



## The 'Conscience of Europe' in the European Sovereign Debt Crisis.

An analysis of the judgments of the European Court of Human Rights and the European Committee of Social Rights on austerity measures.

Aoife Nannery

Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute

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European University Institute  
**Department of Law**

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This thesis is an analysis of judgments of the European Court of Human Rights and the European Committee of Social Rights arising from austerity measures in the European sovereign debt crisis. The thesis considers the protection afforded to socio-economic interests under the two systems, and how this protection has been tested by the challenges arising from the economic crisis.

The first chapter is an analysis of the 'social Euro-crisis cases.' Brought under Article 1 of Protocol 1 to the ECHR the measures enacted to reduce government spending were an alleged violation of the right to property. Almost all of the social Euro-crisis cases were held to be inadmissible by the Court, which cited the gravity of the economic crisis in the respondent states and the executive's margin of appreciation in matters of social and economic policy.

The second chapter places the social Euro-crisis cases in context temporally and thematically, in considering two previous lines of case law developed by Strasbourg: financial and economic stability, and emergency and 'exceptional circumstances'. The ECtHR decisions focus on the severity of the crisis, determining that the margin of appreciation is broader in such circumstances.

The ECtHR section concludes that it does not appear that the European sovereign debt crisis has seen Strasbourg develop any definitive 'crisis approach' to ensure that Convention rights are protected in times of economic instability.

The third chapter examines the case law generated by the European Committee of Social Rights during the same period. This section serves to act as a counterpart to the ECtHR section. The Committee emphasised that times of crisis require socio-economic rights to be protected, and finds many of the challenged austerity measures incompatible with the European Social Charter.



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**The 'Conscience of Europe' in the European Sovereign Debt Crisis: an analysis of the judgments of the European Court of Human Rights and the European Committee of Social Rights.<sup>1</sup>**

**1. Social rights protection in the financial and sovereign debt crises.**

This thesis engages in a case law analysis of certain judgments of the European Court of Human Rights and the European Committee on Social Rights on cases arising from austerity measures implemented to tackle the European sovereign debt crisis. The thesis gauges the response of the two bodies to the crisis, and critically analyses the reasoning in the cases. Human rights bodies have stressed that the economic crisis has had a profound effect upon human rights, and that fundamental rights require greater protection during such periods.<sup>2</sup> This area of law that is rapidly evolving and this thesis explores how two of the human rights bodies of the Council of Europe have responded to the crisis by critically analysing some of the cases which have been decided.

The financial crisis of 2008 and the subsequent European sovereign debt crisis<sup>3</sup> have caused severe hardship in Europe; the number of people at risk of poverty or social exclusion in the EU accounts for nearly a quarter of the entire population, as of 2012<sup>4</sup>, the rates of material deprivation in the EU<sup>5</sup> stood at 23% in 2010.<sup>6</sup> The enormous social cost of the crisis years is now beginning to be reflected in the data - there is a time lag in effect with regard to calculating these rates.<sup>7</sup> This also has ramifications for any legal proceedings where the social impact of a given measure must be assessed by the court.

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<sup>1</sup> The author is very grateful for the supervision, guidance and encouragement of Prof. Claire Kilpatrick (EUI) throughout the project. All errors remain those of the author.

<sup>2</sup> Fundamental Rights Agency Press Release 06.12.2012, 'The crisis is a time to boost access to justice' <http://fra.europa.eu/en/press-release/2012/crisis-time-boost-access-justice>, accessed 28.09.2015.

<sup>3</sup> Precise timelines are difficult to establish, but for the purposes of my analysis I consider the request of Hungary for a Stand-By Arrangement from the IMF after consulting the EU to mark the transition from financial crisis to the sovereign debt crisis. See Council Decision (2009/102/EC) of 4 November 2008 providing Community medium-term financial assistance to Hungary.

<sup>4</sup> See the Annual Report of the Social Protection Committee of the European Commission, 'Social Europe: Current Challenges and the Way Forward' (2012), p. 8.

<sup>5</sup> Calculated by Eurostat as the proportion of people whose living conditions are severely affected by a lack of resources: European Commission – Eurostat, 'Material Deprivation Statistics – Early Results' [http://ec.europa.eu/eurostat/statistics-explained/index.php/Material\\_deprivation\\_statistics\\_-\\_early\\_results](http://ec.europa.eu/eurostat/statistics-explained/index.php/Material_deprivation_statistics_-_early_results), accessed 23 March 2015.

<sup>6</sup> Eurostat Issue number 9/2012, '23% of EU citizens were at risk of poverty or social exclusion in 2010', <http://ec.europa.eu/eurostat/en/web/products-statistics-in-focus/-/KS-SF-12-009>, accessed 31 March 2015.

<sup>7</sup> See *ibid* no. 4, 'Context'.

## **2. Where might the Council of Europe fit into this crisis narrative?**<sup>8</sup>

As the pre-eminent human rights organisation in Europe, it has been said that the Council of Europe has assumed an enhanced role for those suffering hardship caused by austerity measures. In the case of the ECtHR, the right of individual petition has, according to Judge Tulkens, required that the Convention system develop into one of quasi-constitutional protection.<sup>9</sup> With the enactment of Protocol No. 11 to the Convention, the right of individual petition is guaranteed to citizens of all High Contracting States. This breadth of application could also be said to be matched with a corresponding increase in the sophistication of the strategies and reasoning used by the ECtHR. Judge Tulkens claims that the right of individual petition means that the ECtHR has assumed the role of a constitutional protector throughout Europe, and also states that the increasing volume of the Court's case law has allowed it to develop more probing and sophisticated methods for ensuring that Convention rights are being upheld in the Contracting States – “there has been a qualitative evolution... If the Convention as an instrument is a scalpel, it has gone from scraping the surface to making deep incisions.”<sup>10</sup> It may be true that as Strasbourg has matured and added to the growing corpus of its case law, its decision making has become more insightful and penetrating. If that be the case, then the brevity of the judgments in the cases below, and the cursory examination given to the issues presented by the applicants to the ECtHR do not match this development in qualitative terms.

This claim of Judge Tulkens that the sophistication of Strasbourg's jurisdiction has developed in conjunction with its case load is perhaps to counter the criticism that Strasbourg is overextending its reach into the domain of national authorities. The circumstances of how and why the Convention was enacted have also been mentioned by commentators in recent times, in response to claims that international human rights tribunals ought to defer more to the prerogatives of the national authorities in times of crisis. Robert Spano has stated: “The European Convention is....based on the underlying premise that serious human rights problems and their adequate assessment sometimes necessitate a distant perspective, a

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<sup>8</sup> The Council of Europe bodies have been prolific in issuing opinions on the crisis. See Ana Gómez Heredero, ‘Social Security as a Human Right: The protection afforded by the European Convention on Human Rights’, Human Rights Files, No. 23., Commissioner for Human Rights, ‘Safeguarding Human Rights in Times of Crisis’, Issue Paper 2013.

<sup>9</sup> Françoise Tulkens, ‘The contribution of the European Convention on Human Rights to the poverty issue in times of crisis’ European Court of Human Rights – European Judicial Training Network Seminar on Human Rights for European Judicial Trainers Strasbourg 8 July 2014, p. 22.

<sup>10</sup> *Ibid.*

viewpoint taken away from the internal domestic bubble, where the individual participants in the legal process – be it parliamentarians, executive officials or members of the judiciary – may have difficulty or, in some states, are unwilling to examine the controversial issues implicating human rights with the necessary objectivity that distance provides”.<sup>11</sup> These two opinions, from senior ECtHR figures, are worth bearing in mind when the case law is being considered.

The Collective Complaints Mechanism of the European Social Charter was the first quasi-judicial process in international human rights law established specifically to deal with socio-economic rights claims.<sup>12</sup> Although hampered by structural features which mean that the reach and impact of the ECSR’s judgments and statements on the Charter lags far behind that of its sibling ECHR system, the number of Collective Complaints registered with the European Committee on Social Rights has more than doubled since the onset of the crisis, and the Committee has issued some thought-provoking decisions on austerity measures, reaffirm that contracting states have a responsibility to uphold their socio-economic rights obligations even in times of economic crisis. Tulkens’ assertion may be said to be equally applicable to the ECSR.

### **3. Structure of the thesis**

The central premise of the thesis concerns challenges to austerity measures. The two human rights instruments under consideration, the Convention system and the Charter system, each protect a certain set of partially overlapping rights and interests, and the cases reflect this. Two of the most prevalent issues of the economic crisis are employment protection and public sector salaries and pensions. I consider public sector wages and pensions and social welfare payments in the ECHR section and labour reforms and pension reforms in the ECSR section.

The ECHR cases are concerned with the protection of property under Article 1 of Protocol 1, as I believe these cases demonstrate the most apparent link between socio-economic interests and austerity measures in the current crisis. Although the Convention does protect the freedom of association under Article 11, I have opted to focus on the A1P1 cases as

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<sup>11</sup> Robert Spano, ‘The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect?’ (2015) 33 *Nordic Journal of Human Rights* 1, p. 4.

<sup>12</sup> Neliana Rodean, ‘Social rights in our backyard: ‘Social Europe’ between standardization and economic crisis across the continent’ in Marilisa D’Amico and Giovanni Guiglia (eds), *European Social Charter and the Challenges of the XXI century/La Charte Sociale Européenne et Les Défis Du XXI<sup>e</sup> Siècle* (Edizioni Scientifiche Italiane s.p.a 2014), p. 47.

representing the most developed thinking between socio-economic rights in the crisis and austerity measures. Two of the social Euro-crisis cases that I consider – *N.K.M. v Hungary* and *R.Sz. v Hungary*, deal with redundancy payments and reference the social goal of minimising unemployment and labour reintegration, but are considered by the ECtHR under A1P1.

I do, however, consider complaints relating to labour rights under the European Social Charter system. The labour related complaints stem directly from the austerity measures, and labour rights are an economic right under the ESC, whereas I consider that freedom of association, collective bargaining and the right to strike as protected under Article 11 ECHR falls outside of the rubric of my social rights-austerity analysis.

The first chapter examines a number of cases brought before the European Court of Human Rights, ranging from 2010 to 2015. These cases were selected because they each illustrate different issues that have reflected on the challenges of pursuing socio-economic rights claims before the ECtHR in the economic crisis. All of the cases come from states which were involved in some kind of sovereign loan assistance programme, or had been involved in one a short time prior to the filing of the case; Greece, Portugal, Hungary, Latvia and Romania. All of the cases are primarily concerned with Article 1 of Protocol 1 to the Convention, the right to property. The reaction of the respondent states to the economic crisis has been by implementing a programme of austerity measures.<sup>13</sup> Salaries and pensions in the public sector, along with social welfare payments, have borne the brunt of this reduction in government spending, and consequently the legal challenges taken up against austerity measures at the ECHR level have focused on the protection of property.

The cases are arranged along a spectrum, with the greatest cluster of factors emblematic of the issues of socio-economic rights claims in the European sovereign debt crisis in the ‘bailout’ Euro-crisis cases from Greece and Portugal, tapering towards cases where the links with the crisis are more oblique, in the Hungarian, Latvian and Romanian cases.

Having examined the ‘social Euro-crisis cases’, Chapter II focuses on broader analogous themes: the first is financial stability and the role of international financial institutions. The second theme is the concept of emergency under the ECHR and the link between the concept of emergency and the justification for the greater deference to the executive is the ‘exceptional circumstances’ at issue – also invoked by the ECtHR in the social Euro-crisis

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<sup>13</sup> Vani K. Borooah, *Europe in an Age of Austerity* (Palgrave Macmillan 2014), p. 2.

cases. The third chapter looks at the other instrument under consideration: the European Social Charter and the quasi-judicial body tasked with upholding its guarantees, the European Committee of Social Rights. The strengths and drawbacks of the Charter system are discussed, and a selection of Collective Complaints concerning the economic crisis in Greece is examined. The first two Complaints concern employment and collective bargaining under the Charter, while the latter five are a bundle of complaints which concern structural adjustments to Greece's pension system. In light of the Committee's reasoning and decisions on the Complaints, what the crisis has meant for the role of the Committee and the Charter system in the European sovereign debt crisis is considered.



## **Chapter I: The Social Euro-Crisis Cases of the European Court of Human Rights**

### **1. Overview**

This chapter will examine claims brought before the European Court of Human Rights (hereafter the ECtHR, the Strasbourg Court, the Court, unless otherwise stated) challenging measures taken to address the severe fiscal difficulties confronting some contracting states as a result of the European sovereign debt crisis (here taken as dating from 2008 onwards.) Where relevant, the global financial crisis of 2008 will also be considered.

I consider firstly how the ECtHR has read the protection socio-economic rights into the Convention, and whether this protection may have changed during, and perhaps as a result of the crisis. I analyse a certain set of cases that have come before the ECtHR, which I term 'social Euro-crisis cases.'

#### **1.1 Does the European Convention protect socio-economic interests?**

I submit that aside from the right to education and the right to property, the Convention is not an instrument that protects socio-economic rights. Protection has been extended to certain socio-economic *interests* that form part of the civil and political rights enshrined in the Convention.<sup>14</sup> In its development of a number of its interpretative tools, the ECtHR has elaborated on the protection of socio-economic facets of the rights enshrined in the Convention. In the case of *Tyrer v The United Kingdom* in 1978, Strasbourg first iterated its 'living instrument' doctrine: "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions."<sup>15</sup> Attempts have been made to progressively extend the protection of the Convention to situations involving socio-economic rights violations. In the case of *Airey v Ireland* it was held that civil and political rights often possess an economic or social dimension.<sup>16</sup> Certain commentators have argued that the ECtHR envisages its role as bringing about an ever-increasing human rights protection within the countries of the Council of Europe – what has been termed an expansionist approach.<sup>17</sup> This 'inflation' of rights is

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<sup>14</sup> Colin Warbrick, 'Economic and Social Interests in the European Convention on Human Rights' in Mashood A Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007), p. 241.

<sup>15</sup> *Tyrer v The United Kingdom* (Application No. 5856/72) (Judgment of 25 April 1978), §31.

<sup>16</sup> *Airey v. Ireland*, judgment of 16 May 1978, Series A No. 32, at § 26.

<sup>17</sup> Tom Zwart, 'More Human Rights than Court: Why the legitimacy of the European Court of Human Rights is in need of repair and how it can be done' in Spyridon Floaitis, Tom Zwart and Julie Fraser (eds.) *The European*

particularly evident with regard to Article 1 of Protocol 1 to the Convention<sup>18</sup>, which has been progressively expanded to encompass the protection of salaries, pensions and social security benefits, contributory and non-contributory.<sup>19</sup>

The points that I wish to extract from this literature for the purposes of my analysis are the following: only Protocols 1 and 2 to the Convention (concerning the protection of property and the right to education, respectively) are explicitly considered to be socio-economic rights.<sup>20</sup> The drafting of the Convention deliberately omitted socio-economic rights from the purview of the Convention bodies, as that was intended to be the purpose of the Social Rights Charter.

Rather, what has emerged through the case law and the reasoning of the ECtHR is that certain enumerated rights that are civil or political in nature may possess social or economic qualities. O’Cinneide states that Article 2 (right to life), Article 3 (prohibition of torture and inhuman and degrading treatment) and Article 8 (the right to private and family life) holds promise for applicants seeking protection from destitution and deprivation.<sup>21</sup> Ellie Palmer has argued that Article 6 (right to a fair hearing) and Article 14 (prohibition of discrimination) may also serve to protect socio-economic rights in certain instances.<sup>22</sup>

I adhere to this conception of Article 1 of Protocol 1 as a social right for the purposes of my analysis. While it has been suggested that “often the impetus to protect property as a human right is the desire of some to protect the status quo” and that property rights are conceived as “liberalist” and part of the “laissez-faire philosophy”<sup>23</sup>, the ECtHR has expanded upon this view, and views property also as “a redressing and restitutorial-specific tool”.<sup>24</sup>

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*Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar Publishing, Inc., 2013), p. 78.

<sup>18</sup> Article 1 of Protocol 1 states: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

<sup>19</sup> Ingrid Leijten, ‘From Stec to Valkov: Possessions and Margins in the Social Security Case Law of the European Court of Human Rights’ (2013) 13 Human Rights Law Review 309.

<sup>20</sup> See Dragoljub Popović, *Protecting Property in European Human Rights Law* (Eleven International Publishing, 2009), p. 140.

<sup>21</sup> Colm O’Cinneide, ‘A modest proposal: destitution, state responsibility and the European Convention on Human Rights’ E.H.R.L.R. 2008, 5, 583-605. See also Cassese, *infra*. No. 90.

<sup>22</sup> Ellie Palmer, ‘Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights’, *Erasmus Law Review*, Vol. 2(4) (2009).

<sup>23</sup> Deborah Rook, *Property Law and Human Rights* (Blackstone Press Limited, 2001), pp. 2-3.

<sup>24</sup> Popović, *Protecting Property in European Human Rights Law*, p. 145.

The right to property under Article 1 of Protocol 1 possesses quite a wide scope, and “endorses a broad international legal concept of property comprising all ‘acquired’ rights that constitute assets”.<sup>25</sup> It references both the ‘public interest’ and the ‘general interest’ when citing whether interferences with the right to property might be justified; a proportionality test of the rights of the individual against the common weal.<sup>26</sup> The Court has previously held that the right to property under the Convention does not constitute a right to acquire possessions, but rather protects only existing possessions.<sup>27</sup>

A significant facet of the ECtHR’s interpretation of the right to property under the Convention is the inclusion of social welfare benefits and pensions – not necessarily contributory - as possessions within the meaning of Article 1 of Protocol 1. These are traditionally conceived as social rights<sup>28</sup>, and would appear to indicate that the right to property is nested within the overall duty of states to ensure that vulnerable members of their societies are adequately protected from the vicissitudes of life. More specifically for the purposes of my analysis, as the cases that I examine concern a mixture of cuts to salaries, pensions and social welfare payments, the Court has also emphasised that “the principles which apply generally in cases concerning Article 1 of Protocol No. 1 are equally relevant when it comes to salaries or welfare benefits (see, *mutatis mutandis*, *Stummer v. Austria* [GC], no. 37452/02, § 82, ECHR 2011)”.<sup>29</sup>

## **1.2 Relevance to the European sovereign debt crisis**

How does this conception of socio-economic rights under the Convention relate to the cases under consideration? None of the social Euro-crisis cases significantly pushed the boundaries

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<sup>25</sup> ECtHR, *Van Marle and Others v The Netherlands*, App. No. 8543/79 et al (26/6/1986), §41 in Christoph Grabenwerter, *European Convention on Human Rights Commentary* (Helbing Lichtenhahn Verlag 2014), p. 367.

<sup>26</sup> Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edn, Oxford University Press 2014), p. 493.

<sup>27</sup> *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, §50.

<sup>28</sup> See Article 9 of the International Covenant on Economic, Social and Cultural Rights: “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.” <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>, accessed 12 March 2015.

Also Article 34 of the Charter of Fundamental Rights of the European Union – Social Security and Social Assistance: “1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.” The European Social Charter also protects the right to social security in Article 12 – this is covered in Chapter III.

<sup>29</sup> *Koufaki and ADEDY v Greece*, App Nos 57665/12 and 57657/12 (ECtHR (decision) 7 May 2013), §32.

of what may have constituted a social right under the Convention; the jurisprudence of Article 1, Protocol 1 is firmly established in cases concerning pay cuts<sup>30</sup>, pensions<sup>31</sup> and social welfare benefits.<sup>32</sup> This is the question which I address in the section below. I believe that these cases demonstrate the most developed position of the ECtHR on the crossover between sovereign debt financing and social rights in the Euro-crisis context.

## **2. The social Euro-crisis cases**

### **2.1 What is a social Euro-crisis case?**

For the purposes of this paper, I use the term ‘social Euro-crisis case’ as shorthand. ‘Social’ here refers to the nature of the rights at issue in the cases. The applicants primarily relied on Article 1 of Protocol 1, as well as the procedural guarantees in Article 6 and Article 14, the right to a fair trial and freedom from discrimination, respectively. The ‘Euro-crisis’ element (also shorthand – of the respondent states in these cases, only Greece, Portugal and Latvia are Eurozone states. I therefore use this term as something of a catchall for the general push towards austerity politics as a result of the European sovereign debt crisis.) All of the states examined (Greece, Portugal, Hungary, Latvia and Romania) have been subject to macroeconomic surveillance of varying degrees and all have secured some kind of financial assistance – sourced from bilateral loans, international organisations such as the IMF, and Eurozone financial facilities such as the EFSF, the EFSM and the ESM – since the onset of the crisis.

I arrange these cases along a spectrum to better illustrate the trends that they demonstrate. At one end of the spectrum are the Greek and Portuguese cases, where the greatest accumulations of factors that I discuss in this paper are to be found. The provisions challenged stem directly from national legal measures implementing some facet of an economic adjustment programme negotiated by Greece and Portugal by the troika.<sup>33</sup> The Hungarian cases lie further along – while Hungary did seek loan assistance from the EU in

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<sup>30</sup> *Paulet v The United Kingdom* (Application No. 6219/08) (Judgment of 13 May 2014).

<sup>31</sup> *Carson and Others v. The United Kingdom* (Application No. 42184/05) (Judgment of 16 March 2010).

<sup>32</sup> *Béláné Nagy v Hungary* (Application No. 53080/13) (Judgment of 10 February 2015 – appeal to Grand Chamber pending as of 1 June 2015.)

