)employment situation in Greece as other factors may have played a role. Thus, it found no violation of article 1 para 1 of the Charter<sup>318</sup>. It did find, however, a violation of article 1 para 2 since the extent of the reduction of the minimum wage and the fact that it applied to all workers under 25 is disproportionate to the legitimate aims pursued even under the present economic circumstances. In a similar manner, the Committee found a violation of article 2 para 1 since no rule sets an upper limit on weekly work hours nor provides for a minimum weekly rest period, which could mean that a worker in Greece may have to work up to an unreasonable 78 hours per week. What is more, the Committee was not persuaded by the (lack of) arguments of the

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<sup>315</sup> Papadopoulos 2017, p. 9-10.

<sup>316</sup> This argument was also put forward by the International Organization of Employers that presented observations in that case.

<sup>317</sup> Such as combating waste of public funds. See *GSEE v. Greece*, para 38.

<sup>318</sup> The Greek member of the Committee P. Stagkos dissented in that regard criticizing the Committee for not identifying those "other factors" and not taking into account the relevant statistics.

complainant as regards violation of weekly rest and found no violation of article 2 para 5 since the measures do not contain provisions that result in exceeding a working time of 6 days per week.

As regards article 4 of the Charter, the Committee relied on gross figures and held that the reduced statutory minimum wage for everyone and especially for workers under 25 years is “manifestly unfair”<sup>319</sup> and thus contrary to article 4 para 1, as it is far below the established thresholds set by the Committee and is discriminatory based on age in light of the Preamble of the 1961 Charter. Since the same threshold applies to workers of 15-18 years, the Committee held that there is also a violation of article 7 para 5. In addition, the Committee, as in *GENOP-DEI and ADEDY v Greece*, found once again a violation of article 4 para 4 since no periods of notice or severance pay in case of termination of the employment contract during the probation period exist in the Greek legal order. The above-mentioned case was cited by the Committee to find also a violation of article 7 para 7 of the Charter since Greece continues not to provide for 3 weeks’ annual holiday with pay. Finally, Greece was found by the Committee to be violating article 3 of the 1988 Protocol due to the abolishment by the austerity measures of the existing collective bargaining system.

### Comments

It is obvious from the above cases that although the Committee has shown attention for the interpretative methods of the ECtHR, it follows its own different path of reasoning that gives lesser importance to the margin of appreciation doctrine<sup>320</sup> and puts more intensity on the review of the legislator’s choices. Employing very permissive admissibility criteria, it examines in-depth the Greek labour law reforms brought before it in light of several international materials and under the scope of its previous case-law on the relation between social rights and economy, regardless of whether those measures were taken under exceptional crisis circumstances or not. It is notable, that for the Committee the debt crisis is not a reason to lower the protection of the Charter or justify violations of

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<sup>319</sup> *GSEE v Greece*, para. 191.

<sup>320</sup> Mola 2015 p. 182.

fundamental rights, but on the contrary, a reason to strengthen protection as workers and vulnerable persons are those who bear the consequences of the crisis in the harshest way. In addition, the Committee does not hesitate to assess in detail the adequacy of the measures and methods chosen by the national authorities to tackle the crisis in light also of alternative less restrictive measures or to set minimum wage or poverty thresholds<sup>321</sup>. As a result, the Committee has found plenty of labour law reforms violating core labour law rights enshrined in the Charter by Greece during the crisis paying also a lot of attention to the cumulative effect of labour and other (e.g. tax) measures on affected groups of people.

It is important to note at this point the importance of these decisions for the Greek legal order since the European Social Charter is an international treaty that has been incorporated into domestic law as a statutory act of the Greek parliament<sup>322</sup>, thus prevailing over any contrary provision of ordinary legislative acts on the basis of article 28(2) of the Greek Constitution. The case-law of the Council of State<sup>323</sup> also gives direct effect to the Charter's provision and considers its provisions as self-executing. The fact, however, that many of the measures for which the Committee keeps condemning Greece over and over in different complaints are still in force show, on the one hand, the unwillingness of the national courts and authorities to respect the Charter and the Committee's decisions, and on the other hand the inadequacy of the Committee's decision under the collective complaints procedure to enforce changes in the Greek legislation<sup>324</sup>. A new interesting development that may provide, nonetheless, new impetus to (non-)compliance with the ESC and the Committee's conclusions is the surprising recent ratification and acceptance by Greece of all of the articles of the Revised European Social Charter<sup>325</sup>, that lays down even higher standards of protection for social rights. Finally, the analyzed decisions are also indirectly relevant for the EU legal order, since although the EU has not acceded to the ESC, many Charter rights are guaranteed by and are to be

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<sup>321</sup> See also *IKA-ETAM v Greece* case, where the Committee adopts a minimum core approach.