<sup>33</sup> The ‘troika’ of the IMF, the ECB and the European Commission is the most prominent and visible manifestation, but the cases examined do not exclusively stem from troika-imposed austerity measures; only *Koufaki* and *Da Conceição Mateus* challenge the Greek and Portuguese programmes. As will be seen in the rest of the cases, references to the economic crisis are more indirect.

2008<sup>34</sup>, this is not explicitly referenced in the judgment. In the Latvian and Romanian cases, the reference to the unfavourable budgetary situation in the country was the impetus for the contested measures, with the medium-term EU financial assistance granted to those states unmentioned. Temporally, these cases run from 2010 to 2014 (from lodging of the application to the decision by the ECtHR). This is an area of law that is constantly developing and generating new challenges and jurisprudence; my selection is only a partial example.<sup>35</sup>

## **2.2 The 'bailout' cases: Koufaki and ADEDY v. Greece, decision on the admissibility of 7 May 2013**

In 2010 the Greek Government adopted a series of austerity measures, including reductions in the remuneration, benefits, bonuses and retirement pensions of public servants, with a view to reducing public spending and in reaction to the economic and financial crisis the country was experiencing. In July 2010 the applicants took the matter before the Greek Supreme Administrative Court: the first applicant applied to the court to annul her pay-slip; the second applicant – the Public Service Trade Union Confederation – sought judicial review because of the detrimental effect of the measures on the financial situation of its members. On 20 February 2012 the Supreme Administrative Court rejected the applications.<sup>36</sup>

Relying on Article 1 of Protocol No. 1, the applicants complained that the cuts in wages and pensions resulting from Greek Laws nos. 3833/2010, 3845/2010 and 3847/2010 amounted to a deprivation of possessions. The second applicant also alleged violations of Articles 6 § 1, 8, 13, 14 and 17 of the Convention based on the detrimental effect of the measures on the financial situation of its members.<sup>37</sup> The Court opted to join the cases of the first and second applicants, having regard to the similarity between the cases both in terms of facts and in the substantive issues that they raised.<sup>38</sup>

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<sup>34</sup> Council Decision (2009/102/EC) of 4 November 2008 providing Community medium-term financial assistance to Hungary.

<sup>35</sup> For another account of some of the cases which have come before Strasbourg as a result of the crisis, see Lorenza Mola, 'The Margin of Appreciation accorded to States in times of economic crisis: an analysis of the decision by the European Committee of Social Rights and by the European Court of Human Rights on national austerity measures' (2015) 5 *Lex Social: Revista de Derechos Sociales* 174.

<sup>36</sup> Information Note on the Court's case law No. 163, *Koufaki and Adedy v. Greece (dec.)* - [57665/12](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-7627) and [57657/12](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-7627), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-7627>, accessed 17.02.2015.

<sup>37</sup> *Koufaki and ADEDY v Greece*, App Nos 57665/12 and 57657/12 (ECtHR (decision) 7 May 2013), §20.

<sup>38</sup> *Koufaki*, §29.

That a salary is considered to be within the meaning of ‘possessions’ as contained in the first paragraph of Article 1, Protocol 1 is well-established in ECtHR case law.<sup>39</sup> The Court held that the reductions in Ms. Koufaki’s salary should not be considered as a “deprivation of possessions” as was claimed by the applicants, but rather as interference with the right to the peaceful enjoyment of possessions for the purposes of the first sentence of the first paragraph of Article 1 of Protocol No.1.<sup>40</sup> It then proceeded with its test of whether the interference could be said to have been contrary to the Convention; whether the measure was legal, and necessary (whether the specific measure taken was justified or whether other measures were available which would have had a less severe effect on the applicant.) If an interference with the applicant’s rights under Article 1 of Protocol 1 was found to exist, the third stage of the analysis would consider whether the interference was proportionate.

As the deductions in salary had been authorised by Laws nos. 3833/2010 and 3845/2010, the ECtHR held that the first element of the test had been satisfied.<sup>41</sup>

In the second stage the Court considered whether the interference was justified, assessing the public interest of the measures in question. The Court attached “particular weight” to the report submitted by the Greek Government which accompanied Law 3383/2010, as well as to the reasoning of the Greek Supreme Administrative Court.<sup>42</sup> The report refers to the “exceptional circumstances without precedent in recent Greek history”: “this was the worst crisis in the public finances for decades” which “[had] undermined the country’s credibility, thwarted efforts to meet the country’s lending needs and pose[d] a serious threat to the national economy”.

The report went on to state that finding a way out of the crisis represented “a historic responsibility and a national duty” and that Greece had undertaken to “achieve fiscal consolidation on the basis of precise targets and a precise timetable”.<sup>43</sup> It might be noted at this point that the ECtHR hews quite closely to the decision of the Greek Supreme Administrative Court, a point which is discussed in the analysis of the cases below.

The pay cuts imposed upon Ms Koufaki were part of a wider effort to restore stability to the economy as a whole. This included combating tax evasion, opening up formerly closed

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<sup>39</sup> In this regard, the Court cited the previous decision of *Stummer v. Austria* [GC], no. 37452/02, § 82, ECHR 2011 at §32.

<sup>40</sup> *Koufaki*, §34.

<sup>41</sup> *Ibid*, §45.

<sup>42</sup> *Ibid*, §36.

<sup>43</sup> *Ibid*, §37.

professions and reforming social security and retirement systems, leading the ECtHR to consider that the totality of the measures enacted indicated that the legislature was acting in the public interest.<sup>44</sup>

The Court took note of the applicant's submission that her net salary fell from EUR 2,435.83 to EUR 1,885.79 as a result of Laws nos. 3833/2010 and 3845/2010, and of administrative decision adopted under Law no. 4024/2011<sup>45</sup>, but does not regard this as a breach of Article 1 of Protocol 1, as Ms. Koufaki's salary was not reduced to such an extent so as to render her unable to provide for herself. This, combined with the precarious state of Greece's finances, led the Court to find that an excessive burden had not been placed on the first applicant. Françoise Tulkens maintains, in her analysis of the *Koufaki* case, that "a fair balance had been struck"<sup>46</sup> (Judge Tulkens does not elaborate further on this.)

The ECtHR has held on previous occasions that the right to property does not include the right to a salary of a fixed amount.<sup>47</sup> The Court has always taken a cautious stance and afforded states a wide margin of appreciation in matters of social and economic policy: "provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way."<sup>48</sup>

Predictably, the precariousness of Greece's financial position is to the forefront of the Court's reasoning. The macroeconomic instability of the Eurozone negated any meaningful balancing of the rights of the applicant against the measures of the Greek state; once it was established that Ms. Koufaki was not at risk of destitution, no more appears to be required by the ECtHR but to defer to the agreement between Greece and its creditors, and to the decision of the national court. As to whether the impugned measures were proportionate or not, such analyses are usually considered by the Chamber, while *Koufaki* was declared inadmissible on the grounds of being 'manifestly ill-founded.'

The link between the economic adjustment programme and the measure complained of is manifestly clear: the reference to the Memoranda of Understanding conclude/ed between the

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<sup>44</sup> *Ibid.*, §41.

<sup>45</sup> *Ibid.*, §45.

<sup>46</sup> Tulkens, 'The contribution of the European Convention on Human Rights to the poverty issue in times of crisis', p. 5.

<sup>47</sup> *Panfile v. Romania*, (Application No. 13902/11), (Judgment of 20 March 2012), §18.

<sup>48</sup> *Koufaki*, para 48.

Greek government and its international creditors is explicitly referenced by the Court.<sup>49</sup> The reference to the crisis representing the greatest challenge to the Greek state in ‘recent’ history is particularly interesting. Can the potential collapse of the Eurozone banking system (widely predicted be an inevitable consequence of the failure of over-exposed Greek banks to obtain credit on international markets and meet repayments, leading to their collapse and the spread of contagion in the wider Eurozone) be compared to some of the other crises faced by Greece in its past? Can the sovereign debt crisis be equated to the transition of Greece from dictatorship to democracy in the 1970s (which the ECtHR has also had cause to consider – and which it did not cite in *Koufaki*?)<sup>50</sup>

The reference to the dire circumstances and the reference to exceptional circumstances recur in other cases in this section. What such an approach may represent for the interpretation of the ECtHR and how the Court perceives of its role in defending socio-economic rights in times of crisis is something I discuss below.

### **Da Conceição Mateus v. Portugal and Santos Januário v. Portugal, decision of 8 October 2013**

The applicants were pensioners affiliated to Portugal’s state pension scheme and asked the Court to rule that the cuts imposed on certain pension entitlements (holiday and Christmas bonuses) enacted as part of austerity measures under the State Budget Act 2012 were a violation of their rights under the Convention. As the application did not invoke any particular provision under the Convention, the Court decided that interference of the applicant’s right to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 was the appropriate basis.

The Portuguese Constitutional Court had previously found the cuts at issue to be unconstitutional, on the basis that they violated the principle of ‘proportional equality’<sup>51</sup> – the cuts to public sector employees were unconstitutional as no similar measures were levied upon employees in the private sector. Important as regards the admissibility of the case to the ECtHR was the invocation of the Portuguese CC of Article 282 (4) of the Portuguese constitution, permitting the effects of a finding of unconstitutionality to be restricted in

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<sup>49</sup> *Koufaki*, §47.

<sup>50</sup> *The Former King of Greece and Others v. Greece* (Application No. 25701/94) (Judgment of 23 November 2000).

<sup>51</sup> *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal* (Applications nos. 62235/12 and 57725/12 decision of 8 October 2013). Portuguese Constitutional Court, Judgment 353/2012 (Dibrio da Republica, 1.a serie - NO 140 - 20 July 2012) 3846.

exceptional circumstances.<sup>52</sup> This ruled the measures unconstitutional under Portuguese law, but such a finding would have forced the executive to redraft the national budget and develop substantial alternative measures at very short notice. The Portuguese Constitutional Court therefore delayed its finding of unconstitutionality for one year, enabling the applicants to successfully claim that they had exhausted their domestic remedies.

The Portuguese Constitutional Court had emphasised that such differences in treatment between private and public sector employees could not be justified, even to reduce the public deficit to the level specified in the Memorandum of Understanding, citing the existence of alternative measures to achieve the required reduction in spending in both the spending and revenue streams.<sup>53</sup>

As was held in *Koufaki* with regard to the subsistence threshold, the ECtHR in this case analogously held that in order for an infringement to have occurred, the “essence of the right” must have been infringed.<sup>54</sup> The Court then stressed that the nature of the benefit taken away is also to be taken into account – whether the benefit may have been a particularly advantageous one, extended to only certain groups of individuals.<sup>55</sup> The ECtHR took into consideration that the basic pension entitlement amount was unchanged, and limited to three years, thus limiting the measures in both temporal and quantitative terms.<sup>56</sup>

Particularly evocative language is used by the Court when describing the loan assistance programme that was in operation in Portugal at that time: “The very fact that a programme of such magnitude had to be put in place shows that the economic crisis which was asphyxiating the Portuguese economy at the material time and its effect on the State budget balance were exceptional in nature, as the Constitutional Court indeed recognised in its decision of 5 July 2012.”<sup>57</sup>

“As it recently did in similar circumstances relating to austerity measures adopted in Greece (see *Koufaki* and *ADEDY*, cited above, § 41), the Court considers that the cuts in social security benefits provided by the 2012 State Budget Act were clearly in the public

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<sup>52</sup> *Ibid.*, §21.

<sup>53</sup> *Ibid.*, §10.

<sup>54</sup> *Ibid.*, §24.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, §28.

<sup>57</sup> *Ibid.*, §25.

interest within the meaning of Article 1 of Protocol No. 1. Like in Greece, these measures were adopted in an extreme economic situation, but unlike in Greece, they were transitory.”<sup>58</sup>

It is puzzling that the ECtHR sought to emphasise the temporary nature of the Portuguese cuts when assessing whether they represented an infringement of the applicants’ property rights, as opposed to the permanent Greek cuts, when the Greek cuts themselves were not held to be disproportionate.<sup>59</sup>

In a decision similar to the one handed down in *Koufaki*, the ECtHR held that the applicants were not made to bear an “excessive and disproportionate burden”, and ruled the complaint inadmissible by reason of being manifestly ill-founded.<sup>60</sup>

### **2.3 Confiscatory tax and unemployment protection: N.K.M. v. Hungary, judgment of 14 May 2013 and R.Sz. v Hungary, judgment of 2 July 2013**

These two cases share an almost identical fact pattern. While not directly concerned with ‘bailout’ measures, like the two previous cases, they are illustrative of certain parameters that Strasbourg remains within, even when the necessity of cuts in difficult economic circumstances is cited by the national authorities.

*N.K.M.* concerned a civil servant who complained, in particular, that the imposition of a 98 per cent tax on part of her severance pay under a legislation which entered into force ten weeks before her dismissal had amounted to an unjustified deprivation of property.<sup>61</sup> In *R.Sz.*, the applicant was subject to the same tax as the applicant in *N.K.M.*, but it was implemented after he had left his job, at which point he had already spent the money that had served as his severance payment and which was now to be subject to a 98% tax.<sup>62</sup> Much of the same logic and reasoning from the *N.K.M.* judgment is also present in *R.Sz.*

The Hungarian Parliament adopted the Tax Act introducing a new tax on certain payments to public sector employees whose employment had been terminated. The aim of the Tax Act was to fight against excessive severance payments in order to satisfy society’s sense of justice and protect the public purse at a time of economic hardship. The justifying measure cited in

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<sup>58</sup> *Ibid.*, §26.

<sup>59</sup> *Koufaki*, §44. The ECtHR referenced the Greek Supreme Administrative Court’s decision, where it was held that “the cuts in wages and pensions were not merely temporary was justified, since the legislature’s aim had been not only to remedy the acute budgetary crisis at that time but also to consolidate the State’s finances on a lasting basis.”

<sup>60</sup> *Da Conceição Mateus*, § 30.

<sup>61</sup> Press Release, *N.K.M v Hungary* (Application No. 66529/11) (Decision of 14 May 2013).

<sup>62</sup> *R.Sz. v Hungary* (Application no. 41838/11)(Judgment of 2 July 2013), §7.

support of this was the European Commission Recommendation 2009/384/EC on curbing excessive payments in the financial sector.<sup>63</sup>

The Hungarian Constitutional Court pointed out that it reviewed the rate or amount of taxes only exceptionally.<sup>64</sup> However, it held that a pecuniary burden was unconstitutional if it was of a confiscatory nature or its extent was clearly exaggerated, i.e. was disproportionate and unjustified.

The Hungarian government submitted that the rate of tax imposed had not placed an excessive individual burden upon the applicants or endangered their subsistence.<sup>65</sup> The Hungarian Constitutional Court was not convinced of the link between the tax on the severance payment and the “public interest” criterion presented by the Hungarian Government:

“The Court has no convincing evidence on which to conclude that the reasons referred to by the Government were manifestly devoid of any reasonable basis...However, serious doubts remain as to the relevance of these considerations in regard to the applicant who only received a statutorily due compensation and could not have been made responsible for the fiscal problems which the State intended to remedy”.<sup>66</sup>

The taxing of severance pay to the tune of 98% is drastic, even with the proclaimed goal of the Hungarian Government being both to “satisfy society’s sense of justice and of protecting the public purse”<sup>67</sup> (even though the tax was levied on, or deducted from, the revenues concerned even if their morally doubtful origin could not be established.<sup>68</sup>) It is worth remembering that there had been a struggle in the Hungarian courts over such cases, with the Hungarian Parliament stripping the Constitutional Court of much of its power to adjudicate on certain issues, including tax policy. This appears to have exercised influence over Strasbourg’s reasoning, with the Court stating it could not ‘overlook the legislative process

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<sup>63</sup> *Ibid*, § 47. *N.K.M. v Hungary*, (Application No. 66529/11) (ECtHR (decision) 14 May 2013) § 22. This Recommendation was found to be immaterial with regard to the applicants, they being civil servants and not working in the financial sector (*R.Sz. v Hungary*, §48.)

<sup>64</sup> *N.K.M v Hungary*, §11, *R.Sz. v Hungary*, §10.

<sup>65</sup> *N.K.M v Hungary*, §29. *R.Sz. v Hungary*, §28.

<sup>66</sup> *N.K.M v Hungary*, §59, *R.Sz. v Hungary*, §52.

<sup>67</sup> *N.K.M v Hungary*, §26, *R.Sz. v Hungary* §25.

<sup>68</sup> *N.K.M v Hungary*, §11, *R.Sz. v Hungary*, §11.

leading to the enactment of the law affecting the applicant.’<sup>69</sup> The relationship between the ECtHR and national courts is discussed below in the analysis of the cases.

Some of the commentary on *N.K.M* emphasises the lengthy reflections that the ECtHR undertook in this case in relation to the lawfulness and public interest criteria when the case came to Strasbourg<sup>70</sup> – given that taxation is very much a national prerogative. The ECtHR, while navigating through the delicate process of national taxation policy, does however state that “[it] cannot abdicate its power of review”.<sup>71</sup>

Almost identical observations from the Hungarian Constitutional Court were cited in the ECtHR judgments, with the trespass into national taxation policy regarded in light of the role of the ECtHR as an external check on the ruling political majority.<sup>72</sup> The Hungarian Constitutional Court noted that the stated purpose of the tax in question was to alleviate society’s sense of outrage at the excessive payments in the financial sector, given the role played by the financial sector in the global crisis of 2008.<sup>73</sup> The ECtHR was not convinced by this line of argument; “For the Court, excessive risk-taking in the financial sector is irrelevant for civil servants who operate in a regulated environment of subordination.”<sup>74</sup>

Both the national court and the ECtHR noted that the claim made by the Hungarian Government was not only intended to affect incomes earned *contra bonos mores*, but also to unconditional statutory entitlements, which could not be considered to have been earned *contra bonos mores*.<sup>75</sup> An indication that both courts were not, in fact, impinging on the right of the executive to tax income, but rather that the impugned measure was confiscatory and punitive, and failed on those grounds.<sup>76</sup>

The lack of “specific and compelling reasons” given as justification for the measures appears to have played a decisive role, and the fact that the measures purported to serve “social justice” did not justify the disproportionate impact upon the applicant: “it affected the

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<sup>69</sup> *N.K.M v Hungary*, §53, *R.Sz. v Hungary*, § 42.

<sup>70</sup> See the post by Ingrid Leijten, ‘N.K.M. v Hungary: Heavy Tax Burden Makes Strasbourg Step In’ at <http://strasbourgobservers.com/2013/06/10/n-k-m-v-hungary-heavy-tax-burden-makes-strasbourg-step-in/>, last accessed 19.02.2015.

<sup>71</sup> *N.K.M. v Hungary*, §61.

<sup>72</sup> Kriszta Kovás and Gábor Attila Tóth, ‘Hungary’s Constitutional Transformation’ (2011) 7 *European Constitutional Law Review* 183 <[http://www.journals.cambridge.org/abstract\\_S1574019611200038](http://www.journals.cambridge.org/abstract_S1574019611200038)> accessed 14 May 2015, p. 202.

<sup>73</sup> *R.Sz. v Hungary*, §25, *N.K.M. v Hungary*, §58.

<sup>74</sup> *N.K.M v Hungary*, § 58, *R.Sz. v Hungary*, §47.

<sup>75</sup> *R.Sz.v Hungary* § 15, *N.K.M. v Hungary* §16.

<sup>76</sup> *N.K.M. v Hungary* §11, *R.Sz. v Hungary* § 14.

applicant (and other dismissed civil servants in a similar situation) being in good-faith standing and deprived her of the larger part of a statutorily guaranteed, acquired right serving the special social interest of reintegration”.<sup>77</sup> This is curiously formulated; it may be a restatement of the Court’s long held position that, despite the broad margin of appreciation afforded to states in matters of taxation and social policy, such measures will nevertheless be found to be disproportionate if they are “manifestly without reasonable foundation”.<sup>78</sup>

This alone would have given the ECtHR cause to rule in favour of the applicants.<sup>79</sup> Aside from the foray into national taxation policy, the ECtHR also referenced Article 34 of the EU Charter of Fundamental Rights, on social security and social assistance.<sup>80</sup> The ECtHR cited this to support the point that the applicants had suffered at a time of personal insecurity, while unemployed, and continued by stating that they “was made to bear an excessive and disproportionate burden, while other civil servants with comparable statutory and other benefits were apparently not required to contribute to a comparable extent to the public burden, even if they were in the position of leadership that enabled them to define certain contractual benefits potentially disapproved by the public”.<sup>81</sup>

The Court placed a particular emphasis on the burden that the applicants in both cases were made to bear, and the particular weight accorded to the role of redundancy pay – to act as a safety net to those made unemployed and to serve the specific and recognised social goal of labour reintegration. As Lavrysens has noted, this emphasis, together with the invocation of the social assistance provision of the CFREU, may signal the willingness of at least some of the Strasbourg bench to countenance the link between property protection and social rights (Lavrysen advocates that the right to property be instrumentalised – invoked in order to protected other affected rights – in order to ensure that provides the highest possible protection to socio-economic interests.<sup>82</sup>)

This is a point unique to the Hungarian social Euro-crisis cases – as none of the applicants in the other cases were at risk of being made unemployed, *N.K.M.* and *R.Sz.* represent an interesting perspective from Strasbourg on the hardships of unemployment; an emblematic

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<sup>77</sup> *R.Sz. v Hungary*, §61, *N.K.M. v Hungary*, § 75.

<sup>78</sup> *James and Others v The United Kingdom* 21 February 1986, § 46, Series A no. 98.

<sup>79</sup> Laurens Lavrysen, ‘Transforming the Right to Property’, <http://strasbourgobservers.com/2013/07/17/transforming-the-right-to-property/#more-2129>, accessed 11 May 2015.

<sup>80</sup> *N.K.M. v Hungary* §70, *R.Sz. v Hungary* §59.

<sup>81</sup> *N.K.M.*, § 70-71.

<sup>82</sup> *Ibid*, No. 90.

issue of the European crisis, and one which is explored in the decisions of the European Committee on Social Rights in Chapter III.

It also represents a good example of what the ECtHR might consider to be the limits of executive power in the European sovereign debt crisis. The measures have to be of unsound legal basis<sup>83</sup>, pursue an aim that is not remotely connected to the impugned measure, and place such a heavy burden upon a person, or a class of people that can be adequately balanced against the public interest. This is, it must be said, quite a low threshold.

#### **2.4 Welfare payments: Sulcs v Latvia, decision of 6 December 2011**

*Sulcs*<sup>84</sup> concerned changes to the Law on Maternity and Sickness Insurance, as part of a greater drive to reduce public spending. Latvia had received EU medium-term financial assistance<sup>85</sup> (although the case makes no explicit mention of this.) It had been the case that parental benefit was allocated to socially insured persons who either did not gain income because s/he was on parental leave or, on the contrary, did not use the parental leave and continued working. This benefit was paid until the child turned one.<sup>86</sup> The Parliament of Latvia introduced changes to this legislation in June 2009, deleting the provision whereby the parent who was not on parental leave, but continued working, was still entitled to the benefit.<sup>87</sup>

All of the applicants' children were born between December 2008 and June 2009, except for three, who were born shortly afterwards.<sup>88</sup> The applicants argued before the Latvian Constitutional Court that they were entitled, on the basis of legitimate expectations when they had planned their families, to the full amount of parental benefit until their child turned one. The Constitutional Court upheld the legislation.<sup>89</sup>

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<sup>83</sup> At §47, the Court stated that the fact that the impugned measure merely possesses a legal basis is not, of itself, sufficient. There is also an issue of quality, namely the measure must be "compatible with the rule of law and must provide guarantees against arbitrariness".

<sup>84</sup> *Sulcs v Latvia*, (Application No. 42923/10), decision of 6 December 2011.

<sup>85</sup> Council Decision of 20 Jan. 2009 providing Community medium-term financial assistance for Latvia (Decision 2009/290/EC).

<sup>86</sup> *Ibid*, § 2.

<sup>87</sup> *Ibid*, § 5.

<sup>88</sup> *Ibid*, § 3.

<sup>89</sup> *Ibid*, § 7.

In their complaint to the ECtHR, the applicants complained that the legislature had failed to allow a sufficient transitional period for the amendment to the amount of parental benefit.<sup>90</sup> The ECtHR found no issue with the legality of the measure<sup>91</sup>, and found that balancing the budget constituted a legitimate aim.<sup>92</sup> The Court went on to hold that the measure was proportionate as the benefit had only been reduced by 50%, and not removed entirely, as well as noting that the applicants still had the choice of accepting either the parental benefit or the monthly wage.<sup>93</sup>

This case appears rather cut and dried, but it is disappointing that Strasbourg declined to consider the legitimate expectations point raised by the applicants whose children were born after the deadline was passed. Legitimate expectations to benefits and payments previously enjoyed may prove to be a significant issue as social security systems across Europe are adjusted to account for reductions in government spending. As discussed in the analysis of the cases below, the ECtHR's admissibility procedure and procedural rights in times of crisis means that the result in *Sulcs* is somewhat difficult to reconcile with other social security cases, where the Court demonstrates a more robust examination of government cuts.<sup>94</sup>

### **2.5 Frimu and four other applications v Romania, decision of 7 February 2012, Dumitru and others v Romania, decision of 4 September 2012.**

The cases of the civil servants in *Frimu*, and the retired judges in *Dumitru* were primarily concerned with perceived violations of Article 6 and Article 14 ECHR – the right to a fair trial and the right to freedom from discrimination, respectively (although *Dumitru* also contested that the impugned measure violated his right to property under Article 1 of Protocol 1.<sup>95</sup>) Romania was the recipient of precautionary medium-term financial assistance in 2011<sup>96</sup>, although this is not specifically referenced in the ECtHR decision.

In *Frimu*, the applicants, retired court officials, objected to the recalculation of their pension payments, which saw their overall pension reduced by eliminating the state-funded non-contributory portion from the total.<sup>97</sup> The applicants alleged that the cuts jeopardised their

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<sup>90</sup>Mel Cousins, 'Overview of Recent Cases before the European Court of Human Rights and the European Court of Justice (September-December 2011) European Journal of Social Security, Volume 14 (2012), No. I, p.48.

<sup>91</sup>*Sulcs*, § 24.

<sup>92</sup>*Ibid*, § 25.

<sup>93</sup>*Ibid*, § 31.

<sup>94</sup> Cousins, above No. 102, p. 49.

<sup>95</sup> *Affaire Dumitru et Autres c. Roumanie* (Requête n 57265/08, 4 septembre 2012), § 31.

<sup>96</sup> Council Decision of 12 May 2011 providing precautionary EU medium-term financial assistance for Romania (2011/288/EU).

<sup>97</sup> *Affaire Frimu et Autres c. Roumanie et 4 autres requêtes* (Requête n 45312/11, 7 février 2012), § 15.

prospects of maintaining an adequate standard of living, as it represented more than half of the pension payment (the issue of subsistence makes another appearance here.<sup>98</sup>) The applicants relied on other previous judgments in Romania which had ruled in favour of applicants in very similar situations to their own.

The Romanian Constitutional Court found the measures to be constitutional, as only the non-contributory portion of the pension had been taken away, that the amount remaining after deduction was higher than average under the scheme and that it was higher than the statutory pension.<sup>99</sup> The applicants appealed to the ECtHR on the grounds that the Romanian courts had upheld claims identical to their own on previous occasions.

The ECtHR considered whether the divergences in the results of the cases taken against this revised pension scheme represented an infringement of the right to a fair hearing and constituted discriminatory practice. It noted that conflicting lines of case law could take time to resolve, and did not necessarily constitute a breach of legal certainty. It also noted that the applicants had been able to benefit from adversarial proceedings and present evidence freely.<sup>100</sup>

It considered that the case at issue did not constitute a departure from the practice adopted in similar cases, but was, rather, the result of statutory provisions being applied to differing sets of circumstances.<sup>101</sup>

*Dumitru* involved an application by retired judges contesting the decision to stagger various bonuses and payments awarded to them in proceedings. These amounts were to be paid in instalments and were indexed for inflation. There was an extended battle in the Romanian courts over whether the use of this particular device was justifiable, as under the Romanian Constitution it was to be reserved for “extraordinary situations”<sup>102</sup> – the recurrent reference to the exceptional circumstances which the economic crisis represented. The measure was found to be constitutional.<sup>103</sup>

The ECtHR noted that despite changes to the instalment payments, the Romanian authorities

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<sup>98</sup> Press Release, *Frimu and four others v Romania* (Applications No. 45312/11, 45312/12, 45312/13, 45312/14), p. 1.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, p. 2.

<sup>101</sup> *Ibid.*, p. 3.

<sup>102</sup> *Affaire Dumitru et Autres*, § 24.

<sup>103</sup> *Ibid.*, § 25.

had nevertheless complied with them, and that there was nothing in the case file to suggest that the authorities did not intend to carry this out fully.<sup>104</sup>

Articles 6 and 14, as procedural rights, grant an interesting perspective on property claims before the ECtHR. They are particularly important in the context of the crisis, where a frenetic atmosphere of emergency measures may lead to such rights being viewed as dispensable. In the context of human rights adjudication generally and the ECtHR in particular, Brems and Lavrysen have noted that human rights bodies ought to have regard to procedural justice in the cases before them, regardless of the impact upon their legitimacy, simply because it is part of the value system they represent.<sup>105</sup> They also cite studies indicating that it is the client's perception of whether a trial was indeed fair that determines whether they regard the court as legitimate, not necessarily the outcome of the case.<sup>106</sup> This is an important factor to bear in mind, as crises can often result in the sidelining of procedural safeguards.<sup>107</sup>

### **3 Conclusions: what salient points can be derived from these cases?**

#### **3.1 The perceived severity of the crisis.**

The language used by the ECtHR to emphasise the severity of the crisis is striking; the domestic situation is described as “an exceptional crisis without precedent in recent Greek history”.<sup>108</sup> Referring to the Greek crisis in *Koufaki*, Strasbourg cites at length a report which accompanied Law no. 3833/2010 (it is not stated in the decision who the authors of the report are), stating that ‘finding a way out of the crisis represented “a historic responsibility and a national duty”’.<sup>109</sup>

In *Da Conceição Mateus*, the Court stated “The very fact that a programme of such magnitude had to be put in place shows that the economic crisis which was asphyxiating the Portuguese economy at the material time and its effect on the State budget balance were

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<sup>104</sup> Press Release *Dumitru and others v Romania* (Application No. 57265/08), p. 2.

<sup>105</sup> Eva Brems and Laurens Lavrysen, ‘Procedural Justice in Human Rights Adjudication: The European Court of Human Rights’, *Human Rights Quarterly*, 35(1), February 2013, p. 185.

<sup>106</sup> *Ibid*, p. 177.

<sup>107</sup> For examples of some of the trends marking the passing of crisis measures in certain European states, see Stephen Coutts, Leticia Díez Sánchez, Afroditi Marketou and Leonardo Pierdominici, ‘Legal Manifestations of the Emergency in National Euro-crisis Law’ EUI Working Paper 2015/14.

<sup>108</sup> *Koufaki v Greece*, §37.

<sup>109</sup> *Koufaki v Greece*, §37.

exceptional in nature”.<sup>110</sup>

The link to the economic crisis becomes more attenuated in the Hungarian cases and the Latvian and Romanian cases, where the crisis is referenced more obliquely; the need for particular measures as a means of tackling the crisis is either rejected by the ECtHR as illegitimate or disproportionate to the ends sought (*N.K.M. v Hungary*, *R.Sz v Hungary*), accepted as being within the state’s margin of appreciation (*Sulcs v Latvia*), or is woven into the arguments on the need to pursue particular policies (*Frimu v Romania* and *Dumitru v Romania*.) Tackling the crisis remains as a powerful driver of policy, albeit in different forms. How and when the ECtHR chooses to involve itself in crises is interesting from the perspective of the two other themes which I consider in the next chapter: cases concerning financial stability and cases on emergency and ‘exceptional circumstances’.

Compared to the noticeably high levels of deference to the exigencies of the European sovereign debt crisis, these lines of case law in Chapter II demonstrate that the ECtHR has previously intervened and set a rigorous standard for states in instances of uncertainty; trespassing onto traditionally sacrosanct national prerogatives when protected Convention rights are impinged upon. I accredit the more deferential stance of the ECtHR in the social Euro-crisis cases to the scope of the European sovereign debt crisis, although the causes for such a position are likely to be varied and complex. It has been submitted that the political and economic necessity of keeping the banking system in Eurozone states from collapsing represented an imperative objective for the governments of Europe, as well as the European Union bodies.<sup>111</sup>

### **3.2 Reference to the subsistence threshold and the proportionality analysis.**

The subsistence threshold appears as part of the ECtHR’s consideration of whether a measure, if legal and necessary, can be said to be proportionate to achieve the stated ends.

The most developed iterations of the term ‘subsistence’ stem from the case law under Article 3 ECHR – the prohibition of torture and inhuman and degrading punishment.<sup>112</sup> Many of the cases heard by Strasbourg on the question of inhuman or degrading treatment concern those individuals in vulnerable situations who have an especially close relationship with the state:

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<sup>110</sup> *Da Conceição Mateus*, §25.

<sup>111</sup> See Everson and Joerges, No. 15 *supra*.

<sup>112</sup> Article 3 of the Convention states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

prisoners in police custody<sup>113</sup> and asylum seekers<sup>114</sup>, for example. Attempts have been made to extend the protection of Article 3 to socio-economic conditions.<sup>115</sup> In Cassese's account of the *Van Volsem* case<sup>116</sup>, a mother of two children alleged that the cutting off of electricity to her home represented inhuman and degrading punishment. Cassese acknowledges that the issue is a complex one; evaluating whether measures bearing on social rights and the daily living conditions of a person may amount to inhuman and degrading treatment.<sup>117</sup> From the cases Cassese considers, it would appear that the ECtHR interprets such situations on a case by case basis.

This issue is pertinent to the social Euro-crisis cases as regards the sufficiency of the justification of the measures implemented by the national governments and allowed by the ECtHR. If the issue is that none of the applicants in the above cases fell below the threshold of Article 3 (which is indeed a very low one, encompassing the most basic human needs of shelter and sustenance<sup>118</sup>), then this would appear to be rather ill-fitting when considering cases concerning the protection of property.

Where the subsistence threshold was alluded to by the Court, none of the applicants were deemed to have fallen below such a threshold. There is also little guidance in cases like *Van Volsem* on what precisely such a test might look like, making it a difficult situation for both the applicant and the Court to assess.<sup>119</sup> *Da Conceição Mateus* offers some direction on this point.

The ECtHR stressed that the situation of the applicants in *Koufaki* and *Da Conceição Mateus* has not “fall[en] below the subsistence threshold”<sup>120</sup> or “impaired the essence of the right”, but that the measure challenged represented a “reasonable and commensurate reduction”<sup>121</sup> – evidently not caught by A1P1.

Of particular interest in *Da Conceição Mateus* is that, whenever “subsistence” is mentioned,

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<sup>113</sup> *Selmouni v France* (Application No. 25803/94) (Judgment of 28 July 1999).

<sup>114</sup> *N v UK*, (Application. No. 26565/05) (Judgment of 27 May 2008).

<sup>115</sup> Antonio Cassese, ‘Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?’ in *The Human Rights Dimensions of International Law: Selected Papers of Antonio Cassese*, (Oxford Scholarship Online, 2012), pp. 335-337.

<sup>116</sup> *Francine van Volsem v. Belgium* (decision of 9 May 1990, Application No. 14641/89).

<sup>117</sup> Cassese, ‘Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?’, p. 335.

<sup>118</sup> *Ibid*, p. 336.

<sup>119</sup> *Ibid*, p. 337.

<sup>120</sup> *Koufaki*, §44.

<sup>121</sup> *Da Conceição Mateus*, §24.

very often it refers to the *financial subsistence* of the Portuguese State. If the subsistence of the state is at issue (and indeed, what this even means in this context is not clear) then it begs the question whether even a complete deprivation of the benefit in question (pension bonuses) would represent a disproportionate response to such a threat.

The Hungarian cases – always an interesting counterpoint in this discussion, as Strasbourg found for the applicants – grant an insightful perspective on the subsistence question. While the fact that the reduction in the severance payment (98%) could not be said to be a reasonable and commensurate reduction, the ECtHR also highlighted the nature of the benefit – that severance payments are intended to support individuals at times of uncertainty (job loss), and reintegration into the labour force.<sup>122</sup> This indicates a more nuanced approach than the Greek and Portuguese cases, where the Court emphasised that the applicants, even when the cuts were made, still found themselves in relatively privileged positions, and were not in danger of falling into destitution. It would appear that the type of benefit targeted by the state may play a role in influencing how Strasbourg assesses the proportionality of the measure, with those more fundamental payments deserving of greater levels of protection, with benefits connected to redundancy and labour reintegration afforded a high degree of protection.

In a slightly different guise, this concept of subsistence can also be observed in *Sulcs*, where the ECtHR considered legitimate expectations to a benefit of a particular amount. The finding of the ECtHR in *Kjartan Ásmundsson v. Iceland*<sup>123</sup> that Article 1 of Protocol 1 cannot be interpreted as guaranteeing a pension of a certain amount was mentioned by the Court in *Sulcs*.<sup>124</sup> Whether the legitimate expectation to a benefit can be linked to the applicant falling below a certain threshold in living standards is an interesting question that I do not propose to untangle in this thesis; but it is nevertheless important to have regard to the fact that similar issues can arise in somewhat different guises in the cases.

Echoes are also present in *Frimu*, with the applicants arguing that the quotient of their pension that had been eliminated placed them below the subsistence level. This was not specifically addressed by the ECtHR, as the reasoning in the case was fixed more on the fact that the reason for the differing verdicts in similar cases was due to differences of fact, rather

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<sup>122</sup> *N.K.M.*, § 70-71, *R.Sz.*, §57.

<sup>123</sup> *Kjartan Ásmundsson v. Iceland* (Application No. 60669/00, judgment of 12 October 2004), § 39.

<sup>124</sup> *Sulcs*, §31.

than a difference in the interpretation of the relevant statutory provisions by the Romanian courts.

### **The proportionality analysis**

As all of the social Euro crisis cases with the exception of the Hungarian cases (*N.K.M. v Hungary* and *R.Sz. v Hungary*) are admissibility decisions, it must be borne in mind that a substantial proportionality analysis was not engaged in by the Court.

Commenting on *Koufaki* and *Da Conceição Mateus*, Goldmann observes that: “Conflicting international obligations may not claim primacy over human rights obligations, but they might have an impact on the application of the proportionality principle, since they define the goals of the measures that need to be justified as proportional.”<sup>125</sup>

The difficulty in this instance is that very little balancing of the rights of the property rights of the applicants against the financial stability of the respondent states actually occurs. The reasoning of the Court would appear to indicate that such is the gravity of the situation, that any measures required to tackle the crisis threatening to engulf the Greek and Portuguese economies would be found to be proportionate. This raises broader issues with respect to the suitability of the proportionality test as a means of protecting human rights in times of crisis.<sup>126</sup>

In *N.K.M. v Hungary* and *R.Sz. v Hungary*, it would appear that it was the questionable legality and necessity of the measures which led the Court to find for the applicants, with the proportionality of the measures secondary.<sup>127</sup>

I pick up this thread in the next chapter; an insight into how the ECtHR uses proportionality in other crisis situations is helpful when assessing whether the social Euro crisis cases represent a departure from established positions.

### **3.3 The relationship between Strasbourg and national constitutional courts.**

The relationship between Strasbourg and the supreme and constitutional courts of Europe is a topic which falls outside the remit of this paper. It is interesting to note how the economic

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<sup>125</sup> M Goldmann, ‘Human Rights and Sovereign Debt Workouts’ in Juan Pablo Bohoslavsky and Jernej Letnar Čeranič (eds), *Making Sovereign Financing and Human Rights Work* (Hart 2014), p. 91.

<sup>126</sup> Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ 09/08 Jean Monnet Working Paper Series, NYU School of Law. For an example of the problems inherent in using proportionality as a tool to protect social rights in times of economic crisis, see the debate in the *International Journal of Constitutional Law* between Contiades and Fotiadou, and Bilchitz.

<sup>127</sup> *N.K.M. v Hungary*, §47. Although in *R.Sz. v Hungary*, the question of the legality and constitutionality of the measures were also considered under the proportionality principle - § 54-57.

crisis may throw light on the national and supranational judicial relationship. The ECtHR hewed quite closely to the findings of the national constitutional courts in all of the cases above, with interesting divergences on occasion.

In *Koufaki*, Strasbourg adheres almost entirely to the finding of the Greek Supreme Administrative Court. This is not the case, however, in *Da Conceição Mateus*, where the ECtHR is more selective in choosing which of the Portuguese Constitutional Court's arguments to adopt in deciding on the admissibility of the claims.

Unlike in *Koufaki*, where Strasbourg appeared to defer entirely to the findings of the national court (or, more appropriately, to the report accompanying the law implementing the contested measures), here Strasbourg picks and chooses among the Portuguese Court's arguments when formulating its own conclusions. In *Koufaki*, the applicant submitted that the proportionality of the paycuts should have taken into account the rise in the cost of living and basic necessities.<sup>128</sup> This was not alluded to by the ECtHR in considering the subsistence level in its proportionality analysis. In contrast, the Portuguese Constitutional Court factored the increase in the cost of living, and the rise of inflation into its decision that the measures disproportionately affected public sector workers.<sup>129</sup>

In the Hungarian cases, there is an interesting dynamic at play. The embattled position of the Hungarian Constitutional Court is alluded to at the beginning of the judgment<sup>130</sup>, and it may be the case that there was international judicial solidarity at work in this instance.<sup>131</sup> The nervousness of the Court in ruling on such a sensitive domestic issue as taxation is evident in the concurring opinion of Judge Lorenzen joined by Judges Raimondi and Jočiene. The judges allude to their hesitation in finding a violation, but were moved by what "was for me to a considerable extent justified by the very peculiar way this tax legislation was introduced and applied in a case like the applicant's."<sup>132</sup>

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<sup>128</sup> *Koufaki*, §26.

<sup>129</sup> Decision of the Constitutional Court of 5 July 2012 (No. 353/2012) cited in *Da Conceição Mateus*, *ibid*, §4.

<sup>130</sup> *R.Sz. v Hungary*, §13. *N.K.M. v Hungary*, §14.

<sup>131</sup> The Hungarian legal system has been described as being beset by a hostile political class, which may make judicial support from the supranational level more important. International legal bodies such as the ECtHR have handed down judgments condemning the actions of the Hungarian state, these are reputed to have had little impact upon domestic policy and the legislative process. See Kriszta Kovás and Gábor Attila Tóth, 'Hungary's Constitutional Transformation' (2011) 7 *European Constitutional Law Review* 183, p. 202.