<sup>322</sup> Statutory Act 1426/2984.

<sup>323</sup> See Council of State decision 1571/2010.

<sup>324</sup> Papadopoulos 2017, p. 15.

<sup>325</sup> Statutory Act 4359/2016.

relied upon to guide the interpretation of the EU Treaties<sup>326</sup>, the EUCFR and its general principles and EU legislation<sup>327</sup>.

## 4.5. ILO Committee on Freedom of Association

### 4.5.1. Case 2820

On November 2012 the CFA of the ILO published its 365<sup>th</sup> report<sup>328</sup> in which it elaborates *inter alia* on complaints brought before it between 2010-2012 by Greek trade unions (GSEE, ADEDY, GENOP-DEI, OIYE-Greek Federation of Private Sector Employees) and the International Confederation of Trade Unions (ITUC). They alleged violations of workers' fundamental rights to collective bargaining and freedom of association enshrined in ILO Conventions 87, 98, 151 and 154 by austerity measures implemented under the Economic Adjustment Programmes. In particular, they complained about reductions and freezes in the wages-allowances of public sector employees, State intervention in the system of free collective bargaining and wage setting through permanent and less favourable provisions of law instead through the national general collective agreement (NGCA) and exclusion of young workers and apprentices from the scope of the NGCA and the minimum wage standards. In addition, they condemned the lack of social dialogue by the Government, the power of associations of persons to sign binding company-level agreements, the lack of safeguards during the probation employment period and the changes that disrupt the mediation and arbitration system.

The Government's response, in a nutshell, was to dispute those allegations claiming that the measures at stake do not infringe the relevant ILO Conventions and that they were necessary to tackle the exceptional and serious economic crisis, the rise in unemployment and the high public debt in light of the Troika's pressures. The Committee declared itself aware of the exceptional and serious situation under which the measures were taken but emphasized that the consequences of the crisis necessitate the protection of employees and employers from the state's intervention. In that context, it found

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<sup>326</sup> See article 151 TFEU and Explanations to the Charter Title IV-Solidarity articles 27-35.

<sup>327</sup> See e.g. Cases C-116/06 and C-286/06.

<sup>328</sup> International Labour Organization 2012, p. 223-274.



numerous violations of Conventions 87 and 98. In substance, it stressed that the exercise of financial powers by public authorities in a manner that limits compliance with collective agreements breaches the principle of collective bargaining. Thus, restrictions in wage setting, as well as wage reductions of young persons, should be imposed exceptionally only to the extent necessary and for a short period during which safeguards to workers' protection are respected. Furthermore, it noted that the measures are within an overall context of imposed decentralization and weakening of the collective bargaining system that is likely to leave workers without a minimum safety net especially considering the many exclusionary provisions that are less favourable to the workers than those of a higher level as well as the lack of social dialogue. As regards associations of persons, the Committee stated that they might undermine the trade unions' role and should exist only where there are no trade unions at the respective level<sup>329</sup>. Finally, the Committee examined the measure that abolished unilateral resort to arbitration finding no violation in that regard, although it expressed its concerns regarding the restriction in the arbitrator's mandate. In its recommendations, the Committee requested urgently review and repeal of the measures and enhancement of social dialogue.

### Comments

Similarly, to the European Committee of Social Rights, the ILO Committee on Freedom of Association does not consider the debt crisis and the exceptional situation that has arisen as a justification for Greece affecting labour rights through its labour law reforms. On the contrary, the crisis necessitates the protection of both employers and employees from state intervention and weakening through decentralization of the collective bargaining system. The social impact, alternative measures and the temporality of the reforms are elements at which the Committee places particular emphasis. Therefore, the CFA's stance was to declare the incompatibility of some of the labour law measures with ILO Conventions or to emphasize the risk of potential violations. Once again, however, the Committee's (non-binding and non-enforceable) conclusions and recommendations

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<sup>329</sup> The Committee of Experts on the Application of Conventions and Recommendations has also expressed its concerns on this issue and has requested the Greek Government to take action. See International Labour Organization 2013, p. 108.

have been neglected by the Greek Government in the legislative changes adopted after case 2820 that follow a similar pattern but also by the Greek Council of State, as seen in the cases analyzed above.