<sup>132</sup> *N.K.M. v Hungary*, Concurring Opinion of Judge Lorenzen joined by Judges Raimondi and Jočiene.

### **3.4 The admissibility of the decisions and Strasbourg's case management strategy.**

Admissibility claims are decided either by a Committee of three judges<sup>133</sup>, voting unanimously, or else the relevant Chamber.<sup>134</sup> Committee cases represent more than 90% of all applications lodged with the Court. These are cases found inadmissible as they are deemed to be manifestly ill-founded or do not fulfil one of the conditions of admissibility prescribed by Article 35. Sorting through these applications is time-consuming, despite their reduced importance. As a consequence, there is little time to deal adequately with "chamber cases", that is cases that will lead to a decision on the admissibility or a judgment.<sup>135</sup> As has been noted with concern in the literature, Article 30 of the Convention, as inserted by Protocol 11, allows for the Committee or the Chamber to decide whether to relinquish the case to the Grand Chamber.<sup>136</sup>

A brief mention of the use of the 'manifestly ill-founded' criterion to dismiss cases perceived as being unmeritorious; there have been criticisms of the ECtHR's use of 'manifestly ill-founded', chief among them that the Court does not give reasons for its decisions when declaring the claims inadmissible, which, the argument goes, may detract from its legitimacy.<sup>137</sup>

*Koufaki, Da Conceição Mateus, Sulcs, Frimu, and Dumitru* were all<sup>138</sup>, like ninety per cent of the cases which come before the ECtHR, declared inadmissible on the grounds of being 'manifestly ill-founded.' This raises the obvious problem that the consideration of the issues was inevitably treated more cursorily than would have been the case had the case progressed to the Chamber. Singly, cases like *Sulcs* and *Frimu* and *Dumitru* may not raise alarm bells. The crisis threatening to engulf European economies and the perceived need for fiscal tightening, together with the need for the ECtHR to resort to measures to expedite its crippling case load and the relatively privileged position of the applicants in question may

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<sup>133</sup> Article 28 ECHR.

<sup>134</sup> Article 29 ECHR.

<sup>135</sup> Virginia Mantouvalou and Panayotis Voyatzis, 'The Council of Europe and the Protection of Human Rights: A System in Need of Reform' [2008] Research Handbook on International Human Rights Law, Joseph, McBeth, eds., Edward Elgar Publishing, Forthcoming  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1360250](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1360250)> accessed 18 May 2015, p. 5.

<sup>136</sup> Article 30 ECHR, Relinquishment of jurisdiction to the Grand Chamber: Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber *may*, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects. (Emphasis added).

<sup>137</sup> Rudolf Bernhardt, 'Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11' (1995) 89 The American Journal of International Law 145.

<sup>138</sup> *Koufaki*, § 49. *Da Conceição Mateus*, § 29, *Sulcs*, § 35, *Frimu*, § 54, *Dumitru*, § 52.

tempt a dismissal of the issues. Where this becomes worrying, however, is when a similar fact pattern can be deduced across multiple cases arising out of similar domestic circumstances, and still be summarily dismissed by the ECtHR as inconsequential. The collective weight and similarity of these cases ought to indicate that there is cause for concern with the persistent issues in these circumstances.

### **3.5 What do the social Euro-crisis cases represent?**

The interaction between sovereign debt loan assistance programmes, austerity and the protection of fundamental rights, in particular socio-economic rights, has been discussed in the literature<sup>139</sup>, as well as by other human rights bodies.<sup>140</sup> It is important to stress that a socio-economic right may not be considered to have been infringed if the state can prove that it has taken the measures with a view to ensuring the stability of the system, and the totality of the rights protected under the relevant instrument enshrining the socio-economic rights guarantees.<sup>141</sup> This is the case under the European Charter of Social Rights (see Chapter III.) This point is linked to the point on emergency and crisis obligations and whether the exceptional nature of the crisis may alter the obligations owed to different parties.

The reconciliation of human rights protection and the public interest in times of crisis sits uncomfortably with how rights are regarded in general. As McHarg has noted; “it is central to our understanding of rights - especially judicially-protected human rights - that in situations of conflict they protect individuals' interests or choices from being overridden by considerations of collective utility.”<sup>142</sup>

Had the above cases been decided differently, it would not necessarily have represented an extension in the application of A1P1. The ECtHR may have held, as it did in *N.K.M.* and *R.Sz.*, that the government’s reasons for implementing such a measure were deficient and could have been achieved by alternative measures less injurious to the applicant, or

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<sup>139</sup> S Michalowski, ‘Sovereign Debt and Social Rights-Legal Reflections on a Difficult Relationship’ (2008) 8 Human Rights Law Review 35 <<http://hrlr.oxfordjournals.org/cgi/doi/10.1093/hrlr/ngm042>> accessed 17 July 2015. See also Margot E Salomon, ‘Of Austerity, Human Rights and International Institutions’ (2015) 4 Human Rights and International Institutions (November 29, 2014). European Law Journal <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2550773](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2550773)> accessed 1 June 2015.

<sup>140</sup> UNCHR, Report by Special Rapporteur, Danilo Türk, The Realisation of Economic, Social and Cultural Rights, 18 July 1991, E/CN.4/Sub2/1991/17.

<sup>141</sup> Michalowski, *ibid* no. 145, pp. 44-5, citing CESCR, General Comment No. 3: The nature of states parties obligations, 14 December 1990, E/1991/23, § 9.

<sup>142</sup> A McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62(5) The Modern Law Review, p. 672.

disproportionate to the ends sought. In other words, the social Euro-crisis cases could have seen the ECtHR keeping to its usual test of legality, legitimacy and proportionality, while stating that the margin of appreciation afforded to states in times of crisis, though broader than usual, is not infinite. Citing grave financial problems as a reason for sweeping adjustments to pay, pensions and benefits may be deemed an acceptable goal, but ought not to escape scrutiny entirely.



## **Chapter II: The ECtHR on financial stability, emergency and crisis.**

While the previous section considered some of the more apparent points which emerged from a textual reading of the social Euro-crisis cases, the second section of the thesis pans back and engages with two larger themes connecting these cases with previous strands of Strasbourg's jurisprudence. This chapter provides context for the European sovereign debt crisis by examining Strasbourg's approach to previous crises related temporally and thematically.

I consider the role of financial institutions and financial stability (as well as the consequences of financial instability), the perception that a state of emergency exists and the prevalence of 'exceptional circumstances'. The former is linked temporally to the social Euro-crisis cases (as the European sovereign debt crisis was preceded by, and to some extent triggered, by a global financial crisis), while the latter shares a thematic link with the cases in Chapter I, as an ubiquitous feature of the social Euro-crisis cases was the atmosphere of crisis and emergency. Examining some of the ECtHR jurisprudence that has emerged from the crisis, these lines of case law cast an interesting light on how Strasbourg reacts to the protection of social rights in crisis situations.

### **1. The ECtHR on financial stability and international financial institutions.**

I do not assert that a direct link exists between this set of cases and my core social Euro-crisis cases, merely that it is possible to infer interesting insights into the viewpoint of the Court where there is interplay of financial institutions, financial or economic instability and social rights.

Strasbourg placed great emphasis on the gravity of the financial difficulties faced by the respondent states in the social Euro-crisis cases. In the context of the crises, the socio-economic rights jurisprudence of Strasbourg is necessarily enmeshed within the larger context of the global financial crisis, which preceded and to an extent precipitated the European sovereign debt crisis. I do not aim to assert that a direct link exists between this set of cases and my core social Euro crisis cases, merely that it is possible to infer interesting insights into the viewpoint of the Court where there is interplay of financial institutions, financial or economic instability and social rights.

At the *Koufaki* and *Da Conceição Mateus* end of the spectrum discussed in Chapter I, the overt references by the Court to the Memorandum of Understanding concluded between the national governments and the consortium of international lenders presents a frank view of the Court's weighing of the gravity of financial interests. I think it germane to examine these cases below as a contrast to the crisis at issue in the social Euro-crisis cases above. The example of the financial cases serves a dual purpose; to shed light on the view Strasbourg has taken in previous instances of economic and financial instability, and to examine how the Court regards the balance that ought to be struck between protected Convention rights and the state's prerogative to take measures to both avert crisis and to address existing crises with expediency.

In this section, I examine a case involving nationalisation of banks and depositor protection in the financial crisis of 2008 (*Dennis Grainger and others v. UK*<sup>143</sup>), a case concerned with the applicant's inability to recover "old" foreign-currency savings deposited with two banks in what is now Bosnia and Herzegovina following the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY) (*Ališić and Others v. Bosnia and Herzegovina*<sup>144</sup>), and a case involving an IMF loan and the compulsory liquidation of a bank following the withdrawal of a banking licence (*Capital Bank AD v Bulgaria*).<sup>145</sup> All are A1P1 cases, while *Ališić* involved a violation of Article 13 and *Capital Bank AD* involved violations of both Article 6(1) and Article 13. *Grainger* is closely temporally related to the social Euro-crisis cases, while *Ališić* and *Capital Bank AD* are thematically linked.

The margin of appreciation afforded to states in times of "fundamental changes to a country's system"<sup>146</sup> is extensive. Monetary and fiscal stability reside within the inner sanctum of national prerogatives, into which Strasbourg rarely treads. The circumstances in which the Court would defer to the national authorities would include "the transition from a totalitarian regime to a democratic form of government, the reform of the State's political, legal and economic structure and indeed the dissolution of the State followed by a brutal war, phenomena which often involve the enactment of large-scale economic and social legislation."<sup>147</sup> It must also be emphasised that the prevailing consensus in the literature on

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<sup>143</sup> *Dennis Grainger and others v. UK* (Applications nos. [46720/99](#), [72203/01](#) and [72552/01](#) judgment of 10 July 2012).

<sup>144</sup> *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* (Application No. 60642/08) (Judgment of 16 July 2014.)

<sup>145</sup> *Capital Bank AD v Bulgaria* (Application no.49429/99, Judgment of 24 November 2005.)

<sup>146</sup> *Suljagić v. Bosnia and Herzegovina* (Application no. 27912/02) (Judgment of 3 November 2009), §42.

<sup>147</sup> *Ibid.* This language is also reminiscent of the exceptional circumstances case law considered below.

international financial institutions does not present any clear confirmation that bodies like the IMF or the World Bank can be said to possess positive human rights obligations.<sup>148</sup>

### **1.1 Dennis Grainger and others v. UK.**

The ECtHR, following the approach of the U.K. courts, allowed the executive a broad margin of appreciation in determining how shareholders were to be compensated after the collapse and subsequent nationalisation of the Northern Rock bank.

The fact that the nationalisation of the bank was in accordance with law was not contested; the applicants, many of whom had lost their savings and pensions when the bank collapsed, argued that the Valuer appointed should have been permitted to exercise his best judgement as to the compensation scheme, which would have struck a fair balance.

With regard to the legitimacy of the measure, particular reference was made by the ECtHR to the efforts of the U.K. Government to maintain stability in the face of the unfolding financial crisis:

“The Court of Appeal took the view that the Government should be afforded a wide margin of appreciation in this case, since the impugned action arose in the context of macro-economic policy. The Court agrees that given the exceptional circumstances prevailing in the financial sector, both domestically and internationally, at the relevant time, a wide margin of appreciation is appropriate.”<sup>149</sup>

The dangers of ‘moral hazard’ (the risk that financial institutions would take on greater liquidity risks based on an assumption that the Bank of England would provide assistance in the event of a crisis<sup>150</sup>) was also highlighted by the Court: “the Court has stressed on many occasions that this provision [Article 1 of Protocol No. 1] cannot be interpreted as imposing any general obligation on the Contracting States to cover the debts of private entities”.<sup>151</sup>

This reasoning led the ECtHR to conclude that the measure was legitimate. (It ought not to be forgotten that moral hazard has played a significant role in the reasoning behind the

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<sup>148</sup>Sigrun I Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001, Cavendish Publishing Ltd).

<sup>149</sup>*Ibid*, §39.

<sup>150</sup>*Ibid*, §31.

<sup>151</sup>*Ibid*, §42.

imposition of “strict conditionality” in instruments enacted for the management of sovereign debt crises.<sup>152</sup>)

This leaves the issue of whether opting to grant no compensation to the shareholders of Northern Rock amounted to a disproportionate interference with the applicant’s right to property. It was held that “the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances”.<sup>153</sup> As no viable alternative presented itself, the ECtHR considered the Compensation Scheme merely one of the steps in series of support measures, concluding with the nationalisation of Northern Rock.<sup>154</sup>

The *Grainger* case introduces several issues pertinent to the analysis. That I include it as a case concerning social rights in the financial crisis is due to its similarities with the social Euro-crisis cases: firstly, the margin of appreciation granted to the executive was very broad indeed, even at the expense of those who lost their entire savings as a result of the decision not to reimburse the shareholders.<sup>155</sup> This provides an interesting parallel to the social Euro-crisis cases and the sovereign debt crisis: the U.K. not being a Eurozone state, the wider European financial structure was not directly at risk (it was an internal matter, insofar as no international creditors or lending institutions were involved.) The ECtHR nevertheless refused to consider trespassing into national prerogative territory.

## **1.2 Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia**

*Grainger* can be contrasted with another case which involved the repayment of shareholders after a banking collapse: *Ališić and Others v. Bosnia and Herzegovina*. *Ališić* mainly concerned the role of the principle of territoriality in situations of State succession, particularly with regard to frozen bank accounts. However, the point which is considered here

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<sup>152</sup>For a discussion on the link between moral hazard and strict loan conditionality in the context of the *Pringle* case, see Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014), pp. 130-132. See also Werner Baer, ‘The debt crisis of the Eurozone’s peripheral economies: moral hazard and its consequences’ *The Quarterly Review of Economics and Finance* 53 (2013) 315-316.

<sup>153</sup> *Grainger v The United Kingdom*, §37.

<sup>154</sup> *Ibid*, §39.

<sup>155</sup> *Ibid*, §32.

is the applicants' inability to recover "old" foreign-currency savings – deposited with two banks in what is now Bosnia and Herzegovina – following the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY).<sup>156</sup> In this case, the Grand Chamber first agreed with the Chamber's finding that Ljubljanska Banka Ljubljana and Investbanka had remained liable for the "old" foreign-currency savings in all their branches until the dissolution of the SFRY (Socialist Federal Republic of Yugoslavia) and that they had remained liable for these deposits in their Bosnian Herzegovinian branches since the dissolution of the SFRY. The Grand Chamber therefore confirmed that there had been sufficient grounds to deem Slovenia and Serbia respectively responsible for Ljubljanska Banka Ljubljana's debt to Ms Ališić and Mr Sadžak and for Investbanka's debt to Mr Šahdanović. Indeed, the Governments had disposed of these banks' assets as they had seen fit. Having considered the *Grainger* case above, it is important to note that the ECtHR stated that these conclusions were limited to the circumstances of the *Ališić and Others* case.<sup>157</sup>

The Court did not imply that no State would ever be able to rehabilitate a failed bank without incurring direct responsibility under Article 1 of Protocol No. 1 for the bank's debt. Nor did that provision require that foreign branches of domestic banks always be included in domestic deposit-guarantee schemes.<sup>158</sup> The Court indeed considered the present case to be exceptional, as the branches in question were not foreign branches when the applicants had deposited their money, and because it was different from a standard case of rehabilitation of an insolvent private bank (the banks in question had always been either State- or socially-owned).<sup>159</sup> This is interesting to consider in light of the large number of banks throughout Europe that have been partially or even fully nationalised during the financial and sovereign debt crises<sup>160</sup>, as well as the *Grainger* case above.

Whereas some delays might be justified in exceptional circumstances, the applicants had been kept waiting too long and, notwithstanding governments' room for manoeuvre in social and economic policy making, Slovenia and Serbia had not struck a fair balance between the general interest of the community and the property rights of the applicants, who had borne a

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<sup>156</sup> Press Release, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* (Application No. 60642/08) (Judgment of 16 July 2014).

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ališić and Others v. Bosnia and Herzegovina*, § 118.

<sup>159</sup> *Ibid.*

<sup>160</sup> For an insight on the number of failed and nationalised banks in both the financial and sovereign debt crisis in Europe, see OpenEconomics' Failed Bank Tracker, [https://docs.google.com/spreadsheets/d/1kBhKR4s8D\\_AdKdh7Lff6XPxvpwRK5AicKkShLa2oVg/edit#gid=5](https://docs.google.com/spreadsheets/d/1kBhKR4s8D_AdKdh7Lff6XPxvpwRK5AicKkShLa2oVg/edit#gid=5), accessed 12 May 2015.

disproportionate burden.<sup>161</sup> There had therefore been a violation of Article 1 of Protocol No. 1 by Slovenia in respect of Ms Ališić and Mr Sadžak and a violation of that provision by Serbia in respect of Mr Šahdanović.<sup>162</sup>

### **1.3 Capital Bank AD v Bulgaria.**

This case provides an example of the engagement of the ECtHR with international financial institutions, in this case the IMF. The Court held that there had been a violation of Article 6(1) and Article 1 of Protocol 1 in a case which concerned the withdrawal of a banking licence, resulting in compulsory liquidation. The Court held that: “ [the]Government’s reliance on the alleged demands by the IMF to limit the courts’ involvement in the closing of ailing banks was misplaced, because Bulgaria could not avoid its obligations under the Convention under the guise of complying with the recommendations of an international organisation”.<sup>163</sup>

It is interesting to compare the approaches of the ECtHR to how agreements with international financial institutions – the IMF in this case – are to be balanced against the obligations of state parties under the Convention.

The present crises are, of course, very different to the circumstances which placed the IMF in Bulgaria in the 1990s, but it is nonetheless relevant. The Court noted in that case that the stability of the banking system was a “sensitive economic area”, and stated that a wide margin of appreciation was appropriate in the circumstances, but refuted the Government’s reference that the agreement Bulgaria concluded with the IMF, forbidding judicial review as part of a condition to establish a currency board in Bulgaria in the aftermath of the financial crisis in 1996-97, should absolve Bulgaria of its obligations under the Convention<sup>164</sup>.

Time played an important role in the Court’s balancing analysis; it was acknowledged in the *Capital Bank AD v Bulgaria* case that certain circumstances could exist where “there may be a paramount need to act expeditiously and without advance notice in order to avoid irreparable harm to the bank, its depositors and other creditors, or the banking and financial system as a whole.”<sup>165</sup> The Court was of the opinion that this was not such a case where

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<sup>161</sup> *Ališić and Others v. Bosnia and Herzegovina*, § 124.

<sup>162</sup> *Ibid.*, § 159.

<sup>163</sup> *Capital Bank AD v Bulgaria*, §90.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*, §136.

“time was of the essence.” Despite the fact that the revocation of the applicant bank’s licence took place during a banking crisis, “it does not appear that it was a matter of such urgency that any delay occasioned by some sort of formal procedure would have been unduly prejudicial.”<sup>166</sup>

A similar rhetoric was employed in *Ališić*, where the Court held that the delay the applicants had suffered in recovering their savings was not justified, even with the invocation by Serbia and Slovenia of the “territoriality principle”, and the argument put forward that the international law on State succession required only that settlements be negotiated in good faith, with no time-limits required.<sup>167</sup> The ECtHR went so far as to say that it was rather the “equitable proportion” principle is the governing principle in so far as State debts are concerned.<sup>168</sup>, disputing the reasons put forward by the respondent states. Such a principle could equally have been applied to the *Grainger* case, had the ECtHR not limited the finding in *Ališić* to its own facts.

This view is material when reading the Euro-crisis cases; the fear of widespread and devastating contagion prompted many decisions that, in hindsight, were not beneficial and may even have worsened some of the adverse effects of the crisis.<sup>169</sup> The questions of immediacy were not directly addressed by the ECtHR in the Euro-crisis cases discussed in the last chapter.

The ECtHR found for the applicants in two of the above cases (partially in *Ališić* and in *Capital Bank AD*.) Even where the highly sensitive area of domestic financial regulation is a factor, Strasbourg still applies a rigorous standard of review to determine whether challenged measures can be justified. This highlights the central issue of the social Euro-crisis cases; the highly deferential approach to executive decision-making diminishes the standard of review conducted by the Court.

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<sup>166</sup> *Ibid.*

<sup>167</sup> *Ališić and Others v. Bosnia and Herzegovina*, § 120-121.

<sup>168</sup> *Ibid.*

<sup>169</sup> See, for example, the errors in calculating fiscal multipliers by the IMF which underestimated the effects that austerity would have on European economies, leading to increases in unemployment and depressing domestic demand: <http://www.imf.org/external/pubs/ft/wp/2013/wp1301.pdf>, accessed 19.02.2015. Also Paul De Grauwe and Yuemei Ji, ‘From Panic-Driven Austerity to Symmetric Macroeconomic Policies in the Eurozone: From Panic-Driven Austerity to Symmetric Macroeconomic Policies’ (2013) 51 *JCMS: Journal of Common Market Studies* 31 <<http://doi.wiley.com/10.1111/jcms.12042>> accessed 6 September 2015.

## **2. The Rhetoric of Exceptionality: the ECtHR on emergency and crisis.**

The second strand branching off from the core narrative is the discussion of the ECtHR's approach to emergency and crisis, and how this has manifested itself in the social Euro-crisis cases.