## **5. Conclusions and Recommendations**

The main purpose of this study was to establish whether austerity-based labour law reforms implemented in Greece during the European Debt Crisis infringe supranational and national fundamental rights' protection standards in light of supranational and Greek bodies' jurisprudence on fundamental rights challenges, and if so, in what ways. To answer this question, this study has laid down initially in chapter 2 the main individual and collective labour law reforms that have been taken to implement the three Greek MoUs and have been challenged by litigants before competent bodies, comparing them also to the pre-crisis labour law regime in Greece. The reforms include reductions in the wages of public sector employees and reductions in the minimum wage of private sector employees, especially of young persons under 25, facilitation of dismissals and fostering of flexible forms of employment. In addition, the collective bargaining system was transformed favoring the legislator's intervention and the promotion of company-level collective agreements instead of sector-level ones, with changes also focusing on mediation-arbitration. Thus, this chapter has explained that the labour law reforms seem to be driven more by ideology than pragmatism with a focus on flexibility, creating, as a result, a shift towards civil law-the law on contracts in the employer's favor.

Chapter 3 of the study has briefly discussed and interpreted a number of fundamental rights standards that have been invoked by litigants in the different bodies' jurisprudence. It has made remarks about the scope of application of the EUCFR with regards to the framework of financial assistance to Eurozone States and has introduced the main relevant components, as established in case-law and the academic literature, of the rights that have been invoked and elaborated by the CJEU in the analyzed cases. The same pattern has been followed concerning many of the rights enshrined in the Greek

Constitution, the ECHR, the ESC and ILO Conventions that have been invoked before the Greek Council of State, the ECtHR, the ECSR and the ILO CFA. As the study has shown, the analyzed fundamental rights are especially weighty normatively and seem to offer significantly high protection while having a considerable interconnection with each other albeit also differences and possible restrictions.

Finally, chapter 4 has explored representative supranational and Greek bodies' decisions on fundamental rights challenges targeting labour law reforms in Greece during the crisis and has evaluated them against the fundamental rights standards that they monitor compliance with. Thus, the answer that could be given to the research question is, in fact, dependent on each body's approach and reasoning during the Debt Crisis, despite the high protection and the significant importance given to the analyzed fundamental rights standards. As this chapter has shown, the analyzed bodies have followed different paths of reasoning in the cases discussed with regards to infringements of fundamental rights by labour law reforms in Greece, which could even be regarded as conflicting at several instances, reflecting in that way the particularities of fundamental rights protection in Europe. Concretely, as regards the Greek Council of State, it seems to be confronting the crisis as an undeclared state of emergency. This can be inferred from its reasoning in decisions 668/2012 and 2307/2014 on the validity of acts implementing labour law reforms of the first two MoUs that have brought reductions of wages and transformations of the collective bargaining system in Greece. Precisely, it found no violation of the Greek Constitution in those cases except with regards to arrangements restricting the arbitration regime under article 22 of the Constitution. The Council is throughout the crisis assuming the responsibility of a *de facto* constitutional court and is trying, albeit inconsistently, to shield its case-law from the crisis and from the legislator's sensitive choices. It does so by legalistically emphasizing the exceptionality and temporality of the situation and by giving high constitutional importance to notions such as "overriding financial public interest" and "general social interest" to justify restrictions of fundamental rights under the Constitution. Only in recent cases of wage and pension reductions in the public sector, it is cautiously starting to realize that the measures challenged are not temporal or that there are alternative ones and is enhancing judicial review, showing, thus, some sympathy to specific categories of litigants such as

armed/police forces personnel or doctors. In addition, the Council of State is declining to delve into the relationship of austerity-based labour law reforms with EU law, rejecting the possibility of a preliminary reference to the CJEU, and it is also declining to consider the binding effect of the European Social Charter and ILO Conventions and their interpretation by the ECSR and the CFA, without proper justification.

The ECtHR's stance on the issue of potential violations of the ECHR by labour law reforms in Greece and especially by reductions of wages, other allowances, and pensions of public sector employees is reflected in the analyzed *Koufaki* case in conjunction with relevant case-law. The Court did not elaborate at all on claims about violations of other rights of the Convention except of the right to property under article 1 of the 1<sup>st</sup> Additional Protocol, finding, however, after a brief and incomplete reasoning on proportionality the applications manifestly ill-founded. In particular, the Court seems to take a hands-off approach and to emphasize its subsidiary role by enlarging the margin of appreciation awarded to the social policy legislator in times of an "exceptional" crisis. It will intervene only in extraordinary situations or to protect people below the subsistence threshold. Nevertheless, what exactly those situations or this threshold are is still questionable. Thus, according to the Strasbourg Court, the ECHR is not infringed by labour law reforms in Greece during the Debt Crisis.

As regards the CJEU, due to the lack of cases challenging Greek labour law reforms, six preliminary references to the CJEU by Romanian and Portuguese courts concerning reductions of remuneration of public sector employees<sup>330</sup> were analogically discussed. Additionally, case T-531/14 (*Sotiropoulou v Council*), an action for damages concerning reductions in pensions of Greek public sector employees, was also analogically examined in an attempt to pre-determine the Court's stance when such a case will potentially arise. The CJEU's stance was to either declare on a case by case basis the challenges inadmissible for legalistic reasons concerning the application of the EUCFR to national austerity measures, inconsistently with its previous case-law, or to consider the

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<sup>330</sup> C-434/11 *Corpul Național al Polițiștilor*; C-134/12 *Corpul Național al Polițiștilor*; C-462/11 *Cozman*; C-128/12 *Sindicato dos Bancários do Norte and Others*; C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins*; C-64/16 *Associação Sindical dos Juizes Portugueses*.

complaints admissible but to reject them in substance raising procedural and substantive barriers that include a very brief proportionality test. The Court, in reality, has so far avoided giving an answer to the politically sensitive posed question whether labour law reforms in Greece and other countries under financial assistance infringe the EUCFR. It is still to be answered in light of the high criticism that it has received concerning the potential of violations of rights under the Solidarity title if the Court would enter into the merits of the cases.

By contrast, the ECSR pays lesser attention to the margin of appreciation doctrine and has reviewed intensively the Greek legislator's individual and collective labour law choices in complaints 65-66/2011 and 111/2014. It is striking, that the Committee's reasoning is not influenced by the exceptionality of the crisis, thus the 1961 European Social Charter is still applicable and is now even more important for vulnerable persons such as young workers during the crisis. What is more, the Committee puts more emphasis on the public international human rights obligations of Greece when defining the public interest that may justify rights' breaches. In that context, it obliges national authorities to examine alternative less restrictive measures, even if the cost-saving measures are required by an international agreement or by EU law. Thus, based on its case-law and in contrast with the ECtHR, it has created a sort of "core social minimum" by setting specific thresholds and criteria (e.g. minimum wage or poverty line), which it examines in light of the cumulative effect of the different in nature measures imposed. Therefore, the Committee has found a violation of articles 1 para 2, 4 para 1 and 7 para 5 ESC with regards to the reduction of the minimum wage for all workers and especially for young workers under 25 and those between 15-18. The former group is, contrary to article 7 para 7, excluded from the scope of labour law legislation and is not entitled to three weeks' annual holiday with pay. Article 10 para 2 has also been infringed with regards to the arrangements for apprenticeship contracts. Furthermore, the Committee has also found twice (since the Government keeps implementing the measure) a breach of article 4 para 4 by the one-year probationary period measure during which an employment contract is terminated without any notice or severance pay, as well as a breach of article 2 para 1 by measures providing for no upper limit of weekly work and rest periods. Finally, the Committee has

condemned Greece for violating article 3 of the 1988 Protocol by abolishing the existing collective bargaining system.

Finally, austerity-based collective labour law reforms adopted in Greece were also scrutinized by the ILO CFA in case 2820, which, similarly to the ECSR, found no reason to reduce the protection offered by ILO Conventions due to the exceptionality of the crisis, thus finding violations of Conventions 87 and 98 or emphasizing the risk of potential violations. The areas of concern of the Committee were the general framework of decentralization and weakening of collective bargaining, the restrictions in wage setting and the wage reductions of young persons, as well as the restrictions in the arbitrator's mandate.