It must first be stated that I do not maintain that the European sovereign debt crisis is an undeclared emergency. I merely point out that there is cause for concern in the choice of language used by the ECtHR, and that such language and reasoning, evident to varying degrees in all of the social Euro-crisis cases, runs the risk of entrenching an approach which may weaken the formula used by the Court and diminish the protection of rights under the Convention.

In the 'bailout' cases examined in Chapter I, the Court invoked "exceptional circumstances" or some variant thereof ("exceptional crisis without precedent"<sup>170</sup>, "exceptional economic and financial crisis"<sup>171</sup>) when considering the arguments of the respondent governments. The concept of emergency is conspicuous by its absence. I believe these two concepts overlap in substance, even if Strasbourg has not explicitly connected them in its rulings.

I examine below some theoretical contributions to the literature on economic emergency, and legal emergency in general.

### **2.1 The Economic State of Emergency.**

In the corpus of literature on the rule of law, economic emergency is located at the logical intersection of two different strands of scholarship; one arising from the economic development context (economic development of the rule of law), and one responding to the political turmoil ensuing from twentieth century declarations of states of emergency (emergency rule of law).<sup>172</sup>

Gross and Ní Aoláin submit that economic emergency has fallen in between these two approaches, with the economic development literature unconcerned with states of emergency

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<sup>170</sup> *Koufaki*, §37.

<sup>171</sup> *Da Conceição Mateus*, §29.

<sup>172</sup> Oren Gross and Fionnuala Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights', *Human Rights Quarterly*, Vol. 23, No. 3 (Aug., 2001), p. 553.

and the emergency rule of law literature largely neglecting the problems posed by economic emergencies.<sup>173</sup> Heller comments on the work of scholars such as Paulsen and Gross, that the emphasis these authors place on the exceptionality of the situation requiring a derogation is not matched by a precise description of what exactly those situations might look like.<sup>174</sup> This is precisely the issue considered below in the *Jahn and Others v Germany* case.

The cases below occur against the backdrop of the massive rise in importance of global finance in national economies in recent decades, considered to some extent in the previous section. The prominent space that international banking and finance has carved for itself is evident in European economies and the interconnectedness of the Eurozone financial structure. The tone of the public discourse in the Eurozone has been one of emergency – the crisis summits and all-night parliamentary sittings foster an atmosphere of urgency. There is an interesting case to be made that the broadening of the margin of appreciation doctrine, demonstrating exponentially rising levels of deference towards executives where financial stability is concerned, represents the risk of an ‘undeclared emergency’ for fundamental rights.<sup>175</sup>

I would add to this assessment that the nature of the claims in the social Euro crisis cases is compounded both by the untested nature of economic emergency within the ECHR framework<sup>176</sup>, and the nature of the claims themselves – they being largely socio-economic in nature and socio-economic claims being protected only obliquely by the Convention (see Chapter I.) Strasbourg has never been asked to decide on an emergency case where the derogation from the Convention was the result of emergency economic circumstances. As Article 15 must first be invoked by the Contracting Party wishing to derogate, Strasbourg’s role in any emergency situation is necessarily reactive. This is discussed in the next section.

I am influenced by the work of Giorgio Agamben and David Dyzenhaus in conceptualising whether the crisis represents, if not the abdication from the rule of law that an emergency

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<sup>173</sup> *Ibid.*

<sup>174</sup> Kevin Jon Heller, ‘Rhetoric of Necessity (or, Sanford Levinson’s Pinteresque Conversation), The’ (2005) 40 Ga. L. Rev. 779 <[http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/geolr40&section=25](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/geolr40&section=25)> accessed 14 July 2015, p. 792.

<sup>175</sup> Oren Gross and Fionnuala Ní Aoláin, ‘From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights’, *Human Rights Quarterly*, Vol. 23, No. 3 (Aug., 2001), pp. 625-649.

<sup>176</sup> There has never been a derogation from Article 15 of the Convention on the grounds of economic emergency. See Ragnhildur Helgadóttir, ‘Economic Crises and Emergency Powers in Europe’ (2012) 2 Harvard Business Law Review Online, p 134. For a full list of derogations by country, see <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CV=0&NA=15&PO=999&CN=999&VL=1&CM=9&CL=ENG>, accessed 03.05.2015.

would entail, rather an acknowledgement that the crisis represents a departure from usual conditions. Agamben theorizes a ‘state of exception’ as: ‘the state of exception is neither internal nor external to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with one another’.<sup>177</sup>

Dyzenhaus’ concept of a ‘legal grey hole’ is illuminating when examining the social Euro-crisis cases.<sup>178</sup> As opposed to a Schmittian legal black hole, where there is no legal review of governmental actions whatsoever, a legal grey hole occurs where formally judicial review is in place, but in reality the supervision is non-existent. Jan Peter Hoof has written on how Dyzenhaus’ theory might be transposed to the ECHR system, examining cases regarding derogation where terrorist threats represent a “public emergency threatening the life of the nation”. However, I examine below how the concept of emergency, notable by its absence, is implicitly invoked by the ECtHR in its ‘exceptional circumstances’ rhetoric and reasoning.

## **2.2 Article 15 ECHR: Derogation in time of emergency**<sup>179</sup>

Article 15 ECHR is, in some respects, a curious connection to make with the social Euro-crisis cases. Although, as I submitted in my analysis of the cases, and as I discuss below on what I consider the concept of ‘exceptional circumstances’, there is no definite link to the Convention’s own emergency provision. It may appear strange to link two aspects where neither the Contracting States nor the ECtHR have done so, but, as I shall explain, there are compelling reasons for questioning why the ECtHR evokes the spectre of emergency where formal invocation has not been raised.

Firstly, none of the Contracting States have invoked Article 15 in the current crisis, and there are currently no extant derogations in effect.<sup>180</sup> I therefore proceed on the premise that the

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<sup>177</sup> S Humphreys, ‘Legalizing Lawlessness: On Giorgio Agamben’s State of Exception’ (2006) 17 *European Journal of International Law*, p. 679.

<sup>178</sup> David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006).

<sup>179</sup> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Convention has remained operative in its entirety for the duration of the global financial crisis and the European sovereign debt crisis.

The ECtHR has elaborated on the requirements for a 'public emergency threatening the life of the nation': "(1) it must be actual or imminent, (2) Its effects must involve the whole nation, (3) The continuance of the organised life of the community must be threatened. (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate." <sup>181</sup>

Is it possible, then, to have an 'undeclared emergency', where Article 15 is implicitly in effect? The answer, according to the Court's previous case law, would appear to be in the negative. Any High Contracting State wishing to derogate must follow the proper procedure under Article 15 – as the concept of the rule of law is a notion inherent in all of the Articles of the Convention, as one of the fundamental principles in a democratic society. <sup>182</sup>

It is clear from the above that an impromptu derogation from the Convention is impermissible. The language used by the Court in the social Euro-crisis cases, however, bears more than a passing resemblance to the criteria outlined in *The Greek case*. It is submitted that the vocabulary of the ECtHR in these cases possesses disquieting parallels with previous cases; instances where violations of Convention rights may have occurred, but were considered proportionate due to the 'exceptional circumstances' prevailing in the state. My foremost example of this is the *Jahn* case.

### **3. Exceptional Circumstances**

The concept of what constitutes 'exceptional circumstances' is an extremely elastic one (indeed, its ability to encompass a range of different scenarios is arguably its most useful trait), ranging from transitions from authoritarian states to liberal democracies <sup>183</sup>, to averting the meltdown of the global financial system, as can be seen in the social Euro crisis cases. It echoes the comments of those who claim that the margin of appreciation is a 'standardless

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<sup>180</sup>As of 1 September 2013. See Rainey, Wicks, Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, p. 113.

<sup>181</sup> See *The Greek Case* (Applications No. 3321/67, 3322/67, 3323/67, 3324/67), § 112-113.

<sup>182</sup>*The Former King of Greece and Others v. Greece*, (Application no. 25701/94, judgment of 23 November 2000), § 79.

<sup>183</sup> In the case of *Ilaşcu and Others v. Moldova and Russia* (Application no. [48787/99](#) judgment of 8 July 2004), for example, the exceptional circumstances were the dissolution of the USSR and regime transition.

doctrine<sup>184</sup>, and orientates the protection according to what is convenient for the state, not for the protection of human rights. As such, there is no ‘test’ that I am aware of to determine when and how a particular set of circumstances might be deemed to be “exceptional.”

Paraphrasing from the dissenting judgments in the *Jahn* case, considered below, I highlight the existence of, and resort to, this justification as a cause for concern; it is invoked in the gravest of circumstances and remains largely unelaborated.

There are a number of intriguing aspects to considering the social Euro-crisis cases alongside some of the earlier transitional justice cases. The circumstances in these cases were obviously very different, with different factors and reasoning, but as I argue below, reading them together is an interesting exercise. The ECtHR has previously had cause to adjudicate on a wide range of transitional justice cases. I consider one example of this case law below – the political and institutional transition from a centrally-planned State economy to a market economy which took place in the former Communist regimes of Eastern Europe in the 1990’s. If it is possible to draw parallels between the emergency-exceptional circumstances lines of case law with the social Euro-crisis cases, then there ought to be scope to extend this reasoning to cases involving pensions and transitions in the state’s economy to be applicable to the social Euro-crisis cases. The crisis has, after all, resulted in permanent and profound shifts in the economies of Europe. This is most evident in the copious amounts of legislation enacted in the Eurozone Member States to combat the crisis and achieve budgetary stability.<sup>185</sup>

### **3.1 *Jahn and Others v Germany.***

The case of *Jahn and Others v. Germany* provides an insight into how the ECtHR regards the economic difficulties encountered by states in transition, as well as providing guidance on the dangers of a broad and undefined concept of “exceptional circumstances”.

The five applicants in the case inherited land that had been allocated to their ascendants, subject to certain restrictions on disposal, following the land reform implemented in the Soviet Occupied Zone of Germany in 1945. In March 1990 the so-called Modrow Law came into force in the German Democratic Republic, lifting the restrictions on the disposal of land that had been hitherto applicable, whereupon those in possession of the land acquired full title to it. After German reunification some heirs (including the applicants) of persons who had

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<sup>184</sup> Gross and Ní Aoláin, *ibid* No. 171.

<sup>185</sup> De Grauwe and Ji, *ibid* No. 27.

acquired land under the land reform were compelled to reassign their property to the tax authorities of their respective *Land* without compensation in accordance with the second Property Rights Amendment Act passed in July 1992 by the German federal parliament. Heirs of owners of land acquired under the land reform had to reassign it to the tax authorities if, on 15 March 1990, they were not carrying on an activity in the agriculture, forestry or food-industry sectors in the GDR, had not been carrying on an activity in one of those sectors during the previous ten years or were not members of an agricultural cooperative in the GDR.<sup>186</sup>

The *Jahn* case is useful when considering the ECtHR's approach to the Eurozone crisis. Whereas the Chamber in its decision of 22 January 2004 unanimously found a violation of A1P1 of the Convention, the Grand Chamber decided by eleven votes to six that there had been no breach of the right to property. The Court indicated that the historical context in which the crisis develops is significant, and that not all crises may be amenable to the same solutions: "The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation. *The same applies necessarily, if not a fortiori, to such radical changes as those occurring at the time of German reunification, when the system changed to a market economy*"<sup>187</sup> (emphasis added.)

The Grand Chamber held, reversing the decision of the Chamber, that there had been no violation of Article 1 of Protocol 1, finding that the aim pursued by the German Government was a legitimate one, within the state's margin of appreciation, and that a disproportionate burden was not placed on the applicants.<sup>188</sup>

In dissenting opinion of Judges Costa and Borrego Borrego reference is made, as through the entire case, to the Modrow Law having been passed in an "undemocratically elected" parliament in the GDR – to detract from its legitimacy:

"...the Modrow Law is stigmatised as having been "passed by a parliament that was not democratically elected"...it should be appreciated that this Law was enacted "as part of the negotiations" between the two German States (and the four former occupying powers)

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<sup>186</sup> Information Note on the Court's case-law No. 76 *Jahn and Others v. Germany* (2005).

<sup>187</sup> *Jahn and Others v. Germany*, (Applications nos. [46720/99](#), [72203/01](#) and [72552/01](#)) judgment (GC) of 30 June 2005), §91

<sup>188</sup> *Ibid.*, § 125.

and that its aim was “to ensure a transition from a socialist economy to a market economy”....*One could add that the legislative departments of the federal ministries were involved in drafting it. The Modrow Law is indeed the result of political negotiation....*The “non-democratic parliament” of the former GDR is therefore not the sole father of the Modrow Law”<sup>189</sup>(emphasis added).

This dissenting judgment, one of four dissenting judgments from a total of six judges of the Grand Chamber, touches upon many issues which are pertinent to an analysis of the role of the ECtHR, in choosing its stance in times of transition and crisis.

More specifically, however, the italicised part of the judgment above reflects striking parallels with the role of the troika in the present crisis. The plethora of emergency legislation, regulation and decrees has risen exponentially in the years of the crisis, often without the customary levels of parliamentary scrutiny and approval.<sup>190</sup> The dissenting judgment is particularly scathing of the argumentation of the German Government; as the law which granted the applicants their land was passed by a parliament not democratically elected, certain rights within were to be nullified.

Such an argument would have been entirely appropriate in *Koufaki*, where severe cuts in wages were imposed permanently and retroactively, following discussions between the executive and a trio of international lenders. The technocratic nature of the European sovereign debt crisis governance has been highlighted as posing a risk to democracy<sup>191</sup> – in such cases the role of an international human rights court assumes an even greater importance as an external control.

The dissenting judgment of Judge Ress is particularly critical and wary of developing a general concept of “exceptional circumstances”, the contours of which could be dangerously indistinct: “If the Court accepts that exceptional circumstances may justify interferences by the State with the individual's rights, this is a State-orientated concept that is a far cry from the concept of human rights protection.”<sup>192</sup> This was mentioned in the introduction to the thesis, and is an argument which underpins much of my analysis of the social Euro-crisis cases.

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<sup>189</sup> Dissenting opinion of Judges Costa and Borrego Borrego in *Jahn and Others v Germany*, §3

<sup>190</sup> See Stephen Coutts, Leticia Díez Sánchez, Afroditi Marketou and Leonardo Pierdominici, ‘Legal Manifestations of the Emergency in National Euro-crisis Law’ EUI Working Paper 2015/14.

<sup>191</sup> See Everson and Joerges, No. 15 *supra*.

<sup>192</sup> See dissenting opinion of Judge Ress, in *Jahn and Others v Germany* (Application Nos. [46720/99](#), [72203/01](#) and [72552/01](#) Grand Chamber, 30 June 2005), §4.

The partly-dissenting judgment of Judge Cabral Barreto echoes this sentiment: “It is the settled case-law of the Court, however, that the taking of property without any compensation will result in a violation of Article 1 of Protocol No. 1 “except in exceptional circumstances.” I find it very difficult to speculate generally about the type of “exceptional circumstances” that may justify a total lack of compensation.” Citing the case of *The former King of Greece and Others v. Greece*<sup>193</sup>, Judge Cabral Barreto recalled that the Court on that occasion had held, in what he considered a very similar set of exceptional circumstances (the transition from a monarchy to a republic) to those at issue, that “the lack of any compensation for the deprivation of the applicants' property upset, to the detriment of the applicants, the fair balance between the protection of property and the requirements of the public interest”. I can only transpose that reasoning and conclude, as in that judgment, that there has therefore been a violation of Article 1 of Protocol No. 1.”

The prospects for any applicant who might seek to bring a case before the ECtHR in times of crisis or instability would appear to be dim. The breadth and potency of the margin of appreciation doctrine which Strasbourg invokes in these instances has proved an effective rebuff to all who seek to protect and maintain their property in times of uncertainty and instability.

#### **4. Ramifications: a different ECtHR?**

In the introduction, I submitted that the European Court of Human Rights did not effectively engage with the claims brought by the applicants against the measures which affected their right to property during the European sovereign debt crisis. The level of deference shown to the respondent governments as they adopted measures to tackle the economic crisis is the preeminent feature of the social Euro-crisis cases. This chapter considered analogous circumstances where a more robust stance had been adopted by the ECtHR, even as part of dissenting judgments, in order to illustrate that a more exacting standard had been adopted by Strasbourg on previous occasions.

In his analysis of *Jahn*, Lebeck maintains that such deference could be warranted in certain respects by the fact that the situations were exceptional.<sup>194</sup> I am in agreement with him when he states that what is most concerning is not that there is a separate approach for issues of transitional justice per se, but that there appears to be no sophistication of the standard test

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<sup>193</sup> *The Former King of Greece and Others v Greece*, above No. 41, § 99.

<sup>194</sup> Carl Lebeck, ‘Rights in Transitions: The European Court of Human Rights’ Judgment in *Jahn and Others v. Germany*’ (2006) 17 KCLJ 359, p. 364.

applied by Strasbourg in these instances; there is no stricter test of proportionality or a higher level of scrutiny of the methods used to achieve the stated and accepted public purposes.<sup>195</sup>

As Lebeck presciently notes, “while it is certain that the unification of Germany was a unique event, it seems sensible to assume that large-scale legal changes will also occur in the future, and that they will give rise to human rights claims”.<sup>196</sup> This is true with regard to the European crisis; the swathe of changes has been felt at both national and supranational level, encompassing all instruments and changes from constitutions and treaties downwards.<sup>197</sup>

I find this argument compelling with regard to the social Euro-crisis cases, and the engagement of the ECtHR with the financial and sovereign debt crises more generally. As I have argued above, in certain respects the social Euro-crisis cases be regarded as analogous to cases involving issues of transitional justice – the overhaul in the fiscal management of the Greece, as an example, has resulted in fundamental and permanent systemic changes which has discommoded a great many citizens whose daily life in 2015 is no doubt radically different to before the onset of the crisis.

However, what I am concerned with in this piece, and in considering this jurisprudence, is how the language and structures of the transitional justice cases are invoked implicitly. Using the same rhetoric of “exceptional circumstances”, and allowing for a very wide margin of appreciation with regard to fundamental rights protection, the social Euro-crisis cases demonstrate a muted acknowledgement of the precariousness of the situations in the responding states, allowing for fundamental rights infringements without explicitly saying as such.

The analysis of the Euro-crisis cases and the exceptional circumstances cases, together with the consideration of financial institutions, would appear to paint rather a bleak picture for the protection of socio-economic rights in the ECtHR system. It is, of course, a small sample of cases; a thorough examination of the litigation taken against austerity measures as a result of the crisis lies beyond the scope of this project. Yet the very similarities of the fact patterns of the social Euro-crisis cases, and the reasoning used perhaps demonstrated the best chance for the Strasbourg Court to develop a coherent approach on how exactly the twin crises may impact upon protected interests under the Convention. As has been noted, the common denominator of the ECtHR’s approach would appear to be a greater than usual deferential

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<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*, p. 362.

<sup>197</sup> For an overview of the legal changes enacted pursuant to the Euro-crisis, see <http://Euro-crisislaw.eui.eu/>.

stance towards the governments of contracting states. The greater levels of state discretion in times of crisis may enable violations to pass without judicial scrutiny<sup>198</sup>, suggesting that there is no definitive 'crisis approach' in the ECtHR. Their reasoning in certain instances may signal a retrenchment in the protection of socio-economic rights.

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<sup>198</sup>Lebeck, 'Rights in Transitions' p. 364.



**Chapter III: The European Committee of Social Rights in the European Sovereign Debt Crisis.**

**1. The European Social Charter and the European Committee of Social Rights.**

This chapter considers the contribution of the European Social Charter system to social rights protection in the European sovereign debt crisis. The European Social Rights Committee (ECSR) and the ECtHR are two distinct systems governed by separate – but complementary – instruments. As a major theme of human rights enforcement in Europe is the so-called indivisibility between civil and political and social, economic and cultural rights, the prospects for a harmonised interpretation of socio-economic rights protection between the ECHR and ESC systems is something to be considered. The responses of both bodies to the crisis are examined, with a view to determining how socio-economic rights are upheld and defended in times of economic instability.

The ECSR system is comprised of both a monitoring procedure – which is mandatory for all states which have ratified the Charter to submit to, and a Collective Complaints Procedure, for which the additional ratification of the 1995 Collective Complaints Protocol is required.<sup>199</sup> In order to give full consideration to the ECSR's decisions on the European sovereign debt crisis, the reporting system will be briefly examined to inform the analysis of the Collective Complaints. As of September 2015, the number of ratifications of the 1961 Charter stood at forty-three, and signatories to the 1995 Collective Complaints Additional Protocol at fifteen.<sup>200</sup> The Charter allows Contracting Parties discretion as to the rights by which they will be bound, and states are required to accept at least five out of seven so-called “core” articles and another ten articles, or forty-five numbered paragraphs (Article 20). In the Revised Social Charter, States have to accept at least six out of the nine core articles and a number of other rights or paragraphs provided that the total number is at least 16 articles or 63 numbered paragraphs (Part III).<sup>201</sup>

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<sup>199</sup> An alternative route is to make a declaration under Article D2 of the Revised Charter that the state accepts to be bound by the collective complaints system. So far two states — Bulgaria and Slovenia — have made such a declaration. Robin R Churchill and Urfan Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’ (2004) 15 *European Journal of International Law* 417 <<http://ejil.oxfordjournals.org/content/15/3/417>> accessed 8 July 2015, p. 423.

<sup>200</sup> [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp), accessed 03.09.2015

<sup>201</sup> Virginia Mantouvalou and Panayotis Voyatzis, ‘The Council of Europe and the Protection of Human Rights: A System in Need of Reform’ [2008] RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS

The ECSR comprises of 15 independent, impartial experts, who are elected by the Committee of Ministers for a six year term. State reporting on the accepted core articles takes place every two years and every four years for non-core articles.<sup>202</sup>

I consider two sets of Collective Complaints that have come before the ECSR as a result of the crisis. All seven Complaints are from Greek trade unions (it is fortunate that Greece, as the Eurozone state where the economic crisis has been most acutely felt, has ratified the Collective Complaints procedure.) All of the complaints directly concern measures taken by the Greek government to fulfil commitments made in the Memoranda of Understanding with Greece's international creditors to address that country's sovereign debt crisis.

The first two Complaints, No. 65/2011 and No. 66/2011, concern provisions relating to reforms undertaken in Greek labour law and collective bargaining agreements. The second set, Complaints No. 76/2012, 77/2012, 78/2012, 79/2012 and 80/2012, concern measures relating to the reform and consolidation of Greece's pension system.

This set of complaints establishes the clearest link between the legal provisions and instruments aimed at tackling the economic crisis and the Committee's scrutiny of the impact such provisions exert upon social rights under the Charter. The claims concern two of the most pressing issues of the crisis – labour reform and fiscal consolidation in national social security systems – which have been responsible for much of the uncertainty, deprivation and poverty resulting from the European sovereign debt crisis.

As to the question of whether the ECSR can properly be considered a judicial body for the purposes of this analysis, the literature takes a mixed view. Alston refers to the reporting system of the ECSR as 'careful, professional and legally sound.'<sup>203</sup> (He does, however, continue: 'it is not seen to add enough value to the bargaining power of the relevant groups within the domestic political arena as to warrant a significant investment of time and resources.') As has been mentioned, the huge increase of complaints before the Committee since the onset of the crisis may change this viewpoint.

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LAW, Joseph, McBeth, eds., Edward Elgar Publishing, Forthcoming  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1360250](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1360250)> accessed 18 May 2015, p. 8-9.

<sup>202</sup> *Ibid*, p. 8.

<sup>203</sup> Philip Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' [2005] NYU Law School, CHRGI Working Paper  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=832144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=832144)> accessed 12 August 2015, p. 14.

Alston also notes that the ECSR does behave judicially to the extent that it considers both sides of the question when examining compliance, confines itself to applying the applicable legal norms to the facts before it, and formulates its reasoned views in a judicious fashion.<sup>204</sup>

Cullen notes the division of competences within the system, with the ECSR having the exclusive competence to make legal interpretations of the ESC, including whether or not a state is in conformity with any particular provision, and the Committee of Ministers makes political determinations, based on economic and social factors in the state party.<sup>205</sup>

Novitz regards the use of non-judicial language (like using non compliance instead of violation) as evidence of the lesser status accorded to socio-economic rights. Churchill and Khaliq also cite Soudre, who regards the programmatic nature of the rights as the reason for this.

This consideration of the structural features of the ESC system is valuable when considering the Collective Complaints.

### **1.1 The monitoring procedure**

The main supervisory mechanism of the ESC is a multi-stage State reporting system that is operated by the ECSR. On the basis of the reports, the ECSR determines compliance or non-compliance with ESC provisions and adopts Conclusions accordingly.

The Governmental Committee, which is composed of representatives of the contracting states, considers ECSR Conclusions of non-compliance. The State in question must indicate what measures it will take to address the finding of non-compliance. In the event that the Governmental Committee considers that the State is unlikely to take action on a decision of non-compliance, it may propose that the Committee of Ministers issue a Recommendation to the State concerned to take appropriate measures to remedy the situation.

The process is then finalized by the Committee of Ministers, which is the COE's decision-making body comprised of the Foreign Affairs Ministers of all COE Member States. The Committee of Ministers decides whether to adopt a resolution closing the supervision cycle

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<sup>204</sup> Alston, p. 17.

<sup>205</sup> H Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 Human Rights Law Review 61  
<<http://hrlr.oxfordjournals.org/cgi/doi/10.1093/hrlr/ngn042>> accessed 6 July 2015, p 70.

or, by two thirds majority, to issue a non-binding Recommendation, requesting the State to bring national practice into conformity with the Charter.<sup>206</sup>

## **1.2 The Collective Complaints Mechanism**

The Explanatory Report on the Protocol describes how the Collective Complaints Mechanism is intended to complement the State Reporting system and is “designed to increase the efficiency of the supervisory machinery.”<sup>207</sup>

As there are currently only fifteen signatories to the Collective Complaints Procedure, this does hamper the reach of the Committee, as the most meritorious complaints may come from states which have not ratified the Additional Protocol.

Although it has been dubbed the “poor little step sister” of the ECHR system<sup>208</sup>, the jump in the number of Collective Complaints registered since the outbreak of the crisis – many of which are challenges to austerity measures – may signal that the ESC is increasing in prominence. The number of Collective Complaints stood at fifty-four at the end of 2008, and has climbed to one hundred and eighteen at the time of writing (September 2015.) A doubling in the number of complaints lodged and decided since 2009 is undoubtedly a meteoric rise. Not only has the number of complaints decided by the Committee grown, but also the variety of issues which are being raised before the Committee has diversified.<sup>209</sup>

Alston (writing in 2005, when the number of Complaints stood at twenty-five), maintained that the number of complaints may not have inspired confidence in and of itself, but that the stakes involved in some of the cases granted a better evaluation of its importance.<sup>210</sup>

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<sup>206</sup> Melissa Khemani, ‘The European Social Charter as a Means of Protecting Fundamental Economic and Social Rights in Europe: Relevant or Redundant?’ [2009] Columbia Law and Economics Working Paper No. 431 <http://ssrn.com/abstract=1606110>, pp. 11-12.

<sup>207</sup> Robin R Churchill and Urfan Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’ (2004) 15 *European Journal of International Law* 417 <<http://ejil.oxfordjournals.org/content/15/3/417>> accessed 8 July 2015, p. 423.

<sup>208</sup> Alston, pp. 5-6.

<sup>209</sup> In ECSR, Complaint No. 65/2011 *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece*, Decision on the Merits, § 26, the Committee mentions that it had never before been required to rule specifically on the concept of probationary or trial periods in employment contracts; the economic crisis is clearly generating new issues that need to be resolved.

<sup>210</sup> Alston, p. 24.

### **1.3 Strengths and drawbacks of the Charter system**

The ECSR operates very permissive admissibility criteria for the Collective Complaints Procedure. Unlike the ECtHR, there is no requirement that a complaint must not be an abuse of the right of petition. An attempt by the Portuguese Government to invoke such a requirement in Complaint No. 11/2001 was unsuccessful. The Government's argument that the complainant (the European Council of Police Trade Unions) was motivated by political considerations was rejected by the ECSR as being 'invalid, not being one which may be relied on to establish the inadmissibility or ill-foundedness of a complaint.'<sup>211</sup>

It has been suggested that as the claims before the Committee multiply, that such an exhaustive procedure may have to be trimmed in the interests of expediency.<sup>212</sup> This has not yet been deemed necessary, as can be seen in the pension complaints below, where five complaints based on identical fact patterns were submitted by different Greek trade unions and accepted by the ECSR.

The structure of the Charter and the requirements that states are obligated to undertake (choosing from a selection of provisions to be bound by, rather than the Charter in its entirety) makes for an imperfect quilt of protective guarantees. Khemani opines that "there is something problematically oxymoronic in allowing a "pick and choose" system of rights which are simultaneously deemed "fundamental."<sup>213</sup>

#### **1.3.1 The collective nature of the rights under the Charter**

"If we define human rights as rights to which human beings are entitled, those rights can, by definition, never be ascribed to collectivities as such."<sup>214</sup>

Novitz questions whether there something inherent in social rights which means that they must be seen as 'collective rights.'<sup>215</sup> Quite apart from the nature of the problem that can be framed as a Collective Complaint, the collective aspect has implications for the remedies that

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<sup>211</sup> Churchill and Khaliq, p. 434.

<sup>212</sup> Holly Cullen, 'The Collective Complaints Mechanism of the European Social Charter' (2000) 25 European Law Review, p. 22.

<sup>213</sup> *Ibid*, p. 15.

<sup>214</sup> M. Galenkamp, "Collective Rights", Studie-en Informatiecentrum Mese rechten, Netherlands Institute of Human Rights Report Commissioned by the Advisory Committee on Human Rights and Foreign Policy in the Netherlands (1995) Utrecht 65.

<sup>215</sup> Tonia Novitz, 'Are social rights necessarily collective rights? A critical analysis of the Collective Complaints Protocol to the European Social Charter' (2002) 1 European Human Rights Law Review/

can be granted.<sup>216</sup> Novitz acknowledges that the reasons for this choice of system may have been entirely pragmatic, and is sceptical that the mere exercise of tallying interests will impose a duty where none would otherwise arise.<sup>217</sup>

The obvious difficulty is that the scale and breadth of the issue has to be significant enough to justify bringing a collective complaint. This makes it much easier to spot trends, but only after the circumstances responsible for the complaint have become so pervasive as to be felt by large numbers of individuals. In times of crisis, the widespread effects may enable those bringing a complaint to present the scope of the crisis much more convincingly. In Chapters I and II, I pointed out that singular incidents before the ECtHR, while capable of granting relief to individual claimants, are usually not generally applicable (unless the complaint is made under the pilot procedure.) An example of this is the applicant in *Koufaki*, whereas the cuts to the applicant's salary was deemed not disproportionate as it had not threatened her subsistence, the aggregate impact of the measures challenged in CC76/2012 was characterised by the Committee as likely to result in "a large scale pauperisation of a significant segment of the population."<sup>218</sup> The span of the crisis is far more apparent in the form of a collective complaint. Although, as Novitz notes, the anonymity of the collectivity also allows the ECSR to avoid problems affecting individuals.<sup>219</sup>

### 1.3.2 Committee of Ministers

The role of the Committee of Ministers, it has been said, "is a strong reminder both of the fact that governments remain extremely sensitive in relation to social rights and that the autonomy accorded to the European Court of Human Rights under the Protocol 11 reforms is a far cry from the continuing second-guessing role retained by governments under the ESC system."<sup>220</sup> The procedure is also said to be 'highly politicised'<sup>221</sup> and the Janus-faced nature of the Committee's activities means that it occupies a very delicate position. On the one hand it must encourage states to provide information in the reports so as to aid them in realising their

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<sup>216</sup> *Ibid*, p. 51.

<sup>217</sup> *Ibid*, p. 58.

<sup>218</sup> ECSR Complaint No. 76/2012 *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, Decision on the Merits, § 81. This is also noted by Mola in her piece, *ibid* No. 35, p. 190.

<sup>219</sup> Novitz, p. 51.

<sup>220</sup> Alston, p. 59.

<sup>221</sup> H Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 Human Rights Law Review 61  
<<http://hrhr.oxfordjournals.org/cgi/doi/10.1093/hrhr/ngn042>> accessed 6 July 2015, p. 63.

obligations, while simultaneously using that information to rule against them in a quasi-judicial setting. It would not be correct to say that it is this reticence which has militated against states providing detailed information in the exchange with the Committee in compiling reports; the lacklustre participation of some states long predates the establishment of the Collective Complaints mechanism.<sup>222</sup> It is for this reason that I do not consider any insufficient responses by the Committee attributable to a desire not to antagonise respondent governments.

## **2. Relationship to the ECHR system**

It is often said that the European Social Charter is the counterpart of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR). The Council of Europe's website refers to the former as the 'natural complement' to the latter.<sup>223</sup> While most commentators allude to the cross-pollination that has taken place between the two systems (more evident since the Collective Complaints Mechanism has provided a body of case law for the ECtHR to draw upon<sup>224</sup>), certain authors also allude to the 'parallel norms' between the two systems that exist— one must be read in light of the other when issues that can be considered common to both systems are invoked.<sup>225</sup>

Cullen notes that the ECSR adopts a similar interpretative approach to that of the ECtHR by applying principles like legitimate aim, legality, proportionality and margin of appreciation.<sup>226</sup> The practice of the ECSR in evaluating limitations on rights is similar to that of the ECtHR, in that the ECSR tends to be relatively deferential to state arguments in relation to the question of whether a limitation serves a legitimate aim, but often subsequently finds the limitation to be disproportionate.<sup>227</sup> This is worth bearing in mind when the complaints are considered below.

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<sup>222</sup> Alston, p.8.

<sup>223</sup> 'What is the European Social Charter?', available at [http://www.coe.int/T/E/Human\\_Rights/Esc/1\\_General\\_Presentation/default.asp#TopOfPage](http://www.coe.int/T/E/Human_Rights/Esc/1_General_Presentation/default.asp#TopOfPage), cited in Alston, *ibid* No. 201, p 5. See also ECSR Conclusions XIX 2011, p. 17

<sup>224</sup> For an overview of certain instances of the ECtHR and the ECSR referring to one another's jurisprudence, see Giorgio Malinverni, 'The European Court of Human Rights, The protection of social rights, Its relationship with the European Committee of Social Rights.' in D'Amico and Guiglia (eds), *European Social Charter and the Challenges of the XXI century*, p. 110.

<sup>225</sup> Monika Schlachter, 'The European Social Charter: could it contribute to a more Social Europe?', Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013), p. 110.

<sup>226</sup> Cullen (2009), p.62.

<sup>227</sup> *Ibid*, p.85.

The ECSR and the European Court of Human Rights render decisions which are usually consistent with each other's jurisprudence.<sup>228</sup> Malinverni maintains that the collective nature of Charter rights is a manifestation of the Committee's mandate: "The Committee decides on the conformity with the Charter not of individual and concrete acts, but of laws, regulations, practices or situations...since the ECSR has been empowered to rule on Collective Complaints, it happens that both the Committee and the ECtHR have sometimes ruled on similar cases that raise similar issues. The only difference is that the Court considers them as part of individual applications, while the Committee examines them in a more global context, which concerns several persons. But the case law of the two bodies influences each other."<sup>229</sup>

The use of the margin of appreciation doctrine is a good example of borrowing between the bodies. The ECSR has decided in the complaints considered below that the balance between respect for state discretion and protection of ESC rights fell on the side of human rights protection. An example of this approach may be found in Complaint No. 30/2005, *Marangopolous Foundation for Human Rights (MFHR) v Greece*, where, as noted, the ECSR decided that: 'even taking into consideration the margin of discretion granted to national authorities in such matters, the Committee considers that Greece has not managed to strike a reasonable balance' between ESC rights and general interests.<sup>230</sup> In Complaint No. 31/2005, *European Roma Rights Centre v Bulgaria*, the ECSR cited the ECHR decision of *Ilascu v Moldova and Russia* on the proper balance to be struck between the general interest and the interests of particular groups and therefore the extent of a state's margin of appreciation: "Nonetheless, "when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources" (*Autism-Europe v. France*, Complaint N° 13/2002, decision on the merits of 4 November 2003, § 53)."<sup>231</sup>

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<sup>228</sup> *Ibid*, p.92.

<sup>229</sup> Giorgio Malinverni, 'The European Court of Human Rights, The protection of social rights, Its relationship with the European Committee of Social Rights.' In Marilisa D'Amico and Giovanni Guiglia (eds), *European Social Charter and the Challenges of the XXI century/La Charte Sociale Européenne et Les Défis Du XXI<sup>e</sup> Siècle* (Edizioni Scientifiche Italiane s.p.a 2014).

<sup>230</sup> *Ibid*, p. 90, citing *European Roma Rights Centre v Greece* Complaint No. 31/2005, § 35, § 54.

<sup>231</sup> ECSR, Complaint No. 31/2005, *European Roma Rights Centre v Bulgaria*, § 35.

Focusing on the challenge of regressive social security measures, Mola notes that the main causes of action under the Charter and the Convention, i.e. Art. 12 ESC and A1P1 ECHR, present both different (but partly overlapping) contents and similar limitations.<sup>232</sup>

As has been discussed, however, this is by no means a partnership of equals, and the superior status of the Convention system in comparison to the Charter system is plain. Membership of the Council of Europe is conditional upon acceding to the ECHR and compliance with the decisions of the ECtHR, while the European Social Charter is not afforded a similar status. States enjoy a unique degree of flexibility in the obligations undertaken under the Charter, which allows them a measure of discretion as to the rights by which they will be bound. There is no similar flexibility under the ECHR, where under Article 1 states undertake a duty to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

The ECtHR, as the crown jewel of the Council of Europe, did not always enjoy its current standing. Although, as discussed, the Charter system is replete with restrictive features which can hamstring the efficacy of its judgments, it is not far-fetched to venture that the spike in complaints and the developing and diversifying of the ECSR’s reasoning will lead to the ESC system becoming more widely cited and considered. It may be the case that the increased exposure that the Greek Complaints – which concern very high-profile measures, receiving a great deal of media coverage and sparks debate at the highest levels of European politics – bring to the Committee may yet lend the “poor little step-sister” the authority to take up a more prominent and visible role in promoting and protecting socio-economic rights in Europe.

### **3. The ECSR in the European Sovereign Debt Crisis: Conclusions and Complaints.**

The General Introductions to the ECSR Country Reports provide interpretative statements on the Charter. They also address the most pressing issues which the contracting states have been confronted with during the reporting cycle. The economic crisis in Europe, and the strain which it places upon social security systems, has featured in the General Conclusions of the ECSR.

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<sup>232</sup> Mola, *ibid* No. 35, p. 180.

In the General Introduction to Conclusions to XIX-2 (2009), the Committee included a comment on the application of the Charter in the context of the global economic crisis. The crisis came in the midst of a reporting cycle where, at the outset, governments were generally expanding their social security cover. The Committee did state that even in 2008 and 2009, the economic crisis already had had a significant impact on social rights.

In this context, the Committee recalled that under the Charter the “Parties have accepted to pursue by all appropriate means, the attainment of conditions in which inter alia the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised. From this point of view, the Committee considers that the economic crisis should not have as a consequence the reduction of the protection of the rights recognized by the Charter.”<sup>233</sup> This position is reaffirmed in the Collective Complaints.

### **3.1 The Labour Complaints: Collective Complaints 65/2011 and 66/2011**

Alston is of the opinion that the Charter is not a very dynamic instrument, given what he refers to as the Committee’s ‘predilection’ for labour law experts.<sup>234</sup> However true this statement is, labour rights lie at the core of the Charter, and the Committee has a developed jurisprudence to draw upon.

#### **3.1.1 Complaint No. 65/2011 General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece**

GENOP-DEI and ADEDY alleged that the situation in Greece is not in conformity with Article 4§4 of the 1961 Charter and Article 3§1a of the Additional Protocol of 1988.

The Committee, after considering the impugned domestic legal provisions (discussed below), cited the views of the Greek National Commission for Human Rights on the Medium-Term Fiscal Strategy Framework concluded between Greece and its creditors. The Commission expressed alarm at the drastic lowering of salaries and pensions, even at the lower end of the

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<sup>233</sup> ECSR, Conclusions XIX-2 (2009), § 15.

<sup>234</sup> Alston, p. 19.

scale, as well as the weakening of collective bargaining instruments designed to protect minimum standards, in light of rising unemployment and overall job insecurity in Greece.<sup>235</sup>

The Committee referred to the submissions made by the Greek Government in its Preliminary Remarks. The submissions focussed on the economic crisis, the measures implemented to address it and the desired results; a labour market that would be more flexible, a reduction in unemployment, an improvement in the system of collective bargaining agreements and the enhancement of the competitiveness of Greek enterprise.<sup>236</sup>

The Committee reiterated its statement from its general introduction to Conclusions XIX-2 (2009), where it concluded that “the economic crisis should not have as a consequence the reduction of the protection of the rights recognised 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>237</sup>

The Committee is clear that while rising unemployment places added strain on social security systems and contribution revenues decline, the obligations that contracting parties assumed under the 1961 obliges them “to pursue by all appropriate means, the attainment of conditions in which inter alia the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised.”<sup>238</sup>

When applied to the complaint, the Committee considered that attempts at greater labour flexibility with the aim of encouraging hiring and combating unemployment should not result in broad categories of employees being deprived of the protection of the labour law, which defends them both from economic fluctuations and arbitrary decision-making by their employers. It pointed out that this would force employees to shoulder a disproportionately large share of the consequences of the crisis (an echo of its statement that one of the underlying purposes of the social rights in the Charter is the promotion of solidarity.<sup>239</sup>) It also pointed out that such pro-cyclical policies would risk exacerbating the effects of the crisis by placing an increased strain on welfare systems, adding that this would inevitably be

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<sup>235</sup> ECSR, Complaint No. 65/2011 *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Decision on the Merits, § 13.

<sup>236</sup> *Ibid.*, § 14-15.

<sup>237</sup> *Ibid.*, § 16.