It should be noted, that these findings reflect to a degree the reality of fundamental rights protection in the European multi-layered legal order. As has been shown in Chapter 3, there are different standards of fundamental rights protection with different wording and interpretation of the same rights by bodies with separate role and objectives. This parallel pluralistic existence of different standards and different approaches in the bodies' reasoning has been made even more clear during the Debt Crisis. In addition, as discussed in Chapter 4, the different interpretative tools that the bodies have employed during the crisis such as the balancing test of proportionality, the margin of appreciation doctrine and the understanding of the public interest notion have created a situation of legal uncertainty to the detriment of fundamental rights protection, which seems to play only a marginal role in the discussion of the implications of austerity, one decade after the onset of the crisis. Although a body of case-law condemning Greece and other countries for imposing austerity-based labour law reforms to implement Economic Adjustment Programmes has developed, many of the decisions finding violations come from the quasi-judicial European Committee of Social Rights, the ILO Committees and domestic, mostly lower, courts and not the CJEU, the ECtHR, or the Greek Council of State, who seem reluctant to take this case-law into consideration and delve into "judicial dialogue" in this overlapping context.

Through these findings, this study has also highlighted the conflicting relationship of fundamental (social) rights with economics and in general economic and fiscal considerations, especially those imposed by austerity in times of crisis. As is evident in the reasoning of some of the bodies, the State's cash interests, the country's financial and fiscal situation and the socio-economic policy choices of the legislator are prioritized, thus legitimizing austerity's implications on the marginally reviewed during the Sovereign Debt Crisis fundamental rights. The bodies' denial to look in substance into alternative less restrictive measures that may not excessively affect individuals' fundamental rights when going through the proportionality test is representative of that conflicting relationship. In particular, the nature of fundamental rights is such, that identifying alternatives to austerity-based labour law measures that respect fundamental rights may also have the consequence of favoring specific socio-economic policies. Nevertheless, that is the case also when bodies such as the CJEU refuse to go into the merits of the case and to let austerity-based reforms compete with fundamental rights' protection standards; and even when they do so, they provide inconsistent and incomplete tests of interpretation, thus legitimizing almost unconditionally the legislator's policy choices. Therefore, in the view of the author, supranational and national bodies should play a stronger role in reviewing the implications of economic policies such as austerity on fundamental rights, especially during the crisis, thus also enhancing the justiciability and realization of social rights.

To conclude, the findings of this study have a number of important implications for future policy and judicial practice. To the EU and the national legislature, it is recommended that fundamental rights and the bodies' decisions pointing to violations are respected by taking those findings into consideration either within the EU Economic Governance Framework, including the after-Memorandum Enhanced Surveillance Procedure which Greece will shortly enter, or even after that, since most of the labour law measures contested are still in force today and are likely to be for years to come. The European Pillar of Social Rights might also be of assistance towards that goal in conjunction with fundamental rights impact assessments. In addition, labour law should not be seen by the legislature as part of the problem in the crisis but as part of the solution to exit the crisis through strong collective bargaining and employment protection legislation and not through the panacea of flexibility and austerity. Thus, the austerity-

based labour law reforms adopted in Greece through the crisis, especially those condemned by supranational and national bodies such as the reductions of (young persons') minimum wage, weekly work and rest arrangements or the weakening of collective bargaining, need to be abolished and be replaced by the pre-crisis regime strengthened with further socially protective reforms. With regards to the EU and the Greek executive, as the European Committee of Social Rights has pointed out, they should respect Greece's public international human rights obligations as observed by supranational bodies, as well as the fundamental principle *pacta sunt servanda*<sup>331</sup>. The European Social Charter and the comprehensive case-law that the ECSR has developed to interpret it, as well as the ILO Conventions and their interpretation by ILO Committees could be the point of reference in that context, with a view of integrating the ESC's standards into the EU legal order and its policies and specifically into the Charter of Fundamental Rights of the EU. What is more, notions such as "minimum core" or other thresholds that the ECSR has established in its case law could also influence the ECtHR, which, as seen, keeps a hands-off approach during the Debt Crisis enlarging the margin of appreciation doctrine and leaving more room for economic considerations, or the CJEU, which seeks to avoid the sensitive question of fundamental rights breaches in the confrontation of the Greek crisis. It is, finally, equally important that national judges refrain from exercising judicial restraint and start exercising a stronger form of control in the field of social policy and engaging more actively with supranational fundamental rights standards and bodies' decisions as well as national constitutional standards through a proper and complete proportionality test.

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<sup>331</sup> Article 26 of Vienna Convention on the Law of Treaties.



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