<sup>238</sup> *Ibid.*

<sup>239</sup> ECSR Complaint No. 15/2003, *European Roma Rights Centre (ERRC) v Greece*, Decision on the Merits, §19.

the case unless it was decided to stop fulfilling Charter obligations in the areas of social protection.<sup>240</sup>

### **Alleged violation of Article 4§4 of the 1961 Charter**

The complainant organisations claimed that Section 17§5 of Act No. 3899 of 17 December 2010 is incompatible with Article 4§4 of the 1961 Charter as it provides that during the one year probationary period, a permanent contract may be terminated without notice and with no severance pay. In this connection, GENOP-DEI and ADEDY referred to the principle laid down by the Committee to the effect that “the right to reasonable notice of termination of employment applies to all categories of employees (Conclusions XIII -4, Belgium, p.352)” and that the period of notice “also applies during the probationary period (Conclusions 2010, Ukraine)”.<sup>241</sup> Further to this, the length of the probation period is linked, among other things, to the qualifications of the employees and as a result cannot be the same for all employees, or laid down in statute, as is the case for Section 17. The complainants submitted that this would be a breach of the proportionality principle, as espoused by the CJEU and the ECtHR.<sup>242</sup>

As the impugned section concerned “probation employment contracts”, the respondent Government believed that the complainant organisations had confused “the scope of probation employment contracts and open-ended contracts of employment.” The Greek Government held that the emphasis was to be placed on the trial nature of the contract, allowing the employer to evaluate the employee before an open-ended contract of employment is offered.<sup>243</sup> As for the reasonableness of the provision, the Greek government maintained that the economic crisis and the uncertain nature of Greek enterprises’ business activities justified such provisions. On the notice period required under Article 4§4 of the 1961 Charter<sup>244</sup>, the respondent Government submitted that it was not applicable to probationary contracts.<sup>245</sup>

### **Assessment of the Committee**

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<sup>240</sup> ECSR, Complaint No. 65/2011, Decision on the Merits, § 18.

<sup>241</sup> *Ibid.*, § 21.

<sup>242</sup> *Ibid.*, § 22.

<sup>243</sup> *Ibid.*, § 23.

<sup>244</sup> “With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake: to recognise the right of all workers to a reasonable period of notice for termination of employment.”

<sup>245</sup> ECSR, Complaint No. 65/2011, Decision on the Merits, §24.

The Committee had cause to restate several of its principles from previous rulings: the right to reasonable notice of termination of employment applies to all categories of employees, regardless of their grade or status; while the Committee had not set a definition for “reasonable” as a concept *in abstracto*, the major criterion was length of service; the main purpose of giving a reasonable notice is to permit the person a certain time to look for other work before his or her current employment ends and they are still receiving wages; that the only acceptable justification for immediate dismissal is serious misconduct.<sup>246</sup>

While the qualifications required for the post occupied and the conduct of the employee may justify some variance in the length of the probationary period, the ECSR held that the concept could not be stretched to make the probationary period so long that guarantees on notice and severance pay are rendered ineffective.<sup>247</sup>

The Committee held that Section 17§5 of Act No. 3899 of 17 December 2010 was a violation of Article 4§4 of the 1961 Charter, as it made no provision for notice periods or severance pay if the contract were to be terminated within one year, notwithstanding that under the same law, such contracts qualify as ‘permanent’.<sup>248</sup>

### **Alleged violation of Article 3§1 of the 1988 Additional Protocol**

The Greek Government pointed out that although enterprise-level collective agreements are permitted to deviate from sectoral collective agreements, the enterprise-level agreements cannot include terms that are less favourable to those in the relevant national general collective agreements. In addition to this, the Government states that the introduction of the new bargaining level aims at greater decentralization of collective bargaining.<sup>249</sup>

The Committee stated that it had taken into account the conclusions of the ILO Report on the High Level Mission to Greece (2011) on collective bargaining when examining the Parties’ submissions. The Committee held that Article 3 of the 1988 Additional Protocol and, in particular, paragraph 1a, it did not concern the right to collective bargaining.<sup>250</sup> Such concerns would properly be addressed under Articles 5 and 6 of the Charter, but those provisions had not been accepted by Greece and so the Committee was precluded from examining them – a reminder that the *à la carte* approach to accepting certain Charter

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<sup>246</sup> *Ibid.*, § 25.

<sup>247</sup> *Ibid.*, § 26.

<sup>248</sup> *Ibid.*, § 27-28.

<sup>249</sup> ECSR, Complaint No. 65/2011, Submissions of the Government on the Merits, p. 3.

<sup>250</sup> ECSR, Complaint No. 65/2011, Decision on the Merits, § 39.

provisions makes for an imperfect quilt of guarantees. The Committee does not elaborate on this finding, merely referencing the Report of the ILO High Level Mission to Greece.<sup>251</sup> It is odd that such a fundamental difference of opinion of the Committee –evidenced by the dissenting opinion below – did not merit further discussion.

The dissenting opinion of the Greek judge, Mr Petros Stangos, took a different position on this last point. Offering a differing textual interpretation of Article 3§1 of the 1988 Additional Protocol, Mr Stangos considered that a literal interpretation of the provision: that a collective agreement should, in all circumstances, allow the participation and contribution of the workers, or of their representatives, to determine and cumulatively improve their working conditions, organisation and environment. The Committee Member therefore considered that the impugned provisions (§5A.1 of Section 3 of Act No. 1876/90 introduced by Section 13 of Act No. 3899/2010) were incompatible with the Additional Protocol, as they grant trade unions in an undertaking the power to make the working conditions less favourable for the employees of the undertaking than those laid down in the sectoral agreements. Mr Stangos considered that this infringement was, in fact, corroborated by the Greek Government, as they had emphasised that remuneration paid to employees cannot be altered merely by switching from a sectoral collective agreement to an enterprise-level one<sup>252</sup>, while the stated primary purpose of the Act of 2010 is to reduce the cost of labour as a proportion of firms' production costs, with a view to increasing competitiveness.<sup>253</sup>

Mr. Stangos considered that the Greek legislation, granting trade unions in an undertaking the power to make the working conditions less favourable for the employees of the undertaking than those laid down in the sectoral agreements, outlawed participation and contribution by workers' representatives where motivated by an aim (the impairment of working conditions) diametrically opposed to the one which is cited by the Government (improvement of these conditions.)

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<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*, § 10.

<sup>253</sup> ECSR, Complaint No. 65/2011, Decision on the Merits, (Dissenting Opinion of Mr Petros Stangos), pp. 12-13.

**3.1.2 Complaint No. 66/2011: General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece**

GENOP-DEI and ADEDY challenged two provisions of Greek law Act No. 3863 of 15 July 2010, which provided for special fixed-term “special apprenticeship contracts” to be concluded between employers and individuals aged 15 to 18, and allowed employers to pay new entrants to the labour market aged under 25 a rate of 84% of the minimum wage or daily wage, respectively.<sup>254</sup>

The complainants alleged that the special apprenticeship contracts were not real employment contracts, since they did not form part of an integrated apprenticeship system. In support of this claim, the complainants referred to the lack of employer obligations under the contract and that the maximum duration of the special apprenticeship contracts (one year) was insufficient for it to be considered a genuine apprenticeship system.<sup>255</sup>

It was also alleged that the apprenticeship contracts were merely contracts up to one year with no job security, and which deprived the young people concerned (with some exceptions, as in the areas of health and safety) of the benefits and protections provided by labour law, as well as excluding the apprentices from specific labour law safeguards which would otherwise apply and placed disproportionate restrictions on their entitlement to social security.<sup>256</sup>

The Greek government refuted the allegations, stating that the “special apprenticeship contracts” were a means of integrating young people into the labour market, and thus aiding them in acquiring work experience. Given their length, the contracts could not be said to provide stable employment (this was acknowledged by the Greek government,

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<sup>254</sup> *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011, Decision on the Merits of 5 February 2013, § 8.

<sup>255</sup> Complaint, § 5-6.

<sup>256</sup> ECSR Complaint No. 66/2011, Decision on the Merits, §18.

which nevertheless maintained that the apprenticeship contracts allowed for the preconditions of stable employment to be laid down.<sup>257</sup>)

The ECSR began its observations by noting the Greek Government's submissions on the economic crisis gripping Greece; a summary of the arguments put forward by the Government in their submission on the merits of the Complaint.<sup>258</sup> The Greek Government highlighted that the measures were adopted in response to the economic crisis and formed part of an overall package of initiatives introduced to deal with the structural problems in the labour market and the operation of social security and welfare systems.<sup>259</sup> The initiatives were aimed at addressing issues related to wage setting through collective bargaining and conflict resolution, introducing greater flexibility into employment relationship and, more generally, reducing the cost of labour and combating unemployment, especially youth unemployment which had worsened as a result of the financial crisis.<sup>260</sup>

The Greek government also pointed out that youth unemployment was continuing to grow because of young people's lack of experience and skills, meaning employers are unwilling to hire them.<sup>261</sup>

The ECSR referred to its remarks in the general introduction to Conclusions XIX-2 (2009) (considered on p. 59.) The central place of labour rights to the Charter system is reiterated, in particular the provisions which protect employees from arbitrary decisions by employers or economic fluctuations. The Committee also stressed that any government attempts to stimulate greater employment should not deprive broad categories of employees of their labour law rights.<sup>262</sup>

### **Alleged violation of Article 10§2 of the 1961 Charter**

The Committee then considered whether the regulations on the special apprenticeship contracts, restricting the duration of the contracts to a maximum of one year and making

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<sup>257</sup> Decision on the Merits, § 19.

<sup>258</sup> Complaint No. 66/2011, Submission of the Government on the Merits.

<sup>259</sup> ECSR Complaint No. 66/2011, Decision on the Merits, § 11.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*

<sup>262</sup> ECSR Complaint No. 66/2011, Decision on the Merits, § 14.

no mention of employer obligations, constituted a violation of Article 10§2.<sup>263</sup>

It pointed out that apart from the duration of the contract (maximum one year) and the remuneration (70% of the minimum wage or daily wage set by the National General Collective Agreement), Section 74§9 did not regulate the other key aspects of an apprenticeship relationship, chiefly the division of time between practical and theoretical learning, the manner in which apprentices are selected, the selection and qualifications of trainers, the remuneration of apprentices and termination of the apprenticeship contract.<sup>264</sup>

The impugned apprenticeship contracts did not include any of these requirements; merely stating that such contracts are to be concluded to enable the young people concerned to acquire vocational skills.<sup>265</sup> The Committee rejected the Government's argument that provisions made in Act No. 3475/2006 – which governed a separate framework of apprenticeship contracts – could 'compensate' for the deficiencies in the "special apprenticeship contracts".<sup>266</sup>

The above considered, the Committee held that there had been a violation of 10§2 of the Charter.<sup>267</sup> The Committee further requested information from the Greek Government, which the Government had not deigned to offer to the Committee: the reasons given for the special conditions of social security applied to apprenticeship contracts, the necessity of these conditions as well as the results obtained by their implementation; the existence of measures of social assistance for those who find themselves in a situation of need as a result of the implementation of the above-mentioned conditions.<sup>268</sup>

Turning to the context in which the Complaint arose, the Committee laid out how state parties to the Charter were to achieve a balance between the requirement in Article 12§3 to "progressively realise" the effective exercise of the right to social security.<sup>269</sup> While acknowledging that in times of economic crisis, the consolidation of public finances may

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<sup>263</sup> European Social Charter, 1961, Article 10(2): "With a view to ensuring the effective exercise of the right to vocational training, the Parties undertake: to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments."

<sup>264</sup> ECSR Conclusions XIV-2, Interpretative statement of Article 10§2, p. 60.

<sup>265</sup> *Ibid.*, § 37.

<sup>266</sup> *Ibid.*, § 38.

<sup>267</sup> *Ibid.*, § 41.

<sup>268</sup> *Ibid.*, § 46.

<sup>269</sup> European Social Charter, 1961, Article 12(3): "With a view to ensuring the effective exercise of the right to social security, the Parties undertake: to endeavour to raise progressively the system of social security to a higher level."

be required, the Committee stressed that any measures introduced to this end should not undermine the core framework of a national social security system, or deny individuals the opportunity to enjoy the protection it offers against serious social and economic risk. As such, the protection offered by the social security system must not become so insufficient so as to exclude whole categories of persons from its protection.

The inadequacy of the justifications of the Greek Government, and the lack of information presented to explain the details of the contracts would appear to have been influential for the Committee's conclusion that the special apprenticeship contracts were not in compliance with Article 10§2. This is reaffirmed in the pension complaints below, where the Committee demonstrates willingness to countenance measures which may result in complainants suffering materially, but are designed with the objective of systemic sustainability, if convincingly presented by the respondent government. When the respondent government does not provide adequate information for the Committee to deliberate upon, a finding of incompatibility is much more likely.

#### **Alleged violation of Article 4§1 taken in conjunction with Article 1§2 of the Charter**

The complainants alleged that to show that Section 74§8 was incompatible with the Charter, it was necessary to consider 4§1<sup>270</sup> and 1§2<sup>271</sup> in conjunction with one another.

In considering the question of whether fair remuneration being paid under the “special apprenticeship contracts” was incompatible with the Charter, the Committee had regard to its Interpretative Statement of Article 4§1<sup>272</sup>, stating that in order to be considered fair, remuneration must be above the poverty line in a given country – 50% of the national average wage. The Committee went on to state that the wage must not, in principle, fall below 60% of the national average wage (once taxes are deducted – social security allowances or benefits are only considered if they have a direct link to the wage) unless the respondent government can demonstrate that such a wage is sufficient by providing detailed information on the cost of living.<sup>273</sup>

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<sup>270</sup>Article 4§1: “With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake: (2) to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases.”

<sup>271</sup>Article 1§2: “With a view to ensuring the effective exercise of the right to work, the Parties undertake: (2) to protect effectively the right of the worker to earn his living in an occupation freely entered upon.”

<sup>272</sup> ECSR, Conclusions XIV-2 Vol. 1 (1998-2000), pp. 50-52.

<sup>273</sup> ECSR Complaint No. 66/2011, Decision on the Merits, § 57.

The Committee held that it is generally acceptable to pay a lower minimum wage to younger persons in certain circumstances once objective reasons are provided, and that taking part in an apprenticeship scheme or occupational training can come within this. The Committee was not opposed to the idea in principle that a reduction in wages may enable young people to access the labour market, and also pointed out that governments may rely on statistical evidence which demonstrates that young people may incur lower expenditure than other categories of workers.<sup>274</sup> The Committee did state, however, that notwithstanding the above considerations, the reduction in the minimum wage for young workers must not fall below the poverty level of the country concerned.

The Committee went on to express several reservations about the fluctuations in the Greek minimum wage. Referring to the 2011 ILO High Level Mission Report on Greece, the Committee noted that the take-home pay after tax is close to the poverty line for many workers, and also took note of the broader context of the changes in the minimum wage: “312. On the basis of commitments taken in the Memoranda, sub-minimum wages have been introduced for young workers in order to boost youth employment (...)”.<sup>275</sup>

The outcome of the Committee’s consideration of the data and the arguments presented by the parties was that the minimum wage for younger workers had fallen below the poverty level<sup>276</sup> and concluded that the provisions of Section 74§8 of Act 3863/2010 and Section 1§1 of Ministerial Council Act No 6 of 28-2-2012 constituted a violation of Article 4§1 of the 1961 Charter.<sup>277</sup>

While the Committee is prepared to accept the justifications of the respondent government, the reference to other sources to emphasise that the minimum threshold had been crossed may indicate a desire to reinforce its own findings.

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<sup>274</sup> *Ibid.*, § 60.

<sup>275</sup> *Ibid.*, § 61.

<sup>276</sup> *Ibid.*, § 64.

<sup>277</sup> *Ibid.*, § 65.

### **3.2 The Pension Complaints: 76/2012, 77/2012, 78/2012, 79/2012, 80/2012.**

These five Collective Complaints were challenges to provisions enacted pursuant to the Memoranda of Understanding between Greece and its international creditors, and expressed in Council Decision Council Decision No. 2010/320/EU.<sup>278</sup> The measures impugned consisted of structural adjustments to Greece's social security system which involved, *inter alia*, a unified statutory retirement age, a reduction of the upper limit on pensions and a reduction of pension benefits for people entering retirement between the ages of 60–65 with a contributory period of less than 40 years.<sup>279</sup> The measures are considered in detail in the Complaint.<sup>280</sup>

The five complaints are based on the same facts<sup>281</sup>, and the complaints are largely identical. For this reason, only the first complaint will be analysed in detail.

#### **3.2.1 Federation of employed pensioners of Greece (IKA-ETAM) v. Greece Complaint No. 76/2012.**

The Committee considered the opinions expressed by different organisations and bodies on the crisis and the pension system in Greece in Complaint No. 76/2012. After the submissions of the complainant trade union and the respondent government, the Committee considered: the ETUC, the Committee of Ministers of the Council of Europe, the International Labour Organisation, the Greek National Commission for Human Rights, as well as the European Court of Human Rights, and the Parliamentary Assembly of the Council of Europe. All of the additional opinions warned against the deterioration of the situation in Greece and the dangers posed by the crisis to the protection of rights in general and socio-economic rights in particular. Mola notes the distinction between the approaches of the ECSR and the ECtHR in this regard<sup>282</sup>; whereas the ECtHR hews quite closely to the national supreme courts in its consideration of the social Euro-crisis cases, the Committee draws from a more diverse array of sources. As the ECtHR has almost always deferred to executive prerogative in the crisis cases and the Committee has ruled against similar measures, it may be that the Committee

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<sup>278</sup> Decision of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit.

<sup>279</sup> *Ibid*, Article 2(2)(b).

<sup>280</sup> ECSR Complaint No. 76/2012 *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, Decision on the Merits, § 17.

<sup>281</sup> ECSR Complaint No. 76/2012, Decision on the Merits, § 7.

<sup>282</sup> Mola, *ibid* No. 35, p. 189.

sought to bolster its finding by establishing that a consensus existed as to the impact of austerity measures on social rights throughout Europe.

The Committee noted that the complainant trade union expressly invoked Article 12§3 of the 1961 Charter, and the Committee added that the complaint can also be regarded as raising issues pertaining to Article 12§2.

The invocation of Article 31§1 by the complainant trade union is an interesting point to note.<sup>283</sup> This Article recognises that any restrictions or limitations to the rights guaranteed by the Charter must be prescribed by law. The complainant aimed to directly challenge measures stipulated in the Memoranda of Understanding. On the basis of laws passed by the Greek parliament, the power to represent Greece in negotiations with the troika and to agree to the programme (the Memoranda) was delegated to the Minister for Finance. The Memoranda were then to be brought before the Greek parliament for discussion and information before being signed. The complainant trade union stated that this means that any texts adopted pursuant to this procedure would not be “fully-fledged laws” (this is never fully explained, as the Greek parliament did vote on the Memoranda,<sup>284</sup> but the complainant did not go into greater detail, nor did the respondent government refute this claim.) In the decision on the merits, the Committee stated that Article 31§1 cannot be invoked as a stand-alone provision, but rather acts as a reference for interpreting the substantive rights in the Charter which are at issue in a complaint. The Committee had also decided on this point in its decision of the admissibility of the complaint, and stated that in substance, the complaint alleged a violation of Article 12. While this is a procedural issue, it is interesting to note that the legality of measures enacted pursuant to the Memoranda is being raised, and how these are framed by the complainants and handled by the Committee.

In what might be interpreted as an oblique reference to the above point, the Committee emphasised that when state parties agree on binding measures which relate to matters within the remit of the Charter, they ought to take full account of their commitments under the Charter, and that it is for the Committee to assess compliance of a national situation with the Charter. This is the case even when the implementation of parallel international obligations

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<sup>283</sup> ECSR Complaint No. 76/2012 *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, Decision on the Merits, § 12.

<sup>284</sup> Dimitri A. Sotiropoulos, ‘The Greek Parliament and the European Union after the Lisbon Treaty: A Missed Opportunity to Empower Parliament’, in Heffler, Neuhold, Rozenberg and Smith (eds) *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave Macmillan 2015), p.344.

into domestic law may interfere with the proper implementation of those emanating from the Charter.<sup>285</sup>

Addressing the government's argument that the economic and social situation in Greece was the motivation for the adoption of the impugned measures, the Committee held that even where economic reasons make it impossible for a state to maintain their system of social security benefits at previous levels, Article 12§3 requires that the social security system must nevertheless maintained at a satisfactory level that takes into account the legitimate expectations of beneficiaries of the system and the right of all persons to effective enjoyment of the right to social security. This requirement to "raise progressively the system of social security to a higher level" (Article 12§3) is emphasised as being distinct from the requirement to maintain a satisfactory level of social security at least equal to that required for the ratification of the European Code of Social Security.<sup>286</sup>

The Committee reiterated some of its previous statements on how states may restructure their social security systems and remain compliant with their obligations under the Charter: "In this context, the Committee has previously explicitly considered that restrictions or limitations to rights in the area of social security were compatible with the Charter in so far as they appeared necessary to ensure the maintenance of a given system of social security (General observation on Article 12§3; Conclusions XIII-4, p. 143) and did not prevent members of society from continuing to enjoy effective protection against social and economic risks. The Committee has also concluded that in view of the close relationship between the economy and social rights, the pursuit of economic goals is not incompatible with Article 12. It has considered that the contracting parties may consider that the consolidation of public finances, in order to avoid mounting deficits and debt interest, constitutes a means of safeguarding the social security system (Conclusions XIV-1, Austria). It has in particular considered that the adoption of measures aiming to ensure the financial viability of pension schemes, regard being had to demographic trends and the employment situation, may come within this field (Conclusions XIV-1, Belgium). It has likewise stated that new financing methods conducive to greater solidarity may be introduced within this context without this contravening the Charter (Conclusions XIV-1, France)."<sup>287</sup>

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<sup>285</sup> ECSR Complaint No. 76/2012, Decision on the Merits, § 51, citing *Confédération générale du travail CGT v. France*; Complaint No. 55/2009, §33.

<sup>286</sup> *Ibid.*, § 69.

<sup>287</sup> *Ibid.*, § 71.

The Committee elaborated on the criteria to be taken into account when determining whether any restrictions to social security in view of economic and demographic factors are compatible with states parties' obligations under the Charter. These would include the nature of the changes, the reasons given for their introduction and the extent of the changes, the aims being pursued, the availability of alternative means of social assistance for those who find themselves impacted by such changes and the results of those changes.<sup>288</sup> The Committee's application of these criteria to the impugned measures in these complaints is discussed in section 3.3, below.

Reiterating its own position (from Complaint No. 65/2011, above), the Committee again noted that it had already been requested to express an opinion on the repercussions of the economic crisis on social rights. In basing its decision on the entirety of the above criteria, the Committee stated that not all of the reductions in pensions constituted a violation of the 1961 Charter. These included certain holiday bonuses, restriction of pension rights where the level of pension benefits is sufficiently high, and cases where people not at an advanced age might be better off remaining in the workforce.<sup>289</sup>

The Committee also recalled that it had previously upheld structural adjustments to social security systems where the aim of such measures was to reduce the national debt and improve the country's economic foundations. It had also found measures adopted to take account of the aging of the population by reviewing funding structures to be compliant with the Charter. The Committee emphasised that in these cases: "although the overall standard of living of the population was affected by the reforms, care had been taken to ensure that the burden of these reforms did not weigh too heavily on the economically most vulnerable households", and that alternative sources of income were made available to pensioners (Conclusions XIV-1, Finland).<sup>290</sup>

However, the cumulative effect of the restrictions as cited by the complainant trade union (§ 55-61) and not disputed by the respondent government could not but bring about a significant deterioration in living standards. Even considering Greece's particular situation and the necessity of urgent government action to tackle the crisis, the Committee considered the government to have conducted inadequate research and analysis into the effects of the measures and their impact upon vulnerable groups, or discussed available studies with the

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<sup>288</sup> *Ibid.*, § 72.

<sup>289</sup> *Ibid.*, § 77.

<sup>290</sup> *Ibid.*, § 73.

organisations responsible for representing these groups. This, the Committee held, effectively meant that it had not been discovered whether other options could have been implemented which would have lessened the cumulative effects of the contested restrictions upon pensioners.<sup>291</sup>

As such, the Committee held that the Government had not done enough to establish that efforts had been made to maintain a sufficient level of protection for the benefit of the most vulnerable. Although the language is not the same, the finding is one of the impugned measures being disproportionate to the ends sought. Dissecting this decision presents several points for consideration.

As De Becker has pointed out, the conclusion was somewhat vague. Apart from listing a series of general criteria that adjustments to social security systems would have to adhere to in order to remain compliant with Charter obligations (pp. 72-73, above), the Committee did not detail what exactly would have constituted ‘a sufficient level of protection’, or what efforts the Greek government might have made to exhaust all other avenues before the impugned measures were adopted.<sup>292</sup> That the ‘cumulative effect of the restrictions...is bound to bring about a significant degradation in the standard of living...’, which served as the basis for Greece’s non-compliance, was not elaborated upon in the decision on the merits is perplexing. Nor was there developed guidance on this point in the Committee’s 2013 Conclusions, published after the pension complaints had been handed down.<sup>293</sup>

As for the inadequate level of research and analysis into the measures to establish whether less onerous alternatives could have been adopted, the Committee did not specify further what exactly a compliant position would resemble. De Becker speculates that as the Committee cited, in particular, the lack of coordination with the bodies responsible for representing those vulnerable groups which the impugned measures affected, this may be one example of the steps which the Greek Government ought to have taken. She believes these groups to be the social partners<sup>294</sup> (the ECSR does not specify what exactly it means by the organisations concerned), as in its 2013 Conclusions, the Committee found that Lithuania had consulted the social partners, and Lithuania was held compliant, having conducted the

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<sup>291</sup> *Ibid*, § 79.

<sup>292</sup> Eleni De Becker, ‘The Constraints of Fundamental Social Rights on EU Economic Monitoring: Collective Complaints No. 76–80/2012, IKA-ETAM, Panhellenic Federation of Public Service Pensioners, ISAP, POS-DEI, ATE v Greece’ (2015) 17 *European Journal of Social Security*, p. 131.

<sup>293</sup> ECSR Article 12 Conclusions XX-2 (2013),– Greece (not in compliance, p. 30) and Iceland (compliant - cumulative effect of the restrictions was not found to be disproportionate, p. 18.)

<sup>294</sup> De Becker, p. 132.

necessary level of research.<sup>295</sup> While this is a plausible conclusion to come to, it is difficult to understand why the Committee itself did not state this. The Committee, in the conclusions for Greece in the country reports of 2013, confines itself to striking a more conciliatory tone, and restates the conclusions from all of the seven complaints considered. A full evaluation of the complaints will form part of the next reporting cycle.<sup>296</sup>

The Committee concluded by stressing that, as the ECtHR had also held under the Convention, that decisions made in respect of pension entitlements must respect the need to reconcile the general interest with individual rights (an interesting inversion of the ECtHR cases examined in Chapter I, where the individual rights were required to be reconciled with the general interest.) The ECSR concluded that the legitimate expectations of pensioners were negatively impacted by the cumulative effects of the restrictions, but that other mechanisms, as well as domestic courts, are better suited to address this point from the perspective of the right to property.

Some of the points from the documents submitted by the complainant trade union and the respondent government are worth considering in greater detail.

In considering the ILO report on the High Level Mission to Greece of September 2011, the Committee quoted: "It [the Greek Government]...did not have the opportunity to discuss the impact that policies in the areas of taxation, wages and employment would have on the sustainability of the social security system. The Government was encouraged by the fact that these issues [the fact that data from ELSTAT showed that approximately 20% of the Greek population was facing the risk of poverty] were on the agenda of an international organisation and hoped that the ILO would be in a position to convey these issues to the Troika."<sup>297</sup>

This is a startling admission; while it may have been the case that the Greek Government indicated the support of the ILO in negotiations, it can equally be read as intimating that the Greek Government was asking for the ILO's backing in liaising with the Troika. Explicitly enlisting an international human rights body's support is a gesture which is obviously not lost on the Committee. This paragraph of the decision serves to illustrate its awareness of the role of the Troika in the negotiations, and the measures enacted pursuant to them. It would appear to be an express acknowledgement of the Committee's awareness of the nature of the negotiations between Greece and its creditors.

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<sup>295</sup> ECSR, 'Lithuania', Conclusions XX-2 (2013), p. 29.

<sup>296</sup> ECSR, 'Greece', Conclusions XX-2 (2013), p. 30-31.

<sup>297</sup> ECSR Complaint No. 76/2012, Decision on the Merits, § 32.

The Committee goes on to state that the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter.<sup>298</sup> It had held as such on previous occasions where national provisions enacted by state parties to the Charter were intended to implement EU directives or other legal norms emanating from the EU.<sup>299</sup> This point is underscored in the following paragraph, where the Committee emphasises that when state parties to the Charter agree on binding measures which come within the remit of the Charter, they should – both when preparing the text in question and when implementing it into national law – take into account the commitments they have taken upon ratifying the Charter.<sup>300</sup> The above considered, the Committee held that despite the later international obligations of Greece, there was nothing to absolve the state party from fulfilling its obligations under the 1961 Charter.

### **3.2.2 What points can be derived from the complaints?**

Taking the complaints in conjunction with the social Euro-crisis cases of the ECtHR, it is apparent that the ECSR places a lesser emphasis on the margin of appreciation doctrine. It would be incorrect to attribute this solely to a more deferential stance by the ECtHR and a more assertive one by the ECSR. I am inclined to believe that all of the factors considered at the beginning of this chapter played a role in the decisions of the Committee.

It is not suggested, however, that the lesser status afforded to the margin of appreciation doctrine by the ECSR is necessarily an indication of a more assertive stance against austerity claims. As the protection of labour rights and social security rights are core objectives of the Charter and not part of an incremental expansion like Article 1 of Protocol 1 to the Convention, this may explain the assured stance of the Committee.

Unlike the labour complaints, the pension complaints necessitated an evaluation of measures designed to reduce government expenditure, with a more technical analysis on the interaction between Charter rights and the allocation of resources undertaken by the Committee. It is clear that where such an intricate matter as the relationship between social security and cuts in government spending to achieve budgetary equilibrium would require very specific guidance as to how, exactly, such measures could remain compliant with Charter obligations. This is considered in the section below, where I examine how the Committee could have

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<sup>298</sup> *Ibid*, § 46.

<sup>299</sup> *Confédération générale du travail (CGT) v France* Complaint No. 55/2009, § 33.

<sup>300</sup> ECSR Complaint No. 76/2012, Decision on the Merits, § 47.

addressed how the Greek Government's reasoning on the necessity of the cuts to the pension system were intended to place the social security system on a more secure footing.

De Becker highlights that the pension complaints represent the first time that the Committee has held that it is the *cumulative effects* of a series of impugned measures, rather than the impact of the measures singly, which consisted of the violation of the Charter, as well as noting that the Committee does not elaborate on exactly what exactly this might entail<sup>301</sup>: at what point exactly did the aggregation of factors tip Greece into non-compliance, and how are governments to avoid this in the future?

I focus in the next section on a point which lies at the very core of the justification of the Greek Government for the impugned measures and which I believe the Committee failed to address.

### **3.3 The ECSR in the crisis: tackling the crisis and achieving sustainability.**

In all of the complaints considered, the Committee acknowledged that fiscal consolidation and cutbacks in state expenditure are permitted, as are certain reforms in the regulation of the labour market where they are necessary to protect the totality of rights guaranteed under the Charter. What led the Committee to find the Greek Government non-compliant with its Charter obligations were the cumulative effects of the measures upon the affected groups, and the Greek Government's failure to provide an adequate justification for those measures.<sup>302</sup>

One particular argument from the Greek Government's submissions on the complaints is the attempt to justify the impugned measures according to the stipulations of the Memoranda concluded with the troika. The respondent government repeatedly alluded to the central goals of the Memoranda (and by extension, all domestic legislation enacted to implement it) as the stabilisation of the Greek economy in the short term and the placing of the Greek finances on a sustainable footing in the longer term.<sup>303</sup> According to the ECSR, states must differentiate between measures aimed at 'dismantling social security schemes' and arrangements that try to preserve the national social security system in order that it can resume its development when economic conditions permit.<sup>304</sup>

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<sup>301</sup> De Becker, p. 131.

<sup>302</sup> De Becker, p. 131.

<sup>303</sup> European Commission Directorate-General for Economic and Financial Affairs, 'The Economic Adjustment Programme for Greece' (EEOP 61, Brussels 2010), p. 18.

<sup>304</sup> De Becker, p. 126.

In Complaint 76/2012, the Greek Government maintained that the restructuring of the pension system is necessary both to achieve a sharp decrease in government spending, and to ensure that the base for the system in the future was secure. It was asserted by the Greek Government that these measures will actually be to the benefit of the whole. In its current manifestation, the system is deemed to be unsustainable and only a comprehensive overhaul of the system can ensure its survival. This line of argument is somewhat more persuasive in the pension complaints than it is in the labour complaints. In the labour complaints, as discussed above, the Committee criticised the Greek Government's approach for failing to adequately specify how exactly the stated objectives of the measures – employment for young workers – would be encouraged and how the collective bargaining system would offer greater protection as a result. In the pension complaints, the Greek Government presents statistics indicating the rising ratio of pensioners to workers, along with predictions that current rates of benefits and payments into the future with an unprecedented number of pensioners will engulf more and more of public spending as a percentage of GDP (see section 3, above.) The respondent government referenced the intergenerational debt burden and the principle of equal treatment.<sup>305</sup>

The rationalisation and justification for the challenged measures by the Greek Government is contradictory: are long term systemic sustainability and short term fiscal equilibrium susceptible to the same types of measures as the ones challenged in this case? That is to say, can drastic cuts to pension entitlements be regarded as not only an emergency tool to restore liquidity, but also be suitable to place the pension system on a sustainable footing? The Committee does not address this point, which is strange, given that one of the reasons the Committee found the measures constituted a violation of the Charter was the inadequate level of analysis and research carried out by Greece.

To address the first point: that the cuts were necessary to save the public finances from the brink of imminent collapse. This would appear to square with the 'emergency and exceptionality' reasoning explored in the ECtHR chapters. As Schlachter has noted, revised ESC, Article F (corresponding to Article 30(1) and (2) of the 1961 Charter) allows for derogations 'in times of war or public emergency threatening the life of the nation'. This clause is based on Article 15 of the ECHR, so that inspiration as to its meaning may be drawn

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<sup>305</sup> ECSR Complaint No. 76/2012, Submissions of the Government on the Merits, p. 7.

from the case law of the ECtHR.<sup>306</sup> The Committee never references emergency or resorts to the exceptionality logic prevalent in the ECtHR cases, despite the respondent government stressing that the measures were required by the exigencies of the crisis, so this argument is a conceptual one.

The sustainability rationalization is given more consideration in the complaint. The Greek Government states that the measures taken are necessary to ensure that a reasonable level of protection can be maintained into the future. Galazoulas and Tsetoura define sustainability in the context of the pension system as the capacity of a social security (pension) system to endure both from a social (protection) and an economic (financial balance) perspective.<sup>307</sup>

The suggestion made in the complaints would appear to be that both goals might be amenable the same methods. Immediate, large-scale fiscal contraction is capable not only of temporarily restoring stability to the public finances, but is also the most effective tool to ensure long term systemic sustainability. This does not mesh with the understanding that to put a pension system on a sustainable footing (ensuring that asset allocation is efficient, while also ensuring that the pension as a protective social benefit is not undermined<sup>308</sup>) requires a careful and sophisticated blending of different factors. Some of which may require additional capital to update and modernise the system.<sup>309</sup>

Some commentators maintain that the optimal approach is a combination of private and public sector involvement; the former provides the professional expertise to maximise efficiency, while the latter retains control to ensure that the underlying social purpose of the pension system is not undermined. As Galazoulas and Tsetoura state, the safety net between these two is law.<sup>310</sup>

The particularities of the Greek pension system would appear to indicate that while a decrease in the level of public expenditure directed towards funding pensions is certainly necessary to restore equilibrium to the public finances in the short term, there are a number of outstanding structural issues which will not be solved merely by a reduction in spending. This approach reflects many of the measures set out in the Memoranda of Understanding, which

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<sup>306</sup> Monika Schlachter, 'The European Social Charter: could it contribute to a more Social Europe?' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013), p. 109.

<sup>307</sup> Theodoros Galazoulas and Anna Tsetoura, 'Social Security Administration Confronting Sustainability Challenges: The Greek Pension System From a Comparative Perspective' (2014) 16 *European Journal of Social Security*, p. 143.

<sup>308</sup> *Ibid.*

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*, p 144.

lean heavily towards cutting spending as the primary means of pension reform and far less on the overhaul and upgrade of the system (despite the claim in the Memorandum that “measures are structural in nature”<sup>311</sup>, the measures detailed appear to come largely from the demand side, as can be seen in the complaint.)

Galazoulas and Tsetoura note that pension funds in Greece rarely involve professional investment consultants. They cite research which notes that non-professional staff, such as state officials or employee representatives are appointed to membership of funds’ Boards of Directors, without necessarily being familiar with the operation of money and capital markets, and that such a lack of expertise often leads to rather unsophisticated investment decisions.<sup>312</sup> This would appear to indicate that the sustainability of the pension system is dependent not only on the demand-side factors (reducing expenditure), but also on the supply-side (ensuring that best practice is followed in the administration of the system to avert risk and minimise waste.)

Given the particular details of the Greek pension system which were briefly discussed above, I conclude that it need not be assumed that these twin objectives are compatible or can be achieved simultaneously via a reduction in expenditure in the short term, when doing so may jeopardise the achievement of the longer term objective. It is a cause for concern that the ECSR, accustomed to giving structured guidance on technical areas of state expenditure on social security, should have overlooked such a fundamental distinction. This is not expanded upon in the 2012 or 2013 Committee reports on Greece, as the complaints considered here fall outside of those reporting cycles.

### **Conclusion**

As was discussed in the introduction to the chapter, it is likely that the rising of the profile of the ESC system was given something of a “shot in the arm” by the exceptional situation that the crisis created in Europe, compounded by the responses of other judicial fora, which may have prompted prospective litigants to seek other avenues of redress.

It is regrettable that despite a willingness to rule on controversial austerity measures, the ECSR should have left so many crucial points under-elaborated. If the crisis has presented new challenges and seen the ESC system rise in prominence, it is unfortunate that an

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<sup>311</sup> European Commission Economic and Financial Affairs, ‘The Economic Adjustment Programme for Greece’ EEOP 76 (Brussels 2010), p. 15.

<sup>312</sup>Galazoulas and Tsetoura, p. 151.

opportunity to provide guidance on protected social rights in times of economic crisis was not as precise as it might have been.

Even though the standards to which the respondent governments are held by the Committee is more exacting than under the ECtHR system, as was critiqued in Chapters I and II, the ECSR's approach to the crisis is in many respects an unsatisfactory one. The coming reporting cycle, where the Committee may incorporate the complaints explored here, present an opportunity to refine conclusions and develop guidance on Charter rights in the crisis.



## **Conclusion**

The complementary relationship of the European Court of Human Rights and the European Committee of Social Rights is a part of overarching directive of the mandate of the CoE; found in both of the instruments which these bodies are tasked with upholding: “Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms” (Preamble, European Convention for the Protection of Human Rights and Fundamental Freedoms.)

“Considering that the aim of the Council of Europe is the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms...” (Preamble, Revised European Social Charter 1996.)

As different bodies with separate – but interconnected – mandates, a comparison can only partially explain the differences in approach and outcome between the ECtHR and the ECSR. The purpose of the thesis was not to determine whether one body was ‘better’ than the other during the crisis. The comparison merely served to illustrate that if the indivisibility of all human rights – civil and political as well as economic, social and cultural, is to become a reality in Europe, the approach of these human rights bodies to the economic crisis can be better explored when viewed side by side.

The ECtHR’s response to the social Euro-crisis cases largely conveyed the message that the economic crisis represented so great a risk to Europe that the prerogative of the national authorities could not be trespassed upon. The lack of elaboration of its decisions and the underlying reasoning is concerning for the reasons outlined in Chapter II; the function of an international human rights court in times of crisis is to act as an external control, and adopting a deferential attitude towards national executives in these situations can diminish that vital role. It must be recalled, however, that the claimants in the social Euro-crisis cases were largely materially quite well off, even after the significant cuts to pay, pensions and welfare payments. The ECtHR appeared to rely on this factor – it remains to be seen whether applicants who have experienced a much greater fall in living standards as a result of austerity measures will receive a different response from Strasbourg.

The ECSR's judgments do appear to be more robust – it repeatedly asserts that it is for it to assess compliance with the Charter, and not the respondent government. The deferral to the respondent government is more qualified in the Collective Complaints. It cannot be ignored, however, that the Committee introduces some new criteria to ensure compliance with the Charter, without sufficiently detailing what such novel requirements might entail. This may be addressed in future Conclusions by the Committee, as the complaints examined in this thesis fell in the middle of a reporting cycle.

In many of the cases, before both the ECtHR and the ECSR, the applicants attempt to demonstrate the perceived unfairness of the measures affecting them by submitting alternative measures which might have been adopted at a lesser cost to the individual's rights and interests. As has been discussed in Chapter I, the fact that most of the social Euro-crisis cases were decisions on the admissibility, not considered sufficiently important enough to proceed to a full Chamber judgment, was highly relevant here. Such decisions tend to be brief, with the decision of the Court being particularly cursory and not much consideration given to the alternatives proffered by the applicants. The risk of the ECtHR being swamped with complaints has necessitated such an approach. The relative obscurity of the ECSR system allows for a much more generous approach, with the Committee able to consider a wide range of differing views from other sources and engage in adversarial proceedings, with the complainant organisation and the respondent government presented with the other's submissions and given the opportunity to respond. Whatever the other curbs placed on the exercise of its jurisdiction, the ECSR does not suffer from time constraints.<sup>313</sup>

The standards which are set and the safeguards put in place are there to ensure that socio-economic interests are upheld precisely when they are most needed. In having regard to the contributions made by the ECtHR and the ECSR, it is helpful to recall the dissenting opinion of Judge Cabral Barreto in *Jahn and Others v Germany*, where the overly-deferential stance towards the German Government's decision to deprive the applicants of their property when the former German Democratic Republic was uniting with the BRD was criticised in the dissenting judgment. The dissenting judges expressed concern at the use of terms such as 'exceptional circumstances', which were incapable of being sufficiently defined and thus

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<sup>313</sup> As discussed in Chapter III, the reason that such an approach is possible may be because of the hitherto obscure status of the Committee, which may change as the system becomes more prominent: H Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 Human Rights Law Review 61 <<http://hrlr.oxfordjournals.org/cgi/doi/10.1093/hrlr/ngn042>> accessed 6 July 2015.

posed a risk for the protection of human rights. The judge warned that such a concept was state-oriented, and did not properly belong in the reasoning of a human rights court. This is a prescient warning, and captures quite well the risks involved in defending human rights in times of economic crisis.



